

LECTURE VII.

CONDITIONS OF NON-IMPUTABILITY.

Grounds of exemption.

Having dwelt at some length upon *mens rea* as a necessary condition of criminality and discussed with reference to the Indian Penal Code the precise meaning to be attached to the more important words used in the definition of offences to indicate the evil intent essential to constitute the different offences, I shall now proceed briefly to explain the general conditions of non-imputability. Strictly speaking these are rules of evidence carrying either conclusive or rebuttable presumptions. The basis of these exemptions are from their very nature subjective. Whatever may be the form in which these conditions are enunciated, when carefully examined they will be found to deal with circumstances which preclude the existence of *mens rea*, and are therefore mere enumeration of the circumstances that are incompatible with its existence. I have already told you that to constitute a crime there must be a voluntary act, and that this act must be the outcome of an intent to cause an evil consequence. It follows as a corollary to the above that the actor must possess—

Essential conditions of responsibility.

- (a) Free will.
- (b) Intelligence to distinguish between good and evil.
- (c) Knowledge of facts upon which the good and evil of an act may depend. (This includes besides the knowledge of existing facts also the knowledge that

a particular act may cause a prohibited evil consequence).

- (d) Knowledge that the act is prohibited by law. (This, however, is excluded on grounds of expediency as I shall show hereafter).

Where any one of these elements is wanting, responsibility is negatived, for the true basis of responsibility is to be found in the fact that man is a rational animal, that he has intelligence to know what is right and what is wrong, and this intelligence coupled with the freedom of will enables him to choose the one and avoid the other. If man were to act by instinct which is a blind tendency to act in a particular way, instead of acting by reason, there would have been no more justification for punishing him than for punishing a vicious wild beast. It would be an act of senseless cruelty to punish in such cases for mere retaliation or even for making an example of him. In fact the line that divides human beings from the lower animals is exactly the line that divides responsibility from irresponsibility. There are certain rules of evidence which help us in the application of these principles. For instance, in case of infants up to a certain age the presumption is absolute that he is not possessed of the intelligence or knowledge referred to above, and consequently is incapable of committing a criminal act.

As to (a) *i.e.*, the possession of a free will, every human being is presumed to be free to act as he likes unless such freedom of will is taken away by physical force or mental compulsion. Mental compulsion again may be the result of threat of

Free Will.

injury to person or property or may be the outcome of a diseased mind. Mental compulsion arising from threat of injury is only recognised as a valid excuse for a crime when it is a threat reasonably causing the apprehension that instant death would otherwise be the consequence (Section 94). The other form of mental compulsion is not clearly recognised in the Indian Penal Code, but is recognised in various other systems of law. This compulsion arising from a diseased state of the mind is known as irresistible impulse and is treated as part of the law of insanity.

Intelligence. As to (b) i.e., possession of intelligence to discriminate between good and evil, the presumption is conclusive that every human being has sufficient intelligence to distinguish between what is right and what is wrong, and the law will not allow an enquiry as to the sufficiency of a person's intelligence for the purpose of making such a distinction except in certain special cases, such as infancy (Section 83), insanity (Section 84), or involuntary drunkenness (Section 85).

Knowledge. I now come to (c) and (d) which relate respectively to ignorance of fact and ignorance of law. Ignorance of fact is always an excuse unless it is the result of carelessness or negligence. It includes both ignorance of existing facts perceptible by the senses or inferable from other facts so perceptible, as well as ignorance of another kind, viz., ignorance of the relation of one fact to another, a knowledge of which we gain by experience. However, in whatever form it may occur, ignorance of fact excuses criminal responsibility

(Section 79), but when it is due to carelessness it is no excuse (Section 52).

On principle, ignorance of law should be as good a defence as ignorance of fact, for the one is as effective in negating *mens rea* as the other. Both are knowable. If it is difficult for a man in a crowded thoroughfare to avoid treading on another's toes, it is no less difficult for every man to acquaint himself with the laws of the country in which he lives. Why then exclude the one and include the other? The only justification for the distinction is, that it would be difficult to administer the criminal law if it were open for a man who has broken it to set up the plea that he was not aware that the act was prohibited. There is much force in this argument but it has its weak points. If a man, for instance, killed another or stole his purse or forged his name, no court would believe that the offender did not know that murder, theft or forgery was by law punishable, and there is no real danger in allowing the plea to be raised. On the other hand there are offences of which a man may truly say that he was not aware of them. Take the case of a person who shortly after the enactment of the Code gave a beating to a person whom he caught stealing in his house. It was customary in those days to give a beating to a thief when caught. The change introduced by the Penal Code may not have become sufficiently known at the time, the plea of ignorance may be a just and a true plea in such a case. Or take the more recent example of the amendment of Section 375 I.P.C. by the Act known as the Age of Consent Act. In a remote village it might take years for

Ignorance
of law and
fact.

the information to filter down. Should in such cases the plea of ignorance be shut out? Thus there are considerations both for and against the view that ignorance of law should be no excuse. The best solution is perhaps to recognise the distinction between a *malum in se* and a *malum prohibitum*, and to lay down that when by consensus of public opinion an act is considered wrongful no one should be allowed to plead that he was not aware that the law had penalised the act. Where, however, such is not the case and a new offence is created by the legislature, it ought to be open to a person to plead ignorance of the Statute. But in the Code, as in most systems of law, no such distinction is recognised, obviously because it is considered expedient to insist that every man must know the law of the land in which he lives. This doctrine is carried to such an extreme that it is not relaxed even in cases where the acquisition of such knowledge is an impossibility. How far this is defensible I shall discuss later. The presumption is conclusive except where the existence of such knowledge is negated by immaturity of age by the existence of a diseased mind or by involuntary drunkenness.

The presumption that everybody knows the law, that everybody whatever his intelligence or upbringing, has the capacity to distinguish between the right and wrong of every phase of human conduct may have no foundation in fact, but the rule is based on balance of convenience, and the rigour of the law is softened in all such cases by the discretion which every modern system of law allows to Judges to pass lenient sentences. But

this is not enough for the brand of criminality remains.

But apart from the mere theoretic responsibility of individuals for criminal acts, there are other considerations besides those already indicated which enter largely into the consideration of the question of punishment. According to more advanced juridical notions, the mere liability for a wrongful act is not enough to justify punishment. Punishment is not to be inflicted for the mere sake of punishment. It must have an objective. The aims and objects of punishment must therefore largely influence the question of exemption. I shall here refer very briefly to this subject.

Discussions on this question have sometimes proceeded on the wrong assumption that there is only one object of punishment, with the result that different writers have advanced different theories, and none has been found entirely satisfactory to explain the trend of criminal legislation in modern times in regard to punishments. Legislation regarding punishment of crimes has been influenced by the requirements of particular times and particular countries, but of the various recognised objects of punishment none has been wholly ignored, though the importance to be attached to any particular object has varied. The most important aim of punishment, recognised from the earliest times, is the satisfaction of the desire of human beings, both in their individual and their corporate capacity, for retribution. The feeling is natural and the world must grow considerably older before human nature is so changed that the ordinary man will, when struck on the one cheek, turn the

Objects of punishment a necessary consideration.

Retribution.

other. It exists even among the lower animals. The cow turns on you when you strike her calf. Does it do so to make an example of you or to teach you a lesson for future good behaviour? It is the instinctive demand for retribution. The idea of retribution gave birth to the *Lex Talionis* of the Roman law following the old Mosaic law of a tooth for a tooth and an eye for an eye. Whatever theoretical objections there may exist to effect being given to a feeling of this kind, we cannot shut our eyes to its existence and to its intensity so long as human sentiment remains as it is. The strength of this demand for retribution has, however, been gradually diminishing with the growth of culture and ideas of humanity, and we may congratulate ourselves on having attained a plane of thought and culture when we are able to confine this demand for retribution to deliberate acts and against rational beings only, and have not only ceased punishing bulls, pigs, asses and horses not to speak of axes and stones which were not spared even by civilised Athenians, but have also ceased punishing purely accidental acts. The demand for retribution is gradually diminishing but has not disappeared.

vention. Another object of punishment is prevention.

This is aimed at mainly in three ways :—

- (a) By depriving the criminal of the opportunity of committing crimes.
- (b) By reforming him.
- (c) By making an example of him.

am. The reform of the criminal, as an object of punishment, is gradually acquiring more importance and there are many who think that this is the

only legitimate object of punishment. We must, they say, respect the man even in the criminal and refuse to sacrifice him merely for making an example.

This reform is attempted in various ways. Juvenile offenders are sent to reformatories, others are taught useful crafts to enable them when out of jails to earn an honest living.

The infliction of bodily and mental pain is another way of reforming the criminal. The painful experience of the past serves as a warning for the future.

The various forms of punishment with which we are familiar have one or more of these objects in view.

A death sentence is mainly retributive. And as retribution is losing its importance as an object of punishment, in some countries in Europe death sentences have been abolished.

Death sentence.

In old days when the making of an example was one of the most important aims of punishment, the heads of criminals after execution were often exhibited at the city gate to strike terror. We had similar examples in England. We read, for instance, of Moore's head being exhibited on the London Bridge.

Long terms of imprisonment are mainly preventive but like whipping, fine, and similar other punishments also serve the double purpose of causing mental and bodily pain as well as of warning others.

There were some forms of punishment now obsolete which obtained in India even under the British rule which had the effect not only of

Certain obsolete forms of punishment.

causing mental pain to the criminal, but was also most effective as an example to others.

In India, punishment by public exposure (*Tashhir*), as by carrying the delinquent through the town on the back of a donkey with his face blackened as a special punishment for perjury, was common during the Mahomedan period, and was recognised in Bengal Regulation II of 1807, but was abolished by Act II of 1849. A confirmed perjurer had the word *Darogh-go* (liar) tattooed on his forehead. We also find amusing instances of the same kind of punishment in the laws of *Manu*.

In ancient and mediæval periods there was a tendency to punish a criminal by depriving him of the particular member of the body with which a particular offence was committed. We find examples of it in *Manu* and also in Mahomedan law. "With whatever limb," says *Manu*, "the thief sins, even of that the King shall deprive him." A common instance is cutting off the hands of thieves. These have now fallen into disuse.

With these general observations I proceed to consider the provisions of the Chapter of General Exceptions in the Code. In dealing with the provisions of this Chapter, I think, it would be convenient to discuss them in the order in which they are stated in the Code. Sections 76 and 79 may, however, be conveniently considered together.

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

Illustrations.

(a) *A*, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. *A* has committed no offence.

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

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

Section 79,
I. P. C.

Illustration.

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

Ignorantia facti excusat is a well known maxim of criminal law and follows from the doctrine of *mens rea*. Ignorance of fact to be an excuse must be ignorance in respect of a material fact, *i.e.*, a fact which is essential to constitute a particular offence. Such ignorance alone absolves which negatives the evil intent necessary to constitute the offence. "The guilt of the accused," says

Ignorance
of fact.

Baron Parke, "must depend on circumstances as they appear to him." The doctrine is subject to certain reservations which, it is important, you should bear in mind. In the first place no one is allowed to plead ignorance of fact where responsible enquiry would have elicited the true facts. Where a person shuts his eyes to true facts he cannot plead such voluntary ignorance as an excuse. A woman hears a rumour that her husband is dead. She makes no enquiries whether the rumour is true or false and marries again. It is afterwards found that the man was alive. The belief carelessly entertained cannot be pleaded as an excuse in an indictment for bigamy.

A takes away *B*, a girl under the age of sixteen years, out of the keeping of her lawful guardian without his consent. He believes that the girl is above that age, but does so without making any enquiry, and basing his belief on the mere appearance of the girl which as we know is often deceptive. He is guilty of kidnapping from lawful guardianship under Section 361 of the Code and his belief will not avail him.

Good faith.

Section 52 of the Code lays down that nothing is said to be done or believed in good faith, which is done or believed without due care and attention. Reference may also be made to Section 26 which says, that a person is said to have reason to believe a thing if he has sufficient cause to believe that thing, but not otherwise. Whether in any particular case the belief of a person in the existence of a certain state of facts is based

on reasonable grounds or is the result of negligence or carelessness is a question of fact to be decided by the jury in each case. It may be argued that every fact is knowable and a mistake of fact may in all cases be attributed to negligence. Such a view, however, will render the doctrine wholly nugatory. Life would be too short and intolerable if everyone was obliged to scrutinise every fact and take nothing on trust. It is true men often lie, but even the greatest liar speaks the truth in ninety cases out of a hundred. A man sells a watch to you. He tells you that the watch is his. Unless there are any circumstances arousing your suspicion you would be perfectly justified in trusting him, and no one can say you are guilty of negligence, because you did not enter into an enquiry into the history of the watch. Law-givers with the best of reasons take the world as it is, and do not insist on men doing more than they are accustomed to do in the daily transactions of human life. When you do less you are guilty of negligence. In the case of the watch if you believe the watch to belong to the man who brought it to you, you cannot be guilty of being the receiver of stolen property. Take another instance, that of a police officer, who goes with a warrant of arrest against *A*. *B* points out *C* to the police officer as *A*, and the officer without any further enquiry and believing *C* to be *A* arrests *C*. He can plead the mistake of fact as a good defence, and no one would blame him for apprehending the wrong man. The amount of care which the law insists upon, is the care which a reasonable man would ordinarily take and act

upon. *A* marries *B*, a young girl, living with her parents in India. She is treated by everybody as an unmarried girl, and *A* has no reason to suspect that she is otherwise. It afterwards transpires that whilst in England she had secretly married *C* and had deserted him. No reasonable man in *A*'s position would think it his duty to make enquiries in England for the mere chance of finding that *B* was a married woman. In such a case very little enquiry would be expected. But suppose *A* knew that *B* was married to *C* and *B* told him that she had been divorced, and he acts entirely on *B*'s statement, it is very doubtful if his ignorance will not be considered as due to negligence. Similarly in the case of a libel where truth is a justification, the accused will not be allowed to give evidence that there was a rumour floating which he carelessly believed and upon which he acted.

As regards the degree of enquiry it is perhaps permissible to make a distinction between acts that are *malum in se* and those that are merely *malum prohibitum*. You may remember that the distinction between *Reg. v. Prince* and *Reg. v. Tolson* was based on the view that in the case of an immoral act a man who acts under a mistaken belief takes the risk of punishment if it is found that his belief was wrong in fact, even if there were reasonable grounds for such belief; and that in the case of a *malum prohibitum* such a ground of belief is quite sufficient. The Indian Penal Code, as you will see, makes no such distinction. But all the same, I think, if those two cases had

been decided under the Code the result would probably have been the same, but the reasons might have been different. In the case of a man charged with having enticed away a girl below the age of sixteen, the jury would expect a much greater degree of care and caution for the belief that the girl is over that age than in the case of a person who openly enters into a marriage relation with a woman in the belief that she had not a husband living. In the case of enticement it would be expected of the man who commits such an act that he should not feel satisfied with the mere look of the girl, nor should he rely merely upon the girl's statement regarding her age. Whereas in the case of *Reg. v. Tolson* the amount of enquiry upon which the prisoner believed that her husband was dead was held to be sufficient, and would have been so held in this country on a similar charge under Section 494 of the Code, I doubt if a person charged with an offence under Section 497 could successfully defend himself by alleging that upon the same materials he honestly believed that the woman had not a husband living. It seems only just that a man who under a mistaken belief as to facts does an act which is at least morally wrong must, in order to avoid punishment, satisfy the Court that his belief was not based on hasty deductions.

Having regard to the very general terms of Section 79 it is fairly obvious that there is very little room for the distinction made in English and American cases between *malum in se* and *malum prohibitum*. Such a distinction would

“ Justified
by law ”,
meaning of.

have no foundation on anything expressed or implied in the Code, unless it is held that the words 'justified by law' mean approved by law or as just or conformable to right and justice. If this is the meaning of the words 'justified by law' the taking away of a girl over the age of sixteen as in the case of *Reg. v. Prince* would not be an act justified by law, but would only be an act not prohibited by law, and as such not covered by the words of Section 79. In the case of bigamy, however, not only the law does not punish marriage, but approves of it and encourages it in various ways. If this interpretation of the word 'justified' were admissible, the distinction between '*malum in se*' and '*malum prohibitum*' would arise here also. But if we adopt such an interpretation, we will be confronted with this difficulty that many acts which are innocent, and which the law neither approves nor disapproves would not come within the words of the section. Take for instance the case of a person who shoots a human being in a jungle believing that he was shooting a jackal, under circumstances that would render such a belief reasonable. You cannot say that the law approves or disapproves shooting. Therefore the words 'justified by law' must be taken to mean 'not prohibited by law.' If the distinction between *malum in se* and *malum prohibitum* is thus wiped off, the only way to arrive at the same result as in *Reg. v. Prince* and *Reg. v. Tolson* would be to insist on greater care and scrutiny in the one case than in the other. It may be noted that in neither kidnapping nor bigamy as

defined in the Code, a knowledge of the true age in one case or a knowledge of the existence of a husband or wife in the other, is an essential part of the definition. So that, except in so far as the question may be affected by the provisions of Section 79, there is no distinction between the English Statute and the provisions of the Indian Penal Code. It may also be urged that there is nothing which is absolutely good and nothing absolutely bad in this world, and very often the distinction instead of influencing legislation is influenced and even created by it. All the same, there are certain prevalent ideas among intelligent and cultured people by which we judge human acts and divide them into good and evil, and this standard is quite enough for making a selection between acts innocent in themselves but which for reasons of state have been made punishable, and wrongs which by reason of their evil tendency are worthy of condemnation and have been made penal on that account.

The distinction between Sections 76 and 79 consists in this: Section 76 deals with cases where by reason of a mistake of fact the person under a mistake considers himself *bound by law* to act in a particular way, although on the true state of facts his act is an offence. Section 79, on the other hand, deals with cases where by reason of a mistake of fact the person under such mistake considers himself simply *justified* by law to act in a particular way. The antithesis between the two cases is involved in the words 'bound by law' in Section 76 and 'justified by law' in Section 79. To

Distinction
between
Sections 76
and 79,
I. P. C.

punish an act done under a mistake of fact would neither be justified by the principle of retaliation nor by the theory of prevention. You can never guard against committing mistakes and punishment would not prevent their occurrence.

Besides cases of mistake, both these sections also provide for cases which have nothing to do with mistakes, cases which fall within the definition of an offence but are excepted from punishment, because of legal compulsion or legal justification. Illustration (a) of Section 76 belongs to this class. Probably it would have been more logical if one of these sections had dealt with mistakes, and another with cases of legal compulsion or legal justification, without bringing in the question of mistake at all. You have seen that both Sections 76 and 79, whilst admitting the validity of an excuse based on ignorance of fact, exclude expressly an excuse when based on ignorance of law. *Ignorantia legis non excusat* is an equally well known principle of law. The doctrine is based on the fiction that every citizen knows or at any rate ought to know the law under which he lives and by which his actions are governed. It is, as we know, a fiction, but, as many other legal fictions are supposed to be, it is a creature of imperative necessity or expediency. The presumption that every one knows the law is a conclusive presumption, and will be enforced even where it could be shown that it was impossible for the accused to have known the law. In *Reg. v. Bailey* (R. & R. 1) the prisoner was indicted for an offence under the

Ignorance
of law.

Act of the 39, Geo. III, C. 37, and was convicted, although it was found that the Act received Royal assent on the 10th of May 1799, that the fact charged in the indictment happened on the 27th of June, that the ship *Langley* of which the prisoner was the Captain, was at that time upon the coast of Africa and could not possibly know that any such Act had existed. Lord Eldon told the jury that the prisoner was in strict law guilty, though he could not then know that the Act had been passed. The prisoner was, however, pardoned on the recommendation of the Judges. Even if a penal statute is ambiguously worded it is no defence that the accused tried to ascertain the law and was misled by advising counsel. If an offence is committed in England by a foreigner he cannot be excused, because he did not know the English law, and in his country it was no offence. (Barronet's case, 1 E. & B. 1).

The validity of the reasons for distinguishing ignorance of fact from ignorance of law has been the subject of some controversy. I have already referred to it but would like to state more fully the arguments put forward in support of the distinction.

That every man knows or ought to know the law is no doubt a fiction, but a very necessary fiction. Law has to be based not only on theoretic principles but expediency must always play a very large part in the legislation of every country. Theoretically, of course, ignorance of fact being an excuse, equally well should ignorance of law be an excuse, for both negative the

Reasons for
the distinc-
tion between
ignorance of
fact and
ignorance of
law.

existence of a guilty mind. But there are cogent considerations for maintaining such a fiction. The fiction rests on the broad foundations of public policy. Without it justice cannot be administered. For if ignorance of law is admitted to be an excuse in every case, it will be open to an accused to allege that he was not cognisant of the law under which he is arraigned. It is pointed out by Judge Hunt of the United States, with reference to this doctrine, that no system of criminal jurisprudence can be sustained on any other principle. The question of policy is thus discussed by Austin:

“ Now to affirm ‘ that every person may know the law ’ is to affirm the thing which is not. And to say ‘ that his ignorance should not excuse him because he is bound to know, ’ is simply to assign the rule as a reason for itself. Being bound to know the law, he cannot effectually allege his ignorance of the law as a ground of exemption from the law. But *why* is he bound to know the law? or *why* is it presumed, *juris et de jure*, that he knew the law ”?

“ The only *sufficient* reason for the rule in question seems to be this: that if ignorance of law were admitted as a ground of exemption, the Courts would be involved in questions which it were scarcely possible to solve, and which would render the administration of justice next to impracticable. If ignorance of law were admitted as a ground of exemption, ignorance of law would always be alleged by the party, and the Court, in every case, would be bound to decide the point.”

Ignorance of fact according to Austin is either evitable or inevitable. Inevitable ignorance is such ignorance as no amount of attention *practicable under the circumstances* could remove. As an instance, he quotes the case of a man who intending to kill a burgler, who has broken into his house, strikes in the dark and kills his own servant. In such a case if the man had good reasons to suppose that it was the burgler and not his own servant, he would not be guilty of murder or even manslaughter. The same distinction may perhaps with advantage be imported into cases of ignorance of law. Every man can know the law and it would be right to hold, that he must know the law if he can. Therefore ignorance of law under ordinary circumstances would not be inevitable; but it would be an inevitable mistake of law where it is impossible for a person to have such knowledge. Take the case of a person who lives in the interior of the Darjeeling district and who breaks the law the day after the law is passed and published in Calcutta. To guard against ignorance of this kind, in some countries the law wisely provides that no act of the legislature shall take effect until a certain time has elapsed from the date of its passing unless there be special provision to the contrary. Sometimes in Indian statutes also a date is fixed on which the statute takes effect. The General Clauses Act provides that where any Act of the Governor General in Council is not expressed to come into operation on a particular day, then it shall come into operation on the day on which it receives the assent of the Governor General.

Evitable
and inevit-
able ignor-
ance.

If this distinction between evitable and inevitable mistakes were adopted the difficulty that arose in the case of *Reg. v. Bailey* would have been avoided and the law would have been placed on a more rational basis. It is better that hard cases like these should be excluded from the operation of criminal law instead of their being left to executive clemency.

The effect of ignorance both of law and fact is not the same in respect of civil and criminal liability, and naturally so, for in the case of civil law the end is not punishment but *reparation* and civil liability generally arises without reference to intention, and it is considered just and equitable that 'he by whose act a civil injury has been occasioned should ultimately sustain the loss that has accrued rather than another.'

Another hardship that the application of the doctrine often involves is due to the uncertainty of the law. The Bengal creditor who after the decision of the High Court in the case of *Prasanno Kumar Patra v. Udai Santa* (22 Cal. 669) walked away with his debtor's cattle in order to compel the latter to pay his debt, when convicted, would have a real grievance, and I think in all such cases where a man acts *bona fide* upon legal advice, he should get the benefit of his mistake in the same way as he gets the benefit of a doubt arising upon facts. In all such cases, as I have already said, the hardship may, to a great extent, be met by imposing a nominal sentence, and this is what was done in the Full Bench case of *Empress v. Srichurn* (22 Cal. 1017) that overruled the earlier decision. But in such cases it

Uncertainty
of the law
and its effect
on the
doctrine.

would be much better to recognise the inevitable nature of the ignorance and to acquit the accused than to brand him as a thief for having followed the interpretation of law given by two learned Judges of the highest court in the land. These hard cases are, however, of rare occurrence and cogent arguments may be put forward in support of the universal application of the doctrine. Taking first the strictly penal offences with *mens rea* as an essential element, such as are defined in the Indian Penal Code, most of these would be looked upon as deserving of punishment in any state of society and under any system of law however primitive, and the Penal Code may be said to have only defined, systematised and consolidated them. Most offences defined in the Code existed before our criminal laws were codified. That these acts are wrongful is realised by every man of average intelligence, for laws are often mere expressions of the moral sentiments of a people or the ideal to which the law-giver desires to conduct them. Most of the offences under the Indian Penal Code will be found in the breast of every man who has the sense to distinguish right from wrong. A few doubtful cases may arise, but these are indeed very few. As regards municipal and fiscal laws which do not insist on a *mens rea*, ignorance of law or fact are on principle both immaterial. The reasons for this special treatment are, as you have seen, fully explained in *Reg. v. Tolson*.

The chapter of general exceptions comes into play only when an act is otherwise included in the definition of an offence. It gives the accused a plea of avoidance, the onus of the proof of which lies on

him. Before the plea of avoidance becomes material there must be proof of facts to constitute the offence, and if it is the essence of the offence that there must be proof of a particular evil intent, it will, I apprehend, be held in India as it has been held under other systems, that ignorance of law may be proved to rebut the positive evidence regarding the existence of *mens rea*. Take for instance a case of theft. It is not open to one, accused of theft, to get rid of his liability by saying that he was not aware of the law which made theft punishable. But ignorance of law may be pleaded for a collateral purpose. For example, to bring a case within the definition of theft, it must be shown that there was dishonest taking; a *bonâ fide* claim of right if proved, would therefore take the case out of the definition of theft, and it would be immaterial that such claim was based on a view of law that was erroneous. To illustrate what I mean: suppose a Mahomedan dies, leaving an illegitimate son and daughters. The son removes some of his properties without the knowledge and consent of the heirs in the honest but mistaken belief that he also had a share in the estate of the deceased. This ignorance of law may be admissible to negative *mens rea*. So also in a case of criminal trespass the existence of a similar ignorance on point of law may be pleaded to negative the existence of an intention to annoy.

It was held in an American case that it was no defence to an indictment for bigamy that the defendants believed that the female defendant, her husband being married again, could lawfully marry and that they were so advised by the Magistrate

who married them, they relying upon such opinion in good faith. (*State v. Goodenow*, 65, Me, 30, 1874). Under the Indian law also a *bonâ fide* belief like this, having regard to the language of Section 494, I. P. C., will not be a defence, for the definition does not require any particular state of mind to constitute the offence. The case of adultery is on a different footing, for Section 497 requires as an essential condition a knowledge or reasonable belief that the woman is another's wife. It has accordingly been held that where a prisoner accused of adultery set up in defence a *Natra* contracted with the woman with whom he was alleged to have committed adultery, in accordance with the custom of his caste, the question the Court had to determine was, whether or not, the accused honestly believed, at the time of contracting the *Natra* that the woman was the wife of another man. (*Manchar*, 5 Bom. H. C. R. 17). However it will not be sufficient to show that the accused believed that the husband could not complain of the adultery, but it must be shown that the accused believed that the woman was no longer the wife of the complainant.

Take another case. A Mahomedan husband divorces his wife and another person believing that the divorce is valid marries her. Should he be convicted of bigamy because the divorce turns out to be ineffectual under the Mahomedan law?

It is well established, that a mistake regarding a mixed question of law and fact is on the same footing as a mistake of fact pure and simple.

Sections 77 and 78 may be taken together.

Sections
77 and 78,
I. P. C.

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

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

Sections 76 and 79, so far as they give protection to a person acting under the erroneous belief that he is either bound by law or justified by law to do a particular act, would cover a portion of the ground covered by Sections 77 and 78, but not the whole of it. For instance, neither of these sections (76 and 79) would protect a Judge from criminal prosecution if he convicted a person upon a mistaken view of the law, and yet it is essential that a Judge should be protected against all such mistakes. The necessity for giving special protection to Judges is thus obvious and this protection is given by Sections 77 and 78.

Judges and those carrying out their orders are exempt from civil liability by the operation of the Judicial Officers Protection Act (Act XVIII of 1850), which enacts:—

Judicial
Officers Pro-
tection Act.

“No Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially, shall be liable to be sued in any Civil Court, for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits

of his jurisdiction: provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of: and no officer of any Court or other person bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector, or other person acting judicially, shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same.”

Sections 77 and 78 give the same immunity from criminal prosecutions. The propriety of the rule is obvious and need not be discussed at any length. As observed by Crompton J. in *Fray v. Blackburn* (3 B. and S. 576 at p. 578), the rule exists for the benefit of the public and was established in order to secure the independence of the Judges and prevent their being harassed by vexatious actions. The question of good faith only arises when there is no jurisdiction. When there is jurisdiction the immunity extends even to acts which constitute an abuse of it. Lord Esher laid down in *Anderson v. Gorrie* (L. R., Q. B., 1895, p. 668) that no action lay against a Judge of a Court of Record in respect of any act done by him in his judicial capacity, even though he acted oppressively and maliciously, to the prejudice of the plaintiff and to the perversion of justice. Referring to the observations of Chief Justice Cockburn in *Thomas v. Churton*, he said: “I am reluctant to decide, and will not do so until the question comes before me, that if a Judge abuses his judicial office, by using slanderous words maliciously and without reasonable and probable cause, he

Immunity
of Judges.
Malice

is not to be liable to an action" Lord Esher observed: "All I can say is, that I am convinced that had the question come before that learned Judge he must and would, after considering the previous authorities, have decided that the action would not lie. That case was decided in 1862, and there are subsequent cases that confirm the principle which I have stated to be derived from the common law." The same rule was laid down in *Meghraj v. Zakir* (1 All. p. 280) in which it was laid down that no person acting judicially is liable for an act done or ordered to be done by him in the discharge of his judicial duty within the limits of his jurisdiction. In such a case the question whether he acted in good faith does not arise. See also 2 M. H. C. 396; 2 M. H. C. 443; 3 B. H. C., A. C. 36; 4 B. L. R., A. C. 37; 4 B. H. C., A. C. 150; 14 B. L. R. 254; 21 W. R. 126.

Meaning of
Judge.

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

Thus as the illustrations show:—

- (a) A Collector exercising jurisdiction in a suit under Act X of 1859, is a Judge.
(b) A Magistrate exercising jurisdiction in respect of a charge on which he has power

What it
includes.

to sentence to fine or imprisonment, with or without appeal, is a Judge.

- (c) A member of a *panchayat* which has power, under Regulation VII, 1816, of the Madras Code, to try and determine suits, is a Judge.
(d) A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another Court, is not a Judge.

A definitive judgment means a final judgment. According to this definition a Magistrate holding an enquiry or trial preliminary to commitment, is not a Judge within the meaning of Section 19 of the Indian Penal Code, because he is not empowered to give any definitive judgment or any judgment at all. But although such a person does not come within the exemption, no difficulty would seem to arise, for his powers are extremely limited, and it is inconceivable that any such person would by mistake do an act which would bring his act within the definition of an offence defined in the Indian Penal Code. The necessity for protection may however arise in connection with the exercise of the power to grant or refuse bail. It will also appear from the definition that it makes no difference that a judgment is subject to appeal or revision or that, as for instance, in the case of a capital sentence, the judgment is subject to confirmation by the High Court.

A judgment is defined in the Civil Procedure Code to be the statement given by the Judge of the grounds of a decree or order. In criminal law, however, it means the sentence of the law

pronounced by the Courts upon the matter contained in the record. Ordinarily a judgment in a criminal case has to contain the point or points for determination, the decision thereon and the reasons for the decision (Section 367, Criminal Procedure Code).

In England a distinction is made between a Judge of an inferior Court and a Judge of a Court of Record. In *Calder v. Halket* (2 Moo. I. A. 293), Baron Parke, dealing with the question as to what constitutes a Court of Record, referred with approval to the decision in *Dr. Grenville v. The College of Physicians*, 12 Mod. 388, in which it was laid down that wherever there is power *de novo* created by Parliament to convict and fine and imprison, either of those two makes it a Court of Record.

Privilege
confined to
judicial acts.

Court.

It is not every act of a Judge that comes within the exemption. If a Judge, for instance, assaults or abuses his peen, he cannot claim privilege which only extends to judicial acts. The immunity, however, is not confined to acts done in open Court and may extend to acts done in the Judge's private room. Nor is it confined to what are generally called Courts of Justice, but to all other Tribunals discharging similar functions.

The largest statement of this immunity is to be found in the judgment of the Exchequer Chamber in *Dawkins v. Lord Rokeby*, 8 Q. B. 255, where it was laid down that no action for libel or slander lay, whether against Judges, Counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any Court or Tribunal recognised by law. Lord Justice Fry in *Royal Aquarium v. Parkinson* (1 Q. B., 1892,

p. 431, at 452) "accepted" that proposition with this qualification. "I doubt," he said, "whether the word 'Tribunal' does not really rather embarrass the matter; because that word has not, like the word 'Court,' an ascertainable meaning in English law. Moreover, the judgment of the Exchequer Chamber appears to me to proceed upon the hypothesis that the word is really equivalent to the word 'Court,' because it proceeds to inquire into the nature of the particular Court there in question, and comes to the conclusion that a Military Court of Inquiry, 'though not a Court of Record, nor a Court of Law, nor coming within the definition of a Court of Justice, is nevertheless a Court duly and legally constituted and recognised in the articles of War and many Acts of Parliament.' I do not desire to attempt any definition of a 'Court.' It is obvious that, according to our law, a Court may perform various functions. Parliament is a Court. Its duties as a whole are deliberative and legislative: the duties of a part of it only are judicial. It is nevertheless a Court. There are many other Courts which, though not Courts of Justice, are nevertheless Courts according to our law. There are, for instance, Courts of Investigation, like the Coroner's Court. In my judgment therefore, the existence of the immunity claimed does not depend upon the question whether the subject-matter of consideration is a Court of Justice, but whether it is a Court in law. Wherever you find a Court in law, to that the law attaches certain privileges, among which is the immunity in question."

The ground of the rule is public policy. It is applicable to all kinds of Courts of Justice, but is not confined to these Courts alone and the doctrine has been carried further; it seems that this immunity applies wherever there is an authorised inquiry, which though not before a Court of Justice, is before a Tribunal which has similar attributes. In the case of *Dawkins v. Lord Rokeby* the doctrine was extended to a Military Court of Inquiry. It was so extended on the ground that the case was one of an authorised inquiry before a Tribunal acting judicially, that is to say, in a manner as nearly as possible similar to that in which a Court of Justice acts in respect of an inquiry before it. Referring to the case before him in which defendant a member of the London County Council claimed immunity against an action for damages for having made defamatory statements against the plaintiff Company, Lord Esher observed: "This doctrine has never been extended further than to Courts of Justice and Tribunals acting in a manner similar to that in which such Courts act. Then can it be said that a meeting of the County Council, when engaged in considering applications for licenses for music and dancing, is such a Tribunal? It is difficult to say who are to be considered as Judges acting judicially in such a case. The manner in which the business of such a meeting is conducted does not appear to present any analogy to a judicial inquiry. Again, there is another consideration. It is argued for the plaintiffs that this function of granting licenses, which has been transferred from the Justices to the County Council, is not judicial

but merely administrative. The Justices had two distinct and separate duties. They had judicial duties. They had to try criminal cases, and in respect of that duty they would be entitled to the absolute immunity which I have mentioned. They had also administrative duties, one of which was this duty of granting licenses, and for the purpose of performing these they held consultations among themselves. In the case of duties properly administrative, such as that of granting licenses, their action was consultative, for the purpose of administration and not judicial. When such duties are transferred to the County Council, what they do in respect of them is likewise consultative for the purpose of performing an administrative duty, it is not judicial. That consideration also appears to me to show clearly that the case does not come within the doctrine of absolute immunity applicable to Tribunals similar to Courts of Justice."

This point was further elucidated by Lopes L.J., who observed:—"The word 'Judicial' has two meanings. It may refer to the discharge of duties exercisable by a Judge, by Justices in Court, or to administrative duties which need not be performed in Court, but in respect of which it is necessary to bring to bear a judicial mind—that is, a mind to determine what is fair and just in respect of the matters under consideration. Justices, for instance, act judicially when administering the law in Court, and they also act judicially when determining in their private room what is right and fair in some administrative matter brought before them, for instance, levying a rate."

Meaning of
Judicial.

Good Faith.

I have already told you that the question of good faith does not arise when a Judge acts within the limits of his jurisdiction, but it arises when those limits are exceeded. It appears from some of the authorities that the question of good faith is controlled by the legal fiction that every person knows the law of his own country, so that it is not open to a Judge to plead that he assumed jurisdiction on an erroneous view of the law, although he can plead that by reason of a mistake of fact he acted under the wrong belief that he had jurisdiction. The distinction between these two classes of mistakes was pointed out and fully discussed in *Houlden v. Smith*, 14 Q. B. 841. Defendant, a Judge of the County Court, summoned the plaintiff who lived outside the jurisdiction of the Court to appear and show cause why he had not paid a judgment-debt, and on his failure to attend he was committed for contempt for 12 days in jail. Neither was the debtor at the time living within the jurisdiction of the Court from which the summons was issued, nor was the jail in which the debtor was confined within the jurisdiction of the Court. In delivering the judgment of the Court in an action for trespass and false imprisonment, Patterson J. held that the "commitment was without jurisdiction, that the defendant ordered it under the mistake of the law and not of the facts, that although as laid down in *Louther v. Earl Rudnor*, 8 East. 113, and *Gwinn v. Pool*, 2 Lut. W. 935, where the facts of the case, although subsequently proved to be false were such as, if true, would give jurisdiction, the question as to jurisdiction or not, must depend on the state of facts as they appear to the

Jurisdiction.

Want of jurisdiction.

Magistrate or Judge, but that mistaking the law as applying to the facts cannot give even a *prima facie* jurisdiction or semblance, if any. "Although it is clear," said the learned Judge, "that the Judge of a Court of Record is not answerable at common law in an action for erroneous judgment or for the act of any officer of the Court wrongfully done, not in pursuance of, though under colour of a judgment of the Court, yet we have found no authority for saying that he is not answerable in an action for an act done by his command and authority when he has no jurisdiction," and it was held that the defendant Judge was not protected from liability at common law.

I have told you on the authority of *Houlden v. Smith* that where jurisdiction is assumed on a wrong view of law it is not a valid defence. The matter, however, is not free from doubt and it seems quite clear to me that if this is correct law, the immunity does not go far enough. We constantly come across cases where jurisdiction is assumed by Magistrates on erroneous reading of the law, and it seems to me it would be dangerous to lay down that in such cases even if the Magistrate acts in perfect good faith he is liable to action, civil or criminal. Such a view of the law would make the position of Magistrates one of difficulty. It is true, as pointed out by Sir Francis Maclean in *Brojendra Kishore v. Clarke* (13 C. W. N. 458) "it is of the highest importance, in the interest of the public, that, when executive officers are invested with statutory powers of a special and drastic nature, they ought to be very cautious, before exercising those powers, in satisfying

themselves that they have strictly complied with the provisions of the Act which created them." But giving due weight to the argument I am not convinced that an honest and *bona fide* error of law should not be a good defence under Sections 77 and 78 I. P. C. or under the Judicial Officers Protection Act. Of course, if jurisdiction is assumed without due care and caution, having regard to the definition of good faith, such a mistake will not avail.

As laid down by Lord Esher M.R. and Lopes L.J. in *Royal Aquarium v. Parkinson*, 1 Q. B. 431, in an action for slander where the occasion is privileged, the defence of privilege may be rebutted by showing, that from some indirect motive, such as anger or gross and unreasoning prejudice with regard to a particular subject-matter, the defendant stated what he did not know to be true, reckless whether it was true or false.

Want of jurisdiction may arise under different circumstances. A Judge may have no general jurisdiction to act in a certain matter at all or he may have jurisdiction but only under certain conditions or though having general jurisdiction to deal with a matter, he may not have jurisdiction to act in a particular manner. In some cases the plea has been upheld that where general jurisdiction exists, the absence of the conditions by which it may be limited or the exercise of it in a particular way not authorised by law, does not take away the privilege. The distinction was referred to but not decided in *Calder v. Halket* as upon the facts found the question did not arise. Baron Parke said "it is unnecessary to determine, whether, if distinct notice had been given by the plaintiff

to the defendant, or proof brought forward that the defendant was well acquainted with the fact of his being British-born, the defendant would have been protected in this case, as being in the nature of a Judge of record, acting irregularly within his general jurisdiction, or liable to an action of trespass, as acting by virtue of a special and limited authority, given by the statute, which was not complied with, and therefore altogether without jurisdiction."

In *Spooner v. Juddow* (4 M. I. A., p. 353) the validity of a defence based on error of law was recognised and the law was laid down in these terms. "Assuming now that the act complained of was a judicial act and not within the power given by law, the section requires that it should be further done in good faith and *in the belief that it was sanctioned by law*. These two requisites are the necessary pre-requisites for exoneration from criminal responsibility of all persons empowered to act under the direction of law. Law extends its protection only to a person who *bona fide* and not absurdly believes that he is acting in pursuance of his legal power." This question was discussed in *Teyen v. Ramlal* (12 All., 115) where the law was laid down thus:

"Under Act XVIII of 1850, where an act done or ordered to be done by a judicial officer in the discharge of his judicial duties is within the limits of his jurisdiction, he is protected whether or not he has discharged those duties erroneously, irregularly or even illegally or without believing in good faith that he had jurisdiction to do the act complained of. Where the act done or ordered

Jurisdiction
and error
of law.

to be done in the discharge of judicial duties is without the limits of the officer's jurisdiction, he is protected if, at the time of doing or ordering it, he in good faith believed himself to have jurisdiction to do or order it.

"The word 'jurisdiction' is used in Act XVIII of 1850 in the sense in which it was used by the Privy Council in *Calder v. Halket* (2 Moo. I. A. 293). It means authority or power to act in a matter, and not authority or power to do an act in a particular manner or form. A judicial officer who in the discharge of his judicial duties issues a warrant which he has authority to issue, though the particular form or manner in which he issues it is contrary to law, acts within and not without the limits of his jurisdiction in this sense.

"Where a Magistrate of the first class having sentenced an accused person to three years' rigorous imprisonment and Rs. 500 fine under Sections 379 and 411 of the Penal Code, and having issued a warrant purporting to act under Section 386 of the Criminal Procedure Code, for the levy of the fine by distress and sale of cattle belonging to the accused, sold such cattle before the date fixed for the sale, and in contravention of Form 37, Schedule V, and Section 554 of the Code, and Form D in Chapter V of the Circular Orders of the High Court, he was acting in the discharge of his judicial duty within his jurisdiction as a Magistrate of the first class; under such circumstances, it was immaterial that he did not in good faith believe himself to have jurisdiction to sell the property in the manner he did; and the fact that he acted with gross and culpable irregularity did

not deprive him of the protection afforded by Act XVIII of 1850."

Clarke v. Brojendra Kishore is an authority for the proposition that where jurisdiction is given under certain conditions the existence of those conditions must be proved before immunity can be claimed, and it is not enough that the existence of jurisdiction was believed in good faith (16 C. W. N., p. 865). The plaintiff, a Zemindar in the District of Mymensingh, sued the Magistrate of that District for damages for a trespass alleged to have been committed by the latter in searching the plaintiff's catchery on the allegation that the search was not authorised by law and the defendant acted maliciously and without reasonable and probable cause. The allegation of malice was not established. The defence was that the search was justified both under the provisions of the Arms Act, as well as of the Criminal Procedure Code, and that in any case the Magistrate was protected from liability under Act XVIII of 1850. It was held by Maclean C.J. and Harrington J. (Brett J. dissenting)—(1) that the defendant had no jurisdiction to issue the search warrant under the Code of Criminal Procedure, inasmuch as under Section 96 only a Court is authorised to issue such warrant, and as there was no proceeding under the Code initiated before him he was not acting as a Court, but was acting in his administrative and executive capacity; (2) that the search was not authorised under the Arms Act inasmuch as the Magistrate did not comply with the requirements of the Act, viz., that the Magistrate did not, before causing a search, record the grounds

of his belief that the plaintiff was in possession of arms for an unlawful purpose, etc., that the case, therefore, fell within the rule that when a statute creates a special right but certain formalities have to be complied with, antecedent to the exercise of that right, a strict observance of the formalities is essential to the acquisition of the right; (3) that the defendant not having acted in his judicial capacity in issuing the search warrant, he could not rely on the provisions of Act XVIII of 1850. Their Lordships of the Judicial Committee, however, held that the word "Court" in Section 96 includes every Magistrate, and every Magistrate has the power to issue search warrants and make searches, though the proceeding in connection with which the search is made, may not yet have been instituted. Upon this view of the case their Lordships held that the search was authorised, and it was not necessary for the defendant to claim the protection of Act XVIII of 1850, but if it were necessary he might have done so. Their Lordships, however, expressed their concurrence with the view of the law taken by the High Court on the second point. Their Lordships said that Mr. Clarke not having complied with the preliminary condition prescribed by the Arms Act cannot defend his action under that Statute. On the other hand, they had no doubt that Mr. Clarke, in directing a general search of the plaintiff's cutchery in view of an enquiry under the Code of Criminal Procedure, was acting in the discharge of his judicial functions, and they thought that if it had been necessary he might have appealed for protection to the Act No. XVIII of 1850.

In *Kemp v. Neville* [10 C. B. (H. S.) (1861) 523] the plaintiff having sued the defendant, Vice-Chancellor of the University of Cambridge, for false imprisonment, it was pleaded in defence that the Charter of the University empowered them by their officers to make search in the town for common women, and to punish by imprisonment or otherwise as the Chancellor or the Vice-Chancellor should seem fit, all persons as they should upon search find guilty or suspected of evil. The plaintiff was found in company with some scholars under conditions that led to the suspicion that they were there for disorderly and immoral purposes. The proctors thereupon brought her before the Vice-Chancellor who after examining the plaintiff caused her to be punished by imprisonment. Plaintiff, however, denied that she was there for any disorderly purpose and alleged certain irregularities in the procedure. The jury found that the proctors had reasonable grounds for suspicion, that the defendant did hear and examine the plaintiff, but had not made due inquiry into her character. It was held, first, that the Vice-Chancellor in the exercise of the jurisdiction given to him was a Judge of a Court of Record. Secondly, that the jurisdiction attached when the proctors brought the plaintiff before him; and that as the Charter defined no form of proceeding either for the hearing or the determination, no action of trespass lay against the defendant for the imprisonment complained of. On the general question of exemption of Judges from liability Earle C.J., in the course of his judgment, affirmed the rule that a judicial officer cannot be sued for an adjudication

according to the best of his judgment upon a matter within his jurisdiction, and also the rule that a matter of fact so adjudicated by him cannot be put in issue, in an action against him. Reference was made to the earlier cases of *Gwinn v. Pool*, *Floyd v. Barker* (12 Rep. 23), *Hammond v. Howell*, *Cave v. Mountain*, *Metcalf v. Hodson* (Hut 120), *Garnett v. Ferrand*, *Tozer v. Child*, *Calder v. Halket*, *Houlden v. Smith*, *Taaffe v. Lord Downes*, and *Dr. Grenville v. The College of Physicians*.

It may be useful to reproduce a summary of those cases as given in the judgment of this case. In *Gwinn v. Pool* the defendant was held not to be liable in trespass, although as Judge of inferior Court he had caused the plaintiff to be arrested in an action where the cause of action arose, because although there were certain irregularities in the procedure, yet he was held justified because he acted as a Judge in a matter over which he had reasons to believe that he had jurisdiction. In *Floyd v. Barker* (12 Rep. 23) it was held that the Judge and the Grand Jury were not liable to be sued in the Star Chamber for a conspiracy, in respect of their action in Court, in convicting of felony. In *Hammond v. Howell* the Judge who committed for an alleged contempt, under a warrant showing that in truth no contempt had been committed, was held not liable in trespass, because he had jurisdiction over the question, and his mistaken judgment, was no cause of action. In *Cave v. Mountain* the Justice who committed the plaintiff on an information that contained no legal evidence either of any offence or of the plaintiff's

participation in that which was supposed to be an offence, was held not liable in trespass, because the information was considered to be directed against an offence over which the Justice had jurisdiction if there had been any proof thereof. In *Metcalf v. Hodson* (Hut 120) the defendant was held not liable for taking insufficient bail in a cause in a local Court, because in that Court it was a judicial act by him. In *Garnett v. Ferrand* the Coroner, who removed the plaintiff from the place of an inquest, was held not liable for trespass, as the removal was ordered by him in a judicial capacity. In *Tozer v. Child* the churchwarden was held not liable for refusing a lawful vote in a vestry, because, although he was acting partly in a ministerial capacity in receiving the votes, yet he was also acting partly in a judicial capacity in refusing a vote, and in that capacity he was not liable for a mistake if he acted according to the best of his judgment.

Calder v. Halket was a case in which the defendant, a Magistrate of the Foujdari Court at Nadia, was sued for having ordered the arrest of the defendant for being concerned in a riot. Under the authority of that order the defendant was arrested and kept under surveillance. On these facts an action of trespass was commenced in the Supreme Court at Calcutta against the defendant for assault and false imprisonment. It was alleged that the defendant had no jurisdiction over the plaintiff who was a British subject. Baron Parke, in delivering the judgment of the Court, said "it is clear, therefore, that a Judge is not liable in trespass for want of jurisdiction, unless he knew, or

ought to have known, of the defect ; and it lies on the plaintiff, in every such case, to prove that fact. In the case now under consideration, it does not appear from the evidence in the case that the defendant was at any time informed of the European character of the plaintiff, or knew it before, or had such information as to make it incumbent on him to ascertain that fact. The point, therefore, which is contended for by the plaintiff does not arise."

In *Houlden v. Smith* the Judge of the County Court was held liable in trespass, because he was within the exception thus laid down ; and had the means of knowing that he had no jurisdiction. In *Taaffe v. Lord Downes* (3 Moo. P. C. 36) the Judge was justified by a plea in trespass showing a warrant issued by him in his capacity of Judge, although the plea did not show that the warrant was lawful, but was purposely confined to the right of a Judge to protection : see the judgment of Fox J., p. 50.

Throughout these cases among others the vital importance of securing independence for every judicial mind was recognised.

It will be seen that in dealing with Sections 77 and 78 I have quoted freely from cases dealing with the question of civil liability. I have done so, because the law as regards both is practically the same, so far at least as Section 77 is concerned. As regards Section 78 which deals with the immunity of ministerial officers there seems to be some difference between it and the Judicial Officers Protection Act. It has been said by Mayne that the scope of the latter is wider than that of the former.

The learned author points out that for purposes of civil liability the warrant is an absolute protection to the officer so long as he obeys it, whether it was lawful or unlawful and whether it was issued with or without jurisdiction. Under Section 78 where the Court had no jurisdiction to issue the order, it is necessary further to show that the officer acting upon the order in good faith believed that the Court had jurisdiction. This is true as far as it goes, but it may be observed that under Section 78 all that is necessary is to show that the act done was done *in pursuance of an order* of a Court of Justice or *warranted* by such an order. The *obligation* to carry out the order is not essential. Whereas in the case of civil liability the order must be one which an officer is *bound* to execute, so that in some respect there is a larger protection to ministerial officers under Section 78 than under the Act of 1850.

In the case of *Thacoordass Nundee v. Shunkur Roy* (3 W. R. Cr., p. 53) it was held that a Civil Court peon who in contravention of the provisions of the Civil Procedure Code arrested under civil process a judgment-debtor going to a Court in obedience to a citation to give evidence within the precincts of that Court cannot claim the protection of Section 78. The question of good faith does not appear from the report to have been raised. A similar view was taken in another case reported in 7 W. R. Cr., p. 12. In that case a bailiff, in executing a process against the moveable property of a judgment-debtor, broke open a gate which, it was held, he had no authority to do. He was convicted and the conviction was upheld.

Before leaving the subject I may refer incidentally to a question that arose in *Pulin Behary Das v. King-Emperor* (16 C. W. N., p. 1105) as to whether the validity of the initial appointment of a Judge can be questioned in order to support a plea of the want of jurisdiction on his part to try a case. Mr. Justice Mukerjee, in an elaborate judgment relying on a number of English and American authorities, held that the acts of one who, although not the *de jure* holder of a legal office, was actually in possession of it under some colour of title or under such conditions as indicated the acquiescence of the public in his actions, could not be impeached in any proceeding to which such person was not a party. In other words, to put it shortly, the title of *de facto* judicial officers was held not to be collaterally assailable.

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

Accident.
Section 80,
I.P.C.

ILLUSTRATION.

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

According to Stephen an effect is accidental, when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the

circumstances in which it is done, to take reasonable precautions against it. It would be useless and cruel to punish an act that no human forethought or care could prevent. When a consequence is caused by an accidental act it is not possible to impute any evil intent to the agent. Strictly speaking the accidental act is not his act at all. He neither wills the act nor the consequence. The illustration to Section 80 makes the matter clear. The man at work could not foresee that the head of the hatchet would fly off, he did not will it nor did he intend the death that was caused. The matter is self-evident and requires no elaboration. In all these cases there must be no negligence.

Some difficulty may arise in interpreting the words "doing of a lawful act in a lawful manner by lawful means." Suppose A is in possession of an unlicensed gun with which he shoots a jackal in a jungle; by accident he hurts a person who had concealed himself in that jungle, and there is no want of proper care and caution. Would the fact of the want of a license preclude him from claiming the protection of Section 80? I think not, for shooting is a lawful act and killing a jackal with a gun is killing it in a lawful manner by lawful means. The fact that the possession of the gun was unlawful and constituted an offence ought not to deprive a man of the protection which is given to him, because the circumstances under which the act was done were such as to negative the existence of a *mens rea*. Or take the case of a person who accidentally causes the death of another as the result of a shooting in a closed area or in a close

season. By shooting under those circumstances the person may be guilty under the special law, for the breach of that law, but the existence of the prohibition should not to my mind render the act or the manner or the means unlawful.

The law in England relating to accidental acts is on a more satisfactory footing. In Stephen's Digest it is explained that an effect is accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it. A similar explanation is to be found in the Tenth Parliamentary Report wherein it is provided that an injury is said to be accidentally caused whenever it is neither wilfully nor negligently caused. Nothing corresponding to this Section is to be found in Macaulay's original draft. His views are to be found in the following note:—

“It will be admitted that when an act is in itself innocent, to punish the person who does it because bad consequences, which no human wisdom could have foreseen, have followed from it would be in the highest degree barbarous and absurd.

A pilot is navigating the Hooghly with the utmost care and skill: he directs the vessel against a sand-bank which has been recently formed, and of which the existence was altogether unknown till disaster. Several of his passengers are consequently drowned. To hang the pilot as a murderer on account of

this misfortune would be universally allowed to be an act of atrocious injustice. But if the voyage of the pilot be itself a high offence, ought that circumstance alone to turn his misfortune into a murder? Suppose that he is engaged in conveying an offender beyond the reach of justice; that he has kidnapped some natives, and is carrying them to a ship which is to convey them to some foreign slave-colony; that he is violating the laws of quarantine at a time when it is of the highest importance that those laws should be strictly observed; that he is carrying supplies, deserters and intelligence to the enemies of the State. The offence of such a pilot ought, undoubtedly, to be severely punished. But to pronounce him guilty of one offence because a misfortune befell him while he was committing another offence,—to pronounce him the murderer of people whose lives he never meant to endanger, whom he was doing his best to carry safe to their destination, and whose death has been purely accidental, is surely to confound all the boundaries of crime.

* * * * * For example, hundreds of persons in some great cities are in the habit of picking pockets. They know that they are guilty of great offence; but it has never occurred to one of them, nor would it occur to any rational man, that they are guilty of an offence which endangers life. Unhappily one of these hundreds attempts to take the purse of a gentleman who has a

loaded pistol in his pocket. The thief touches the trigger, the pistol goes off, the gentleman is shot dead. To treat the case of this pick-pocket differently from that of the numerous pick-pockets who steal under exactly the same circumstances, with exactly the same intentions, with no less risk of causing death, with no greater care to avoid causing death; to send them to the house of correction as thieves, and him to the gallows as a murderer, appears to us an unreasonable course. If the punishment of stealing from the person be too light, let it be increased, and let the increase fall alike on all the offenders. Surely the worst mode of increasing the punishment of an offence is to provide that, besides the ordinary punishment, every offender shall run an exceedingly small risk of being hanged. The more nearly the amount of punishment can be reduced to a certainty the better; but if chance is to be admitted, there are better ways of admitting it. It would be a less capricious, and therefore a more salutary course, to provide that every fifteenth or every hundredth thief selected by lot should be hanged, than to provide that every thief should be hanged who, while engaged in stealing, should meet with an unforeseen misfortune, such as might have befallen the most virtuous man while performing the most virtuous action.

We trust that his Lordship in Council will think that we have judged correctly in proposing that when a person engaged in the commis-

sion of an offence causes death by pure accident, he shall suffer only the punishment of his offence, without any addition on account of such accidental death."

This view seems to be in accord with the law in England as well as in the Continent. The Prussian law, as quoted by Hamilton in his Penal Code, makes the matter perfectly clear. It lays down that 'if the act which had the accidental result were in itself unlawful, yet cannot the result itself be held to be a crime.'

The question, however, is not of any great importance in so far at least as offences under the Indian Penal Code are concerned; for the definition of offences in the Code, with rare exceptions, includes as a necessary ingredient, an intention to cause a particular injury. An accidental act is necessarily unintentional and such an act would not generally fall within the definition of an offence even apart from the provisions of Section 80 of the Code. Even if the act is negligent it cannot be said to be purely accidental. The omission of any provision similar to Section 80 in Macaulay's original draft is no doubt due to this.

Accident is, however, not a defence when the defendant *meaning* to strike one person and unintentionally strikes another person. Thus if one of two persons, who are fighting, strikes at the other, and hits a third person unintentionally, this is a battery, and cannot be justified on the ground that it was accidental. (Russell on Crimes p. 882.)

Section 81.—Nothing is an offence merely by reason of its being done with the knowledge that it

is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

ILLUSTRATIONS.

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

(b) *A* in a great fire pulls down houses in order to prevent the conflagration from spreading. He does this with the intention in good faith of saving human life or property. Here if it be found that the harm to be prevented was of such a nature and so imminent as to excuse *A*'s act, *A* is not guilty of the offence.

This section covers three different kinds of cases, *i.e.*, cases in which injury is done to one man in order to prevent greater injury to another,

cases in which a smaller injury is done to a man in order to prevent greater injury to himself, and also cases in which to prevent injury to a person he is put to the risk of an equal or greater injury.

The motive, however, must be the prevention and not the causing of injury. Illustration (a) to Section 81 is an instance of the first kind. Illustration (b) is of the second kind, and the third class of cases may be illustrated as follows:—

You see a tiger attacking a man and you feel sure the tiger will be on him in a minute, you shoot the tiger fully knowing that the man and the tiger are so close that you might kill the man and not the tiger. In all these cases you are guilty of no offence. No evil intent can be imputed in any of these cases.

INFANCY.

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

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

The question whether a criminal intent can be negatived in any given case by reason of tender age of the agent, and subsequent immaturity of intellect, depends upon a variety of circumstances. The age at which a person may be said to have acquired sufficient intelligence to judge of the nature and consequences of his acts varies with climatic condition, education, precocity, etc. Up to a certain

Infancy.
Secs. 82, 83.
I.P.C.

age, however, the presumption of innocence is conclusive. Both according to English as well as Indian Law a child under seven is *doli incapax*, and against this presumption no averment can be received. An infant above the age of seven and below the age of twelve is according to Indian Law not responsible for his acts, if he has not attained sufficient maturity of understanding to judge of their nature and consequence. Nothing is said in the Code as to whether the onus to prove want of mature understanding is on the infant or whether it is on the prosecution to prove affirmatively the existence of sufficient mental capacity to fasten upon him the responsibility for the criminal act. Having regard, however, to the provisions of the Indian Evidence Act, which places the burden of proving the existence of grounds of exemption upon the party alleging the same, it is clear that the law starts with the presumption of criminality until the negative conditions are established.

In *Queen v. Lakhini Agradanini* (22 W. R. Cr. 27) it was held that the non-attainment of sufficient maturity of understanding would have to be specially pleaded and proved. That the onus is on the person who claims the benefit of a general exception to prove the circumstances which entitle him to the exemption. But observed the Judges: "Looking at the matter from a practical point of view, it seems that the cases of infants such as we are at present considering have not been adequately provided for by the legislature. It may be said and indeed it has been held that where the accused is under twelve years of age it is

Onus
proof.

the imperative duty of the trial Judge to find whether he is possessed of sufficient maturity of understanding. But the question of onus of proof seems to be upon defendant."

In this case a girl of over seven and under twelve years of age was placed on her trial on a charge of arson. On the preliminary objection to the trial under Section 83 the jury found that the prisoner was aware of the nature of her act, *i.e.*, she was aware that it would do damage, but that she was not aware that she would be imprisoned in consequence. The Sessions Judge referred the case to the High Court expressing the opinion that if a person be aware of the nature of his or her act, *i.e.*, whether it is right or wrong, that person may, even if he or she does not know that punishment will follow, be considered capable of committing an offence. The High Court (Jackson and McDonald, JJ.) held that the words "consequences of his conduct" in Section 83 do not refer to the penal consequences to the offender, but the natural consequences which flow from a voluntary act, such for instance as that when fire is applied to an inflammable substance it will burn.

According to the English law, however, children above the age of seven and under the age of fourteen are presumed not to possess the degree of knowledge essential to criminality, though this presumption is rebuttable by strong evidence of a mischievous discretion. Sir Fitz James Stephen is of opinion that the limit of age of absolute irresponsibility should be raised to twelve, and that the stage of rebuttable presumption should be done away with. Whatever view may be held of

the precocity of Indian children, to start with a presumption of responsibility against a child of eight years seems unreasonable, and no Judge with any idea of responsibility is likely to hold a child of that age criminally responsible without fully satisfying himself that the child had sufficient maturity of understanding to judge of the nature and consequence of his acts. According to German law an infant up to the age of twelve is considered wholly irresponsible, after which age, and until he has completed the age of eighteen, proof of the absence of requisite intelligence may rebut the presumption.

After the full age of responsibility has been attained, youth may be a ground of extenuation but not of exemption.

LECTURE VIII.

CONDITIONS OF NON-IMPUTABILITY—*continued.*

INSANITY—GENERAL.

The condition of non-imputability based on the existence of a diseased mind is ordinarily dealt with under the head of insanity which is meant to include both mental derangement and imbecility. The word 'insanity' does not occur anywhere in the Code and the rule of exemption regarding it is laid down in very general terms in Section 84, which runs as follows:—

Insanity.
Sec. 84.
I.P.C.

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

The use of the more comprehensive term 'unsoundness of mind' has the advantage of doing away with the necessity of defining insanity and of artificially bringing within its scope various conditions and affections of the mind which ordinarily do not come within its meaning, but which none the less stand on the same footing in regard to exemption from criminal liability. It would interest you to know that in Macaulay's draft the law was stated thus:—

Section 66.—Nothing is an offence which is done by a person in a state of idiocy ;

Section 67.—Nothing is an offence which a person does in consequence of being mad or delirious at the time of doing it.

The wider expression 'unsoundness of mind' covers mental defects both congenital and post natal, such as idiocy, madness, delirium, melancholia, mania, hypochondria, dementia, hallucination and every other possible form of mental affection known to medical science by whatever name designated. I shall, however, in dealing with the subject, use the more familiar, though less precise expression 'insanity' as an equivalent for 'unsoundness of mind' used in the Code.

General observations.

In dealing with the legal aspect of the question we are only concerned with the effect insanity has on the mind and with special reference to the question whether the sufferer has that minimum of knowledge and intelligence and that freedom of will which are at once the basis of responsibility and the justification for punishment. You will observe that one of the elements I have mentioned, namely, freedom of will has no place in Section 84. This is a point I shall discuss later when dealing with that particular form of insanity now recognised both in England and America and known 'as irresistible impulse.'

The subject of insanity is one of the most difficult in the whole range of the Law of Crimes and has given rise to endless discussions and controversies. An examination of the inner working of that complicated machinery called the human mind is always difficult, and the difficulty is greatly enhanced when that mind is not normal. In carrying our investigations into the regions of psychology we have to rely almost entirely on an examination of the working of our own mind, but

we cannot argue from a sane to an insane mind, and that again with reference to matters which represent not what is common between the two, but what the one excludes and the other includes. Unfortunately the insane cannot help us in our investigations. A great deal of difficulty in the treatment of the subject has been due to an anxiety to bring all the different phases of insanity under one common denominator and to apply one common test to all. The right and wrong test of which you will hear more later on, has been adopted as a measure of legal responsibility in the same way as a yard stick is taken as a measure of length. The mental condition of two insane persons often differ as widely as sanity from insanity, and this greatly enhances the difficulty of laying down general rules which can be satisfactorily applied to all its forms.

In dealing with the subject I do not propose to confine myself to the limited question of what the law in India actually is, which reduces itself to the question of the interpretation of Section 84 of the Code which I have already quoted, but would like to discuss, as many other text-writers have done, the larger question which is this: what ought to be the law relating to insanity. That law even in England has never been authoritatively laid down in spite of the pronouncement of the Judges in McNaghten's case. In India Section 84 contains the barest skeleton of the law of insanity, and in interpreting the section the question of what the law ought to be is as important as the question what the law is. The law has wisely refrained from

going into details, and it is not possible that a subject which a great American writer has discussed in a book of nearly thousand pages, could be squeezed into a section of thirty-nine words. The question of what the law ought to be is certainly not less important even in India than the question of what the law is. In dealing with the former question it is of the utmost importance to bear in mind what I have said regarding—

- (a) The basis of criminal responsibility and
- (b) The object of punishment.

What the law ought to be, according Mr. Mercier, depends on what appears to be fair and just to the ordinary man when the matter is explained to him, in other words, to the common sense of the jury and not that which commends itself as equitable and right to the faddist, the pedant, or the enthusiast. I venture to think that law cannot be left entirely to the judgment of the man in the street nor does it appear that the learned author meant it. The reference to the explanation itself brings in all the considerations based on theories of law and those considerations can never be discarded.

The danger of leaving cases entirely to the common sense of the jury which results practically to leaving them to their sympathies, is illustrated by the result of recent sensational cases in France and America; cases which resulted in acquittals in absolute disregard of the clear provisions of law. Madame Cailaux's case in France and White's case in America are the most recent instances of that danger. In England in numerous trials the verdicts in cases of insanity have been guided not by the directions given

by the presiding Judge regarding the law of insanity, but by the answer which the jury in their common sense have thought fit to give to the question "should the prisoner at the bar be punished for the act he has done," and their verdict in most cases, though in disregard of Judge's directions, has been what to the layman must appear eminently just. The reason is to be found in the fact that the law, as laid down in McNaghten's case, is too narrow and even harsh, and the verdict of the jury in many cases represents a revolt against the law so laid down. When the law, as laid down in that case, has not met with popular approval, it is necessary to move out of the narrow groove into which Judges have often found themselves and to go out in search of a test that would conform to well-established theories of legislation, and yet would not be too fine for the common sense of the jury.

There is no charm in the word insanity and a person suffering from a mental disease is no more entitled to exemption from liability by the mere fact of the disease than a person suffering from fever or any other ailment. Irresponsibility can only be claimed when the disease has affected the judgment in a particular way or in the words of the Indian Penal Code, when it has rendered the sufferer incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. Exemption in the case of the insane is based on grounds similar to those applying to infants specially those who are outside the age of absolute exemption, *i.e.*, such want of the reasoning faculty as renders a person incapable of distinguishing right from wrong. Lord Hale

Basis of exemption from liability.

accepted as his standard of responsibility the intelligence of a child of fourteen. "The best measure," says he, "is this: such a person as labouring under melancholy distemper hath yet ordinarily as great understanding as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony." Sir Fitz James Stephen can find no analogy between healthy immaturity and diseased maturity. The question, however, is not one of maturity or immaturity of intellect, but of the level of intelligence in which a person may be found at a certain point of time. One often comes to the same point from opposite directions. You pass the same spot in ascending up a hill as in descending down it, and the position is the same whichever way you arrive at it. Shakespeare's second childhood is in many respects similar to the first and real childhood. The absence of a certain degree of intelligence is the point of importance, and it is immaterial whether this is due to one cause or another.

Lord Hale's analogy, however, is not quite complete, and there is this difference between the two cases that in the case of children below a certain age the exemption is absolute and is no way dependent upon the degree of intelligence possessed by such a child, whereas insanity is never an absolute ground of exemption, for the very obvious reason that insanity affects the mind in various ways and in different degrees of intensity, and there is no justification for extending the exemption to a person, simply because medical men would call him insane, if his intellect, though diseased, has not been deranged to an extent

that would negative the existence of intelligence justifying responsibility. As I have told you the grounds of exemption in cases of infancy are not materially different from those of insanity, such differences as exist are not differences of principle but of policy. Whereas it is safe to lay down that within certain age limits a child is incapable of distinguishing right from wrong and must be given absolute immunity from punishment, it is not possible to lay down any such general proposition in cases of insanity. Cases of insanity have thus greater analogy with the case of children between the age of 7 and 12, whose exemption as you have seen is dependent on proof in each case of the absence of sufficient maturity of understanding to judge of the nature and consequence of the act constituting the offence charged. In judging of the sufficiency of understanding in all such cases regard must be had to the simplicity or complexity, as the case may be, of the elements constituting the offence charged. Unsoundness of mind may deprive a person of the understanding that it is wrong to make a defamatory statement, even though the statement be true, and yet such a person may have sufficient sense to know that it is wrong to steal his neighbour's horse.

So far it seems simple enough to arrive at the principles upon which exemption in the case of the insane is to be determined. However, the conflicts and controversies, and these have been endless, which have ranged round the subject are largely due to the existence of two schools of thought which have diverged very considerably

Views of
different
schools
of
thought.

and have influenced legislation in different countries. One school which I shall call the logical school look upon insanity as merely a source of intellectual error vitiating the judgment, and generally influencing the mental attitude of the insane towards a criminal act or as destroying the free-will which is the fundamental basis of responsibility. Accordingly they limit exemption on the ground of insanity only in so far as it has been productive of such intellectual error as would, if existing in the mind of a sane person, afford grounds for exemption, or has to the same extent interfered with his freedom of will. To understand this school and to carry their arguments to their logical conclusions, it would be necessary once again to advert shortly to the basis of criminal responsibility and to the theory of punishment. The first essential of responsibility, as you have already seen, is the existence of a free-will, and where this is negatived as in the case of compulsion, there is no crime and the insane, besides being entitled to the benefit of all forms of external compulsion to which the sane may be subject, have the additional advantage of being allowed to plead the existence of a species of internal compulsion, which I propose to discuss under the head of irresistible impulse. The sane are also excused if they act under a mistake of fact which may negative *mens rea*, but the mistake must not be such as could be avoided by acting with reasonable care and caution. In the case of the insane where the mistake is due to a diseased mind and not to any extraneous grounds, it would be enough to show that the mistake existed and no question of

care or caution would arise. Again for the sane a mistake of law is no excuse, but it would be an excuse for an insane, because the presumption that every man knows the law cannot arise in his case. Therefore on strict principle and looking upon insanity as a mere source of intellectual error and intellectual compulsion, insanity, whether temporary or permanent, complete or partial, is excusable—

- (a) If it overpowers the will and the sufferer ceases to be a free agent or, in other words, if it gives rise to what is known as irresistible impulse.
- (b) If it deprives the sufferer of the knowledge that the act is either morally wrong or contrary to law.

This want of knowledge of the right and wrong of an act or of its being illegal may again be due to various causes; it may for instance be due to—

- (a) Mental disorder leading to error regarding external objects.
- (b) Affection of the cognitive faculties and loss of memory depriving the sufferer wholly or partially, generally or with reference to a particular matter, of the knowledge gained by past experience of the connection between different events.

This again may lead to ignorance—

- (i) regarding the relation between two things as cause and effect;
- (ii) regarding one's own obligation to society and consequent ignorance regarding the rights and wrongs of an act;

(iii) regarding the law of the country.

You will thus see that it is not difficult to theorise regarding the principles that should govern exemptions on grounds of insanity, and that these principles are in many respects not different from those which we apply in fixing the criminal character of acts done by sane and adult persons, except that the causes which bring conditions of irresponsibility into being in the case of the sane are different from those which operate in the case of the insane, and the knowledge gained by experience which we impute to the sane are not imputable to the insane. Difficulty, however, arises in the application of these principles to individual cases by reason of the difficulty that arises in determining the extent of the mental affection in a particular case. As Tracy J. told the jury in Arnold's case, (1 Collinson, Lunacy, 475; S. C. 16 St. Tr. 695,) 'it is not every kind of idle and frantic humour of a man or something unaccountable in his actions which will show him to be such a mad man as to be exempted from punishment.'

Insanity, as I have already pointed out, is not a single condition of the mind, and I propose in dealing with the subject to treat it as far as practicable under the various heads indicated above. I shall endeavour to show how these different affections give rise to different considerations upon which exemption is or at least ought to be based. You have seen that the ultimate basis of exemption in all cases is the absence of *mens rea*, and the mental conditions the existence of which enables us to predicate its absence in

the case of sane persons are in many respects neither different nor less diversified than those in the case of the insane, and I hope that the method of treatment which I propose to adopt will simplify the consideration of the matter. The difficulty of laying down a rule of law that would apply to all forms of insanity was recognised by the Judges in Macnaghten's case [10 Cl. & C. F. 200] in giving their answers to the questions put to them by the House of Lords. They prefaced their answers by the following pertinent observation:—

“They think it right in the first place to state that they have forborne entering into any particular discussion upon these questions, from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case. As it is their duty to declare the law upon each particular case on facts proved before them, and after hearing argument of counsel thereon, they deem it at once impracticable, and at the same time dangerous to the administration of justice if it were practicable to attempt to make minute applications of the principles involved in the answers given by them to your Lordships' questions.”

This is one of those cases without which no discussion of the subject of insanity can be considered complete.

Macnaghten was tried in 1843 for causing the death of Mr. Drummond, the Private Secretary of Sir Robert Peel. The evidence was to the effect that the prisoner was suffering from morbid delusion and that persons so suffering might have a moral perception of right and wrong, but that in the case of the prisoner it was a delusion which carried him away beyond the power of his own control, and left him no such perception; and that he was not capable of exercising any control over acts which had connection with his delusion; that it was of the nature of the disease with which the prisoner was affected to go on gradually until it had reached a climax, when it burst forth with irresistible intensity; that a man might go on for years quietly, though at the same time under its influence, but would all at once break out into the most extravagant and violent paroxysms. Macnaghten's delusions were that he thought he was harassed by his enemies and that Mr. Drummond was one of them. Tindal C.J. charged the jury in the following terms:—"The question to be determined is whether, at the time the act in question was committed, the prisoner had or had not the use of his understanding so as to know that he was doing a wrong or wicked act. If the jurors should be of the opinion that the prisoner was not sensible, at the time he committed it, that he was violating the laws both of God and man, then he should be entitled to a verdict in his favour; but if, on the contrary, they were of opin-

ion that when he committed the act he was in a sound state of mind, then their verdict must be against him."

The verdict of the jury was 'not guilty' on the ground of insanity. It was an unpopular verdict and was debated in the House of Lords and the House determined to take the opinion of the Judges on the law. Accordingly all the Judges assembled on the 19th June 1843, and various questions of law were propounded to them on the law relating to insanity. I quote below these questions and answers:—

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

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

understand your Lordships to mean the law of the land."

Question II.—"What are the proper questions to be submitted to the jury when a person, afflicted with insane delusions respecting one or more particular subjects or persons, is charged with the commission of a crime (murder for instance), and insanity is set up as a defence?"

Question III.—"In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?"

Answers II and III.—"As these two questions appear to us to be more conveniently answered together, we submit our opinion to be that the jury ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction. That, to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not, we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect

to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered on the principle that every one must be taken conclusively to know it without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable, and the usual course therefore has been to leave the question to the jury whether the accused had a sufficient degree of reason to know he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and corrections as the circumstances of each particular case may require."

Question IV.—"If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?"

Answer IV.—"The answer must of course depend on the nature of the delusion; but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes in

self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

These answers, although they do not amount to judicial decisions, have been and are still regarded as authoritative expositions of the law relating to insanity, and I shall criticise those answers in dealing with the form of insanity to which any particular answer may relate.

The procedure by which these answers were obtained was very irregular and the prefatory remarks of the Judges which I have quoted show that they did not quite approve of the method adopted, yet, in the words of Wharton, "these answers, thus dubiously born and almost smothered from their birth in a cumbrous phraseology, have been the oracle of Anglo American Jurisprudence on insanity for sixty years."

IRRESISTIBLE IMPULSE.

Irresistible
impulse.

I shall now deal with the species of insanity which affects the will. I have already told you that sane or insane, an agent is not responsible for an act done by him against his own will. To constitute criminality you must have as a first condition a voluntary act. Civil law recognises both physical and moral compulsion as affecting one's freedom of action and thereby his legal liability. Criminal law is more stringent and the only compulsion it recognises is physical compulsion. Strictly speaking what is called moral compulsion is no compulsion at all. In the case of persons with a sound mind

it is a conclusive presumption that in the absence of actual physical compulsion he is free to act as he likes and internal compulsion or in other words, no mere prompting of one's own mind, however strong it may be, is recognised as constituting legal excuse for crimes. This principle has been consistently followed even in most extreme cases, one instance of which is to be found in *Reg. v. Dudley* (14 Q. B. D. 273), to which I have already referred. This presumption of free agency may not be applicable to a person with a deranged mind. The impulse to do a particular act, even though known to the actor to be wrongful, may be entirely due to mental disorder or such a disorder as may have weakened the power of resistance which a sane person is expected to possess.

Criminal law while punishing a man for his faults, does not punish him for his misfortunes, and it is only right that if such a state of mind exists and is due to disease it should be recognised as a valid excuse. But the mere fact that an impulse is not resisted would not show that it is irresistible. When a man, not suffering from any disease, commits a crime and then attributes it to an irresistible impulse the plea has never been admitted. In some of these cases medical experts have come forward to say that irresistible impulse itself is a disease. These experts seem to have a partiality for discovering new diseases. We read of cases under the Defence of the Realm Act being defended in England on the ground that cowardice is itself a disease. In one sense everything abnormal is a disease, but Courts of law would hardly be justified in accepting such a doctrine as

it will have the effect of condonation of crime to an extent that is dangerous to society at large. Putting aside these extreme views it seems to me that the position is really this: *A* commits an offence under an impulse which he says was irresistible; in substance it only means that the impulse was not resisted, not that under no circumstances could it be resisted. If a sane person were to put forward such a plea he would be told that he was bound to resist the impulse, and that there is no impulse which a sane person cannot resist if he tries his utmost. But if a person otherwise proved to be insane puts forward such a plea he is excused, not necessarily because the impulse was irresistible but because the disease had so far weakened his power of resistance that he yielded to the impulse under circumstances in which a sane person would have been expected not to yield. I believe this would be a more correct and consistent view of the law on the subject. The plea of an irresistible impulse therefore will not by itself be a defence, but should be a good defence only where there is evidence of an antecedent unsoundness of mind.

In dealing with these cases we must try to adopt the golden mean, remembering that law is intended to be a benefit to society and not a scourge, and in settling the line of demarcation between conditions of imputability and non-imputability we must be very careful, lest in the words of Lord Hale, "on one side there be a kind of inhumanity towards the defects of human nature or on the other side too great an indulgence given to great crimes."

A habitual thief may at the sight of a valuable article feel what he would call an irresistible impulse to put the article into his pocket. The impulse would perhaps have been less irresistible if he had found a policeman near by. The irresistible impulse in such cases would be found to be due to familiarity with prison life, to a sense of security against detection, and the consequent absence of that dread of punishment which would ordinarily operate upon the mind of a first offender. Before the act, the offender has perhaps balanced the advantages and the disadvantages, the probable gain and the probable loss, and has found that the former outweighs the latter. This judgment of the mind is often arrived at by a process so quick as to be almost imperceptible. At any rate when the act is done, in nine cases out of ten, the offender will have forgotten, that before striking the balance he had gone through this process of mental arithmetic, and when he finds his calculations have gone wrong he wonders at the state of his mind and then, perhaps, honestly attributes it to the existence of what he calls an irresistible impulse. Once a plea of this kind is indiscriminately admitted, impulses will be found to have proved irresistible in many more cases than they do now. Besides, if we were to give protection to a person sane in other respects who cannot or will not control his temper, it will be difficult to withhold such protection from the fanatical *gazi*, or the American Negro who act under strong impulse undeterred by fear of legal punishment. The grant of such protection takes away all the incentive towards self-control and sets a premium to brutal murders and other

offences of an aggravated kind. Both the *gazi* and the Negro after going through a few years schooling in a jail will perhaps find on their return that they could control their impulses if they wished. Even if we were to assume that there is such a thing as irresistible impulse without any other symptoms of insanity, how are we to distinguish cases in which the impulse was controllable from cases in which it was uncontrollable? It would be most impolitic to allow an issue to be raised which is incapable of satisfactory determination. The same principle which has induced the legislature to ignore the existence of motive in determining the criminal character of an act or to ignore the mere existence of a criminal intent unaccompanied by an overt act would justify our shutting out a plea of irresistible impulse except in cases of insanity. Criminal law as pointed out by Sir Fitz James Stephen is itself a system of compulsion on the widest scale. It is a collection of threats of injury to life, liberty and property if people do commit crimes, and it is necessary in order to be effective that at the moment when the impulse to commit crimes is strongest that the law should speak out most clearly and emphatically to the contrary.

The plea of irresistible impulse has been raised in many cases, specially in cases of unaccountable and motiveless murders, but I am not aware of a single case in which the sturdy common sense of an English Jury has not prevailed over specious arguments put forward in defence of bad cases. *Reg. v. Haynes* (1 F. and F. 666) was a case in which the prisoner had murdered an "unfortunate woman"

with whom he was intimate. The plea of insanity was based upon the contention that it being impossible to assign any motive for the perpetration of the offence, the prisoner must have been acting under what is called a powerful and irresistible influence or homicidal tendency. The learned Judge Baron Bramwell, after telling the jury that mere absence of motive was not sufficient upon which they could safely infer the existence of such an influence, added— "A morbid and restless (but irresistible) thirst for blood would itself be a motive urging to such a deed for its own relief. But if an influence be so powerful as to be termed irresistible, so much the more reason there is why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence—the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse against rendering the crime punishable you at once withdraw a most powerful restraint, that forbidding and punishing its perpetration. We must, therefore, return to the simple question you have to determine. Did the prisoner know the nature of the act he was doing; and did he know that he was doing what was wrong?"

In *Reg. v. Barton* (3 Cox 275) prisoner was indicted for the wilful murder of his wife. It was proved that immediately before murdering her, he had killed his own child, and that after murdering his wife he tried to cut his own throat.

When questioned by the Surgeon he exhibited no sorrow or remorse, but stated that the trouble, dread of poverty and destitution had made him do it, fearing that his wife and child would starve while he was dead. Apparently there was no other motive. The Surgeon formed the opinion that at the time the prisoner committed the act he had not, in consequence of an uncontrollable impulse, exercised any control over his conduct. "Monomania," he said, "was an affliction which for the instant completely deprived the patient of self-control in respect of some particular subject which is the object of the disease." Baron Park told the jury that the question was whether the prisoner knew the nature and character of the deed he was committing, and if so, whether he knew he was doing wrong in so acting. As to the excuse of an irresistible impulse he expressed his concurrence with Baron Rolfe's views that the excuse of an irresistible impulse co-existing with the full possession of reasoning power might be urged in justification of every crime known to the law for every man might be said, and truly, not to commit any crime except under the influence of some irresistible impulse. Something more than this was necessary to justify an acquittal on the ground of insanity, and it would be dareful for the jury to say whether taking into consideration all that the Surgeon had said the impulse was one which altogether deprived him of the knowledge that he was doing wrong. Could he distinguish between right and wrong?

The prisoner was sentenced to death.

This was a clear case of sane motive. But having regard to the fact that the act was the result of a motive not wholly unworthy, no Court in India would have sentenced the prisoner to death in the exercise of the discretion that the law wisely allows Judges in this country, a discretion which was denied to Judges in England, where however very often the rigour of the law is softened by the intervention of the Crown in such cases. Crompton J. in *Reg. v. Davies* (1 F. F. 69) took the same view. 'It is not sufficient,' said the learned Judge to the jury, 'that the prisoner did the act (setting fire to a house) from being in a reckless depraved state of the mind.'

Irresistible impulse when attributable to a diseased mind seems to have been recognised as a valid excuse in some English cases.

In India we frequently hear of cases of persons running amock and murdering without any apparent motive any one coming in his way but in no case the murderer has escaped punishment on the ground of insanity or existence of an irresistible impulse. It is noticeable that the questions put to the Judges in Macnaghten's case were not specifically directed to cases of this kind, but it may be gathered from the answer to the first question that the learned Judges were of opinion that generally where there is sufficient intelligence to distinguish between right and wrong, the mere existence of an irresistible impulse would not excuse liability. One may ask why the existence of this species of insanity was not recognised. The reason is to be found in the fact that the meagre knowledge that existed in those days regarding

the effect of insanity on the mind made both the Judge and the jury sceptic of the existence of such impulse, and it is perhaps owing to the same cause that the Indian Penal Code also does not clearly provide for this class of cases.

The right and wrong test can hardly be applied to cases of this kind. Where unsoundness of mind creates an uncontrollable impulse to act in a particular way, and the impulse is so powerful as to override the reason and judgment and to deprive the accused of the power to adhere to the right and avoid the wrong, the mere intellectual perception of right and wrong would not affect the question. 'Irresistible impulse,' says Wharton, 'is not a defence in a criminal prosecution, unless it exists to such an extent as to subjugate the intellect, control the will, and render it impossible for the person to do otherwise than yield.' This irresponsibility will, however, not be extended to one who with no mental disorder acts from overmastering anger, jealousy or revenge. There must be insanity first.

In *Reg. v. Offord* (1831) (5 C. & P. 168), though the question does not seem to have been specifically raised, Lord Denmond in charging the jury clearly recognised the validity of such a plea. He said, persons *prima facie* must be taken to be of sound mind till the contrary is shown, but a person may commit a criminal act and yet be not responsible, if some controlling disease was in truth the acting power within him which he could not resist, then he will not be responsible. This is also the view taken by Sir Fitz James Stephen. After discussing the question at great length with reference to

the answer of the Judges, the learned author observes:—

"I am of opinion that even if the answers given by the Judges in Macnaghten's case are regarded as a binding declaration of the law of England, that law as it stands, is that a man who by reason of mental disease is prevented from controlling his own conduct is not responsible for what he does."

Again observes the same learned author:—

"There are cases in which madness interferes with the power of self-control and so leaves the sufferer at the mercy of any temptation to which he may be exposed, and if this can be shown to be the case, I think the sufferer should be excused."

The law in America is much in the same state. It is specifically provided in the New York Code that a morbid propensity to commit a prohibited act existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defence to a prosecution therefor. Although there have been some decisions to the contrary in America, it is now well settled that mere emotional insanity or temporary frenzy or passion arising from excitement or anger, although ungovernable or mere mental depravity or moral insanity, so-called, which results, not from any disease of mind, but from a perverted condition of the moral system, where the person is mentally sane, does not exempt one from responsibility for crimes committed under its influence. Care must, however, be taken to distinguish between mere moral insanity or mental depravity and irresistible impulse resulting from disease of the mind. (Cyclopædia of Law and Procedure, Vol. 12, p. 170).

It may be urged that if irresistible impulse is a good defence it ought to be so for the sane and the insane alike, but in the case of persons otherwise sane we have yet to be convinced that any impulse can really be irresistible. It may also be objected that so long as there is intelligence to judge between right and wrong, it is immaterial whether an act is committed under a sane or insane impulse. I shall in dealing with other aspects of insanity have to criticise the undue stress that has generally been laid in the discussion of this intricate problem upon this rigid standard of right and wrong. For the present I would only quote the words of an eminent Scotch Judge Lord Justice Clerk, who very pertinently said to the jury in 1874: "It is entirely imperfect and inaccurate to say that if a man has a conception intellectually of moral or legal obligations he has a sound mind. Better knowledge of the phenomenon of lunacy has corrected some loose and inaccurate language which lawyers used to apply in such cases. A man may be entirely insane and yet may know well enough that an act which he does is forbidden by law. It is not a question of knowledge but of soundness of mind. If a man have not a sane mind to apply his knowledge, the mere intellectual apprehension of an injunction or prohibition may stimulate his unsound mind to do an act, simply because it is forbidden or not to do it because it is enjoined. If a man has a sane apprehension of right and wrong, he is certainly responsible, but he may form and understand the idea of right and wrong and yet be hopelessly insane. You may discard these attempts at definition altogether. They only mislead."

The law regarding irresistible impulse may be stated thus:—

- (a) The existence of such an impulse is not to be presumed from the mere absence of a motive for a criminal act.
- (b) Where, however, the existence of a diseased mind is proved by other evidence, such evidence along with the evidence furnished by the act itself may suffice to prove the existence of an irresistible impulse, and when proved, is according to more recent decisions in England and America a good ground for exemption, even though there may be sufficient understanding that the act is wrong or illegal.
- (c) Where, however, the existence of such understanding is not negatived, the mere irresistible impulse does not seem to be a ground of exemption in India:

In support of the first proposition I may refer you once again to *Reg. v. Haynes* and to the observations of Baron Bramwell in that case. The learned Judge said—

"It has been urged that you should acquit the prisoner on the ground that it being impossible to assign any motive for the perpetration of the offence, he must have been acting under what is called a powerful and irresistible influence, or homicidal tendency. But the circumstance of an act being apparently motiveless, is not a ground from which you can safely infer the existence of such an influence. Motives exist unknown and unknowable, which might prompt the act. A morbid and restless, but irresistible thirst for blood, would

itself be a motive urging to such a deed for its own relief."

On similar ground the defence of insanity failed in *Reg. v. Burton* (1863, 3 F. and F. 772).

There have, however, been cases in which insanity has been inferred from the nature of the crime itself. On these cases a well-known writer on Medical Jurisprudence observes: "It is a dangerous doctrine to adduce the crime or the mode of perpetrating it as evidence of insanity, but such cases incontestably prove that there are some instances in which this is almost the only procurable evidence."

As to (b) the decisions are conflicting, but on the whole I think this is the better view of the law. *Reg. v. Brixey* was a case of this nature. In this case a quiet inoffensive maid-servant suddenly showed signs of violence of temper about trivial matters and a few days afterwards cut the throat of her master's infant child. She was perfectly conscious of the crime, and wished to know whether she would be hanged or transported. The case satisfied three of the medical tests for detecting homicidal monomania laid down by Dr. Taylor, *viz.*, absence of motive, of any attempt to escape, and of any accomplice. She was acquitted.

As to (c) the words of Section 84 seem to be fairly decisive. The point was discussed in *Reg. v. Lakhshman Dagdu* (10 Bom. 512).

The accused in this case had killed his two young children. The learned Judges, whilst holding that the fever from which the accused was suffering had made him terrible and sensitive to sound, that his thoughts were confused, that the prisoner

was very fond of his children and the reason for the murder as given by him,—*viz.*, that the children began to cry which vexed him,—was altogether insufficient and unreasonable, that there was no premeditation, no precaution, no concealment, or attempt to escape, nor sorrow nor remorse, and that according to medical writers there would be no responsibility attaching to the accused, still held the accused guilty. "It is our duty," observe the learned Judges, "to apply the principles which have received judicial recognition, and these are substantially the same here and in England. And if the legal test of responsibility, in cases of unsoundness of mind, prescribed by Section 84 of the Indian Penal Code be applied to the present case, it would be impossible for us to acquit the accused, unless we could hold that the fever from which he was suffering had caused delirium.

"The fever had certainly made him terrible and sensitive to sound. He was 'bhrumest' as his wife says. His thoughts were confused; but there is no sufficient evidence, as we have already said, to warrant our holding that he was not conscious of the nature of his act. And if he was conscious of its nature he must be presumed to have been conscious of its criminality."

Although the decision does not seem open to any criticism having regard to the words of Section 84, I do not think the learned Judges were right in saying that the law was substantially the same here and in England. The learned Judges were apparently thinking of Macnaghten's case without reference to later developments

which have shaken the foundation of the right and wrong theory as the sole test of exemption.

This decision was followed in Madras in the case of *Queen-Empress v. Venkata Sami* (12 Mad. 459). In that case the learned Judges thus deal with the medical evidence: "The medical officer's evidence does not amount to more, in our opinion, than that there is the possibility of a sudden attack of homicidal mania; but judging the evidence by the ordinary judicial tests which we are bound to apply, we cannot say that it warrants a finding that the appellant did not know that what he was doing was wrong within the meaning of Section 84 of the Indian Penal Code. The case of *Queen-Empress v. Lakhshman Dagdu*, cited by the Acting Government Pleader, contains, in our opinion, the points of the law to be decided in such cases."

For exemption on the ground of insanity this case was much stronger than that of *Reg. v. Brixey*. For the medical evidence in this case went much further than the evidence in that case. I reproduce the evidence of the medical officer who had the prisoner under observation and who also formed his opinion upon the evidence given in his presence. It would serve to indicate the extreme rigour of the Indian law and the necessity for its modification in order to bring it on a line with the more humane view taken of such cases in other countries. The medical officer said:

"The prisoner before the Court has been under my observation in the district jail since 4th February in consequence of a requisition addressed to me from this Court. So far as my observation has gone

while the prisoner was in the jail, I have no reason to believe that he is insane; but if the medical evidence is required on the whole merits of the case, this opinion might be modified.

"I have been present in Court the whole of to-day, and have heard the evidence given by the witnesses. I find from the evidence that the prisoner had been sick of fever for six days previous to the occurrence; that he had had very little food during that period; and that whilst in this enfeebled condition, he had fever on the night previous to the deed, and that during the period when he was supposed to have had fever he used words in a manner which renders it possible that he was then suffering from delirium. I consider that the abusive tendency taken by the delirium is a matter of great importance. He was evidently suffering from the opinion that some one had injured him, and I find that the prosecution offers no theory of intention whatever. It is shown that the sword or swords with which the deed was committed were in the same hut. It is also admitted that he lived affectionately with the child he killed, and that none of the abuse of the previous evening was directed towards her. It is an established fact that during and after paroxysms of intermittent fever there occasionally arises a want of mental control known as *post febrile lunacy*, I consider that the chances are that the prisoner was labouring under the impression that some one had injured him, and under this opinion and incited thereto by the fact of the sword being at hand, without in all probability knowing that this was a child, had started at

unknown enemies. The fact of the goat having been wounded also helps the theory to some extent, especially if the Head Constable's theory is correct that the wound was not caused by a slash but by a thrust. A thrust would show more deliberate intention to kill what was in reality only a harmless goat. Had he slashed the goat, the theory that the Head Constable suggested that he missed the girl and hit the goat would be more tenable. The prisoner is now in feeble state of health, and has an enlarged spleen, from which I infer that he has suffered from malarial fever recently. He has also suffered from fever in jail."

The medical officer further added—"I have had no reason to suppose that the prisoner had suffered from epileptic fits; but if he had been subject to them, it would greatly favor the theory of a homicidal impulse; and such impulse would be greatly aggravated by the existence of fever at the time. If the prisoner had committed the deed in a state of febrile delirium, it is quite consistent that after the delirium had left him he would be aware of what he had done. It depends greatly on the degree of delirium; but it would be quite consistent with delirium that he should know what he had done."

The same view of the law was taken in *Queen-Empress v. Razai Mian*. The learned Judges observed "that the unsoundness of mind must be such as would make the accused incapable of knowing the nature of the act or that he was doing what was contrary to law."

The most important case, however, so far at least as Bengal is concerned, is that of *Queen-Empress v.*

Kader Nasyer Shah (I. L. R., 23 Cal., p. 604). Prisoner was charged with having caused the death of a boy aged about 8 years.

It was found upon the evidence that the accused had been suffering from mental derangement for some months previous to the date of occurrence, and since the destruction of his house and property by fire, that on one occasion he was seen eating potsherds and that he often complained of pain in the head. It also appeared that when the enquiry preliminary to commitment was taken up he was found not to be in a fit state of mind to be able to make his defence. The murder was committed without any apparent sane motive. The evidence further showed that the accused was fond of the boy and had no quarrel with the boy's father. On the other hand it was proved that the accused observed some secrecy in committing the murder. He tried to conceal the corpse and hid himself in a jungle.

Upon these findings the learned Judges held that a ground of exemption under Section 84, Indian Penal Code, was not made out. Following Macnaghten's case their Lordships observe "it is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act or that he is doing what is wrong or contrary to law." The case is open to the same comments as those I have offered in the case of *Reg. v. Lakshman Dagdu*.

The protection on the ground of irresistible impulse cannot, however, be extended to acts which can be shown to be the result of deliberation. For, as pointed out by Mr. Mercier in his treatise on criminal responsibility, those acts only should be called impulsive which are undertaken without full consideration of their advantages. An act long meditated even if decided on with reckless disregard of its disadvantage would scarcely be called impulsive. By impulsive we mean suddenness not only of conception but of execution. An impulsive act then is an act suddenly conceived and instantly carried out.

LECTURE IX.

CONDITIONS OF NON-IMPUTABILITY—*Continued.*

INSANITY (Continued)—DRUNKENNESS.

I now turn to the other and more common forms of insanity—perhaps, the only forms which the framers of the Indian Penal Code, have recognised as affording grounds for criminal irresponsibility. These are also the forms with which old English text-writers have mainly concerned themselves. Where this kind of insanity exists it has been universally recognised. The only difficulty in these cases has arisen in finding whether upon the facts of a particular case insanity of this description has been made out. The test by which cases of this kind are to be judged, is as laid down by the Penal Code, *viz.*, whether the unsoundness of mind in any particular case has been such as to render the sufferer incapable, by reason of such unsoundness, of knowing the nature of the act or that the act is either wrong or contrary to law. To bring a case within this rule of law three things are essential—

Forms of
insanity
universally
recognised.

- (1) An unsound mind.
- (2) A defect in the understanding by reason of such unsoundness.
- (3) A defect in the understanding to the extent mentioned in the rule.

The three conditions are interdependent and often co-exist.

The second condition excludes cases where the defect of understanding, even if it is to the extent

laid down in the third condition, is due to defective education or the result of mere upbringing. The third condition contemplates three kinds of ignorance or incapacity :

- (a) Ignorance regarding the nature of the act.
- (b) Incapacity to judge that an act is morally wrong.
- (c) Incapacity to judge that the act is prohibited by law.

The incapacity to judge the nature of an act may be due to the affection of the senses leading to error in the perception of external objects, but in cases of insanity it is generally due to the imagination overpowering and dominating the senses. This kind of insanity may shortly be called delusion and consists in believing in what does not exist. An insane person may, for instance, cut off a man's head thinking he is only chipping off the heads of dandelions or he may strike a human being thinking it is only an earthen jar or what more frequently happens he may see or hear things that have no existence outside his imagination. Where ignorance such as this exists the ground of exemption is perfectly clear. Similar mistake would exempt even a sane person if the existence of the mistake is made out. There is, however, this essential difference that in the case of the sane the mistake is often due to causes that are not subjective but objective, causes that exist outside the mind, and even where a mistake is made out it is necessary to show that the obligation to be circumspect and to try to avoid such mistakes has been discharged, *i.e.*, he must show that he had reasonable grounds for the

Delusion.

mistake and that he acted with reasonable care and caution. We had a recent instance of certain soldiers firing at a village chowkidar under a tree mistaking him for a jackal. The men were acquitted. Cases of insane delusion are dealt with in answer IV of the Judges given in Macnaghten's case. An insane person suffering from such a delusion is to be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real, and they illustrate their meaning in the following way: For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes in self-defence, he would be exempted from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

The remarks of Lord Justice Clerk, which I have already quoted, furnish the strongest comment on the last portion of the answer. The mental machinery works in co-ordination with all its parts and the proper action of one part is dependent on the others. Is it conceivable that a man who suffers from delusions, such as are referred to in the answer, can be credited with such accurate knowledge of law as to be able to judge under what circumstance he can cause the death of another in self-defence? Can you in dealing with such a mind raise the ordinary presumption that he knows the law? If you cannot, it would be wrong to punish. Even Section 84 of the Indian Penal

The 4th
answer
criticised.

Code will not in a case of this nature fasten responsibility to an insane person if it is established that the prisoner by reason of insanity and of his insane delusions was not aware that the act was wrong or contrary to law. The answer so far as it goes, partially shuts out the right and the wrong tests in the case of persons suffering from insane delusions. The explanation of the 4th answer is to be found in the fact that the Judges were confining their answer to a special kind of insanity, *viz.*, cases of partial insanity where the mind is sound in every other respect and works and reasons properly in every other matter except the particular delusion the prisoner may be suffering from. It may be doubted if such a mind is found in actual practice and whether a man suffering from such a delusion is likely to possess a mind to which a perfect knowledge of the right and wrong of an act can be attributed. In such a case, such knowledge it would be dangerous to infer from the fact merely of an attempt to conceal the act or to escape from punishment. Even the cat, when discovered stealing from the pantry, skulks away with a guilty look. Is that an indication of rationality? Such a consciousness often comes after the act is done which brings relief to the mind just as remorse or penitence follows a wrongful act done by a sane person under the influence of an overpowering passion.

Macnaghten's case has come for much adverse criticism in America.

In a case (16 American and English Encyclopaedia of law, 2nd Edition, p. 620) Judge Bartlett, in dealing with the case of a poor Italian barber

who killed his wife under the insane delusion that she exerted an evil spell over him, put bugs in his ear, poison in his food, sucked blood from his ear, put water and blood in his body, and contemplated eloping with a man worth ten thousand dollars, said that the law does not require that insanity must be "clearly proven" as a preponderance of evidence meets the legal requirements; moreover if the prisoner's evidence creates in the minds of the Jury a doubt as to his sanity at the time of the killing the prosecution must remove that doubt by a preponderance of evidence.

The right and wrong test must be applied in reference to the particular act in question.

It is a most unjust rule that delusion only excuses in case that facts believed by the lunatic to be true would justify the act if they really were true.

It seems to me that the safest test is that laid down by an American Judge 'was insanity the efficient cause of the act, and whether the act would not have been done but for that affection.'

In France, as in America the law regarding insanity is on a more satisfactory footing.

There it is no offence if the accused was in a state of mental alienation at the time of doing the act, or if he acted under an irresistible impulse. The word "Mental alienation" has been held by a series of decisions of the Court of Cassation, to have the widest possible meaning, and it is understood to comprise "the whole of the possible derangements of the intellect, all varieties of lunacy, and every kind of mental affection."

DELUSION.

Delusion consists in believing what does not exist. Wharton defines an insane delusion to be an unreasonable and an incorrigible belief in the existence of facts which are either impossible absolutely or impossible under circumstances of the case; a fixed belief which is contrary to universal experience and known natural laws.

As I have said ignorant and credulous people often believe in such facts without being insane. Such belief based upon reason, however defective and absurd, is not within the meaning of the rule.

The word delusion, though often loosely used to cover all cases of error in the perception or cognition of external objects, has, however, a precise meaning of its own which distinguishes it from other similar forms of error such as illusion or hallucination, but the distinction for my present purposes is unnecessary.

Hadfield's case is one of the most important cases on delusional insanity. The case was decided in 1800, and was thus anterior to Macnaghten's case. It was the first revolt against the stereotyped test 'did the prisoner know that he was acting against the laws of God and man.' It was a remarkable instance of Erskin's forensic eloquence which made an English Judge for the first time to get out of the narrow groove of the right and wrong test. This case requires more than a passing notice. The trial was for high treason for shooting the King. It was established beyond doubt that, under the influence of certain delusions, the prisoner had conceived a desire to

put an end to his own life, that being reluctant to commit suicide, he had fired at the King, knowing and believing that this attempt alone will be sufficient for his purpose, and that he will be hanged for the attempt. It was also shown that the man made his preparations, watched his opportunity and aimed the gun at the King, just as any sane person would do. If the favourite right-and-wrong test had been applied to this case, there could be no doubt that the man knew that he was doing an act which was punishable by law. It was argued by counsel for the prisoner that it was the case of a morbid delusion of the intellect, and if the act in question was the immediate offspring of the disease, he was entitled to a verdict in favour of the prisoner. Lord Kenyon threw off the right and wrong test and held that there was no reason for believing that the prisoner when he committed the act was a rational and accountable being, and that he ought to be acquitted. "With regard to the law," said he, "there can be no doubt upon earth; to be sure, if a man is in a deranged state of the mind at the time, he is not criminally answerable for his act; but the material part of this case is, *whether at the very time when the act was committed this man's mind was sane.* His sanity must be made out to the satisfaction of a moral man, meeting the case with fortitude of mind, knowing he has an arduous duty to discharge yet if the scales hang anything like even, throwing a certain proportion of mercy to the party." This was undoubtedly a very rational view of the matter. But at the same time it seems clear that the direction to acquit in this

case, is opposed to the views expressed by Lord Lyndhurst in *Offord's* case and Lord Mansfield in *Bellingham's* case. It is also opposed to the view taken by Tindal C.J. in *Reg. v. Vaughan* where the prisoner's mind being unhinged by reason of some loss suffered by him, he believed that everyone was robbing him. In an indictment for stealing a cow the learned Judge told the Jury that "mere eccentricity or singularity of manner was not sufficient and that it must be shown that the prisoner had no competent use of his understanding, so as to know that he was doing a wrong thing in the particular act in question." How this could be shown except by reference to the deranged state of the prisoner's mind with reference to other matters, it is difficult to imagine. Examined by the test laid down in *Macnaghten's* case, there ought to have been a verdict against *Hadfield*.

Ignorance or error regarding the nature of an act may also cover cases of ignorance regarding its consequences. Just as an ignorant villager unacquainted with the mysteries of electricity may by careless manipulation of a live-wire cause disastrous consequences and plead his ignorance in defence; in the same way an insane person may pull the trigger of a loaded gun or throw a lighted match on a stack of hay or let loose a tiger out of its cage not realising the dangerous nature of the act, and where he acts under such ignorance his ignorance is a good defence.

An amusing instance is referred to in Sir Fitz James Stephen's book of a lunatic cutting off a man's head when asleep, so that he might enjoy

the fun of seeing the headless man awaking and looking round for his lost head. A man who thinks in this way cannot be said to be a rational being.

Delusion again may be subjective or objective. Subjective delusions are those regarding one's personal duty or obligation, as for instance, a person may suppose himself to be a King and may on the strength and by reason of such belief kill another whom he may have imagined to have deserved death for committing a real or imaginary crime. An objective delusion, on the other hand, is a delusion of visual or other sensual organs. An objective delusion may exist in the case of the sane as well as of the insane; but such a delusion may be so deep rooted as to be incapable of correction and may itself be the cause of insanity.

Delusions are thus not limited to errors regarding external objects. A man may have fancied grievances against others, as for instance, in the case of *Reg. v. Vaughan* the prisoner fancied that every body was robbing him and similarly in the case of *Reg. v. Offord* the delusion was that the inhabitants of *Hadleigh* were continually issuing warrants against the prisoner with a view to deprive him of his liberty. A man may fancy that he hears the voice of God commanding him to do a particular act, or that he is under a religious obligation to do a certain act; such a belief would negative the knowledge that the act is morally wrong, and if due to insanity it is a valid defence.

It is impossible to exhaust the list of various kinds of delusions under which an insane person

is often impelled to act. Where the existence of a delusion can be gathered from the surrounding circumstances the plea of insanity may be held to be established, and it seems too much to expect the defence to show that the prisoner did not know either that the act is morally wrong or is contrary to law.

The two important cases of this class that are to be found in the Indian Reports are those of Ghatu Paramanick (28 Cal. 613) and Dilgazi (34 Cal. 686). In the first case it was found that the act was committed when the accused was labouring under a delusion. He imagined that he saw something very wrong in the conduct of his wife, and his brother-in-law who was a young boy of eight years only, in relation to another person, and labouring under this delusion he killed the boy; but still one of the learned Judges found himself unable to say that the accused when he committed the deed was in such a state of mind as to incapacitate him from distinguishing between right and wrong, and the conduct of the accused after committing the deed was considered as indicating the absence of such incapacity. The learned Judges finding that the delusion existed fell into the groove of Macnaghten's case and found the accused guilty. The decision might have been right for the delusion in this case did not indicate the same degree of derangement as was indicated in the English cases I have referred to, for what is called a delusion in this case may be nothing more than the working of an over-suspicious mind, and may not have been evidence of insanity at all, much less of a

mind incapable of distinguishing right from wrong.

In Dilgazi's case the accused was tried for the murder of his wife and there was no rational motive for the crime. The learned Judges in acquitting the accused made the following observations:

"There is no doubt that his mind was at the time unsound. He apparently had definite delusions as to dangers that threatened his wife, his disease affected his intercourse with his neighbours, and his cultivation of his crops in both of which he showed a failure of his reasoning powers. His climbing a tree in search of his pillow indicates a state of mind resembling that which is generally described as idiocy. In view of the uncertainty that always exists as to how far a diseased state of mind extends, and in view of the difficulty that is never absent from cases like this, of obtaining any trustworthy evidence, we find that the facts on the record prove that the unsoundness of his mind prevented his knowing the nature of his act, and that it was wrong."

It may be said that in this case the learned Judges took a broader and a more rational view of the law applying to cases of this class.

Incapacity to judge that an act is either morally wrong or is contrary to law, often arises from incapacity to judge of the nature and consequences of an act but not always. A man may, for instance, know that by his act he may be causing a man's death, but at the same time he may be under the delusion that he can cause a revival after death. In some cases it may be due to insane motive such

as a belief that by causing a man's death he would be sent to heaven or that the salvation of the human race depended on it. At the same time the man may have full knowledge of the fact that he may be punished for the act. Sometimes ignorance regarding the morality or the legality of an act may be due to loss of memory and utter forgetfulness of lessons and experience of life as was observed by Tracey J, in Arnold's case, 'where a man is totally deprived of his understanding and memory and does not know what he is doing, any more than an infant, or a wild beast, he will properly be exempted from the punishment of the law.'

I have dwelt perhaps at more length than was necessary on the subject of insanity as a ground of exemption from criminal liability. This subject has occupied a large part in the Criminal Law of every civilised country. China was perhaps the only country which did not recognise lunacy as a ground of exemption, but even there the penalty was commuted in cases of murder to imprisonment with fetters subject to His Majesty's pleasure. The relatives of a lunatic were bound, under heavy penalties, to notify the case to the authorities, and lunatics were, in general, required to be manacled. Matters may have improved there in recent years.

The subject has lost a good deal of its importance by the legislation undertaken in England and other countries of a preventive nature against the commission of crimes by persons of unsound mind. In England the first step in this direction was taken in view of an order passed by the Judge to

keep Hadfield in confinement after his acquittal. Legislation in India has also been directed towards that end, and I may refer you to the provisions of Chapter XXXIV of the Criminal Procedure Code. It is laid down in Section 464 that if a Magistrate holding a trial or an enquiry is satisfied on medical evidence that the accused is of unsound mind and is incapable of making his defence, he shall postpone further proceedings in the case. The next section provides that if any person committed before a Court of Sessions or a High Court appears to be of unsound mind and incapable of making his defence, the question of such unsoundness or incapacity shall be tried and judgment pronounced accordingly. On such finding being arrived at by a Magistrate or a Court of Sessions if the offence is bailable, the offender may be released on sufficient security being given that the prisoner shall be properly taken care of, and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court (Section 466). On failure to furnish such security or in case of non-bailable offences the case shall be reported to the Local Government who may order the accused to be confined in a lunatic asylum, jail or other suitable place of safe custody (Section 466).. These provisions relate to cases of insanity at the time of the trial without reference to the question whether the unsoundness of mind existed at the time of the commission of the offence. Section 470, however, provides that when a person is acquitted on the ground of insanity the finding shall state whether he committed the act or not, and when such

finding is recorded such person shall be kept in safe custody and the case shall be reported to Local Government. The Local Government may exercise all or any functions given to the Inspector-General of Prisons by the succeeding Sections 472, 473 and 474. Section 474 empowers the Inspector-General to certify that a prisoner may be discharged without danger of his doing injury to himself or any other person, and the Local Government may thereupon order him to be so discharged or to be detained in custody or to be transferred to a public lunatic asylum. By Section 475 the Local Government is authorised to deliver a lunatic to the custody of a friend or a relation willing to take care of him. In this connection you may also refer to the Lunacy Act (Act IV of 1912).

DRUNKENNESS.

It is a settled principle of law that voluntary drunkenness is no excuse. The Indian Penal Code lays down the law in Section 85.

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

If a man chooses to get drunk, it is his own voluntary act and he does so at his risk.

It is very different from insanity which is a disease for which the sufferer is not responsible. The disease may be brought about by carelessness or misbehaviour, but that is a different matter.

Sec. 85,
I.P.C.

Drunkenness
and
Insanity.

Intoxication is a voluntary species of madness which is in a party's power to abstain from, and he must answer for it. If, however, the drunkenness is involuntary, as when a man is forced to drink or when any intoxicant is administered to him without his knowledge, any criminal act he may commit will be judged with reference to his mental condition at the time the act was committed. Such a case is exactly on the same footing as unsoundness of mind. The words used in Sections 84 and 85 are identical and all the considerations that arise in case of insanity also arise in cases of involuntary drunkenness.

There is no dispute as to any of these propositions. It was at one time supposed that drunkenness not only does not excuse an offence, but on the other hand aggravates it. Sir E. Coke tells us: "As for a drunkard who is *voluntarius dæmon*, he hath, as has been said, no privileges thereby, but what hurt or ill-so ever he doth, his drunkenness doth aggravate it." It was probably this remark which induced a learned Judge in this country to tell the Jury that "drunkenness in the eye of law makes an offence the more heinous." With reference to this remark Macpherson and Anslie JJ. observed:—"There is no authority for such a proposition, and all that the Judge should have said was that drunkenness is no excuse, and that an act, which, if committed by a sober man, is an offence, is equally an offence, if committed by one when drunk, if the intoxication was voluntarily caused." (*Q. v. Zoolfikar*, 16 W. R. Cr. 36). Where, however, habitual drunkenness causes any mental disease,

Voluntary
Drunkenness
—no excuse.

and affects the mind such disease is looked upon as insanity *pro tanto*. One of the grounds urged by some European text-writers in support of the law laid down in Section 85, Indian Penal Code, is that few violent crimes would probably be attempted without resorting to liquor, both as a stimulant and as a shield. This argument may not apply with equal force to India.

In England and in America there is an important exception to the general doctrine that voluntary drunkenness does not excuse an offence, and the exception in the language of Sir James Stephen is stated thus:—"If the existence of a specific intention is essential to the commission of a crime, the fact that an offender was drunk, when he did the act, which, if coupled with that intention, would constitute such crime, should be taken into account by the Jury in deciding whether he had that intention."

Exception
in England
and
America

Illustrations.

The following cases will illustrate the rule of law quoted above. In an indictment for inflicting bodily injury dangerous to life with intent to murder, where it appeared that the prisoners were both very drunk at the time, Patterson J. told the Jury that "although drunkenness is no excuse for any crime whatever, yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all and yet he may be guilty of very great violence." (*Rex v. Cruse*, 8 C. & P. 541, 546). In an indictment for attempting to commit suicide it appeared that the prisoner had thrown herself into a well. It being proved that at

the time the prisoner was so drunk as not to know what she was about, Jervis C.J. said: "If the prisoner was so drunk as not to know what she was about, how can you say that she intended to destroy herself?" (*R. v. Moore*, 3 C. & K. 319). Again, where a person was indicted for shooting with intent to murder, and it was shewn that he was intoxicated shortly before he fired the shot, it was held that the charge could not be sustained.

Where the prisoner had stabbed a person, and it was proved that he was drunk at the time, Alderson B. said, with regard to the intention, "drunkenness may perhaps be adverted to according to the nature of the instrument used. If a man uses a stick, you would not infer a malicious intent so strongly against him, if drunk when he made intemperate use of it.....But when a dangerous instrument is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party." (*R. v. Meakin*, 7 C. & P. 297).

So also drunkenness would be taken into consideration in a case where the crime is attributed to provocation or *bona fide* mistake, but not so if there is a previous determination to resent.

In a case where a man was indicted for uttering a counterfeit coin, an offence which requires specific intent to cheat, the drunkenness at the time of the offence was taken into consideration, as there was no ground to suppose that he knew the money to be counterfeit. (*Pigman v. State*, 15 Ohio, 555, 1846).

Drunkenness may be a defence to perjury also, but not if the false oath was intelligently taken. (*People v. Willey*, 2 Park C. R. 19, 1855).

The law in India.

While the above illustrations will sufficiently elucidate the law as accepted in England and America, it seems to me more than doubtful if, having regard to the terms of Section 86, Indian Penal Code, the law in India is not different from what is laid down in those cases.

The wording of the section is somewhat peculiar. It begins by laying down the law without reference to cases in which knowledge or intent is a necessary ingredient of the offence, but in the second part it speaks of knowledge only and omits any reference to intent. Assuming that the omission is intentional, the only explanation for such omission is that given by Mr. Mayne, *viz.*, that "in the majority of cases the question of intention is merely the question of knowledge." The effect of the section seems to be that the same knowledge will be attributed to a man in a state of voluntary intoxication as to a man not so intoxicated, but not necessarily the same intention. It is said that a man must know the natural consequences of his act, and if he knows what the consequences are likely to be he must be held to have intended them. This inference from knowledge to intention would not arise when a man is drunk. In each case it will be for the Jury, after having attributed the knowledge, to ask whether, having regard to the mental condition of the prisoner, the general inference can reasonably be drawn. If this is a correct interpretation of the section, in the case of the

attempted suicide as in the illustration already quoted, the law will attribute to the offender, who threw himself into a well, the knowledge that such act was likely to cause death, but will not necessarily also attribute to such a person the intention which ordinarily follows from the knowledge. Where intention and not knowledge is the gravamen of an offence and intention is to be affirmatively established by evidence, what may be sufficient proof of intention in other cases may not be sufficient evidence to prove intention on the part of a man who is drunk. I shall illustrate what I have said with reference to Section 304, Indian Penal Code. *A* under provocation strikes *B* on the head with a heavy iron bar and thereby causes his death. The mere knowledge that the act was likely to cause death without the intention to cause death brings the offence within the latter part of the section. But intention to cause death aggravates the offence which falls under the first part of the section. In ordinary cases the intention, in the absence of anything to show the contrary, will flow from the knowledge itself but not in the case of a man who is drunk.

LECTURE X.

CONSENT—COMPULSION—TRIFLES.

Preliminary observations.

Volenti non fit injuria is an old maxim of the Roman Jurisprudence. This principle, like all general principles so broadly laid down, is subject to many exceptions and I propose in this lecture to examine the principle with the limitations that have been imposed on it.

Although theoretically every crime must involve injury to the body politic, an examination of the criminal law of every country would show that the large body of offences are those which are essentially private wrongs, though they may have their reflex on the well-being of the society at large. In such cases the harm to society consists merely of the general alarm to the public resulting from the harm caused to the individual and there can be no alarm from an act done to a person with his own consent. Confining ourselves to an examination of the offences under the Indian Penal Code, we may say broadly that offences against the human body (Chapter XVI) and those against property (Chapter XVII) are private wrongs or at any rate in them the element of private injury predominates.

The question of consent justifying a criminal act does not arise in connection with offences against the public. To these may be said to belong offences enumerated in Chapters VI, VII, VIII, IX, X, XI, XII, XIII, XIV, and XV.

There are certain other offences which partake of the character of both public and private offences and as to these you have to see which is the more predominating element. I shall therefore deal principally with the two main private offences already indicated, I mean offences against the human body and those against property. Broadly speaking there is no injury to any right when the act of injury is itself consented to by the owner of the right. The underlying principle is thus explained in a note on the draft Code. "It is by no means true that men always judge rightly of their own-interest. But it is true that in the majority of cases they judge better of their own interest than any law-giver or any tribunal which must necessarily proceed on general principles and which cannot have within its contemplation the circumstances of particular cases and the tempers of particular individuals."

Rights may be divided into two classes, alienable and inalienable. All offences against property are offences against alienable rights and if done with the consent of the owner, is a complete defence both to civil and criminal actions. Offences against the human body embodying the right to security of life and limb stand on a somewhat different footing. Up to a certain stage the right is an alienable right, but beyond that stage it is inalienable and no amount of consent is of any avail to the person who infringes that right. Every man has to live. It is his duty to live. It is the right of the State that he should live and be useful to the body politic of which he is a unit. It is only the outlaw of the

Alienable and inalienable rights.

old days, whose life was a forfeit to the State. That was an inhuman system but is happily gone, never to come back again. The right to live is therefore an inalienable right and no one can agree to give it away. If a man attempts to kill himself he is guilty of an attempt to commit suicide (Section 309).

Under the English law inalienability also extends to injuries which amount to mayhem. Mayhem is akin to the grievous hurt of the Indian Penal Code, though it does not cover exactly the same ground. According to English law a man may not maim himself nor can he consent to such an act from a friendly hand (*Rex v. Wright*, 1 East P. C. 306, Co. Lit. 127 a; *People v. Clough*, 17 Wend. 351, 352). Although there is nothing in the Indian Penal Code to prevent a man from causing grievous hurt to himself in so far as others are concerned, this is also classed among inalienable rights. Beyond these there are no further restrictions to a man consenting to any injury to his body. This extension of inalienability to mayhem or grievous hurt of the Indian law is justified in English law on the ground that it makes the person less fitted to fight for his country which is a duty which everybody owes to the State. It follows that consent is a good defence to all offences against property and to all offences which do not involve the causing of death or grievous hurt. A man cannot only not consent to the causing by another of his own death, but he cannot also consent to his eyes being blinded or his legs to be amputated or other offences of the same

kind which are included in the definition of grievous hurt (Section 320). Mayhem by its very definition was strictly confined to such deprivation of the limbs as rendered the man unfit for fighting. Grievous hurt of the Indian Penal Code goes beyond that and I cannot say that it does so wisely. A more restricted definition of grievous hurt might have been wiser. In English law the dislocation of the front tooth amounted to mayhem but not of the others. This was perhaps on military considerations as in old days walls had to be scaled by means of ropes in which the front teeth were useful. In modern warfare the teeth are of little use. In some cases this is justified on the ground that the loss of the front teeth weakens a man as he cannot eat meat without them. Similarly I doubt that there was any necessity of bringing within the meaning of grievous hurt the destruction of a finger, for instance, or the permanent disfiguration of the head or face. Under the English law the cutting off of the nose is not mayhem. These might have been classed as minor offences to which at any rate consent might have been permitted to furnish a defence. Macaulay in his note on the draft Penal Code said rightly that if Z chose to sell his teeth to a dentist and permitted the dentist to pull them out the dentist ought not to be punished for injuring his person, and yet under the law as enacted such an act would amount to grievous hurt and the dentist would be punished in spite of the consent. Common sense would suggest a different view. The existence of the consideration would be immaterial for the benefit spoken of in Section 88 is not pecuniary benefit (*Baboolun Hijrah*, 5 W. R. Cr. 7). The wisdom of the law

in not giving effect to consent to the causing of mayhem or grievous hurt of the more serious type except under exceptional circumstances seems obvious. Any law of conscription might be rendered ineffective, if a man could be allowed to have his legs amputated to escape joining the army.

Sections 87, 88 and 89 of the Chapter of General Exceptions in the Indian Penal Code deal with the law of consent in criminal cases. Consent does not justify causing of death or grievous hurt. As to the first, the restriction is absolute and unconditional, except that by statutory provision in some cases consent has the effect of reducing the gravity of the offence. For instance, the fifth exception to Section 300 provides that "culpable homicide is not murder when the person whose death is caused being above the age of eighteen years suffers death or takes the risk of death with his own consent." Section 314 furnishes another example of the same kind. As to the second it is removed under certain conditions. The law does not recognise that death, though it may be a relief in many cases, can be under any circumstances a benefit to a man. A man suffering from extreme or unbearable torture or pain may prefer death to his suffering and may implore another to shoot him, but if that other does shoot him he will be held guilty, though under exception to Section 300 the offence will be reduced from murder to culpable homicide not amounting to murder. I should like before proceeding further to explain to you that Sections 87, 88 and 89 do not refer to offences against property. The reason is obvious. The very definition of those

offences excludes the existence of a consent. It is an element which enters into the definition of all such offences that there should be intention to cause wrongful loss to one or wrongful gain to another. There is no wrongful loss or wrongful gain when the act is assented to by the owner of the property himself, and even where instead of the word 'dishonestly,' the word 'fraudulently' is used to denote the *mens rea* of an offence the same result follows. I have already explained to you that fraud implies besides deception an injury. Therefore want of consent is implied in all offences against property, and apart from this such offences against property as involve extortion or theft in all its aggravated forms, necessarily exclude consent, because extortion is inconsistent with consent, and theft by its definition involves removal of property without the consent of the person in possession. Sections 87, 88 and 89, in speaking of 'harm' done to another, refer apparently to bodily harm and not to 'injury' in its wider sense. The operation of consent mentioned in those sections thus relate to offences against human body with the restriction provided by Section 91.

I shall now proceed to discuss the provisions of Sections 87, 88 and 89. Section 87 gives immunity to a person who causes harm to another who takes the risk of it or gives consent to it, provided the act is not known to be likely to cause death or grievous hurt. The next section extends the operation of consent to all offences short of causing death intentionally, provided the act is done for the benefit of the person who has given such consent. The

Secs. 87, 88
and 89,
I. P. C.,
explained.

words in italics mark the main distinction between Sections 87 and 88. An agreement for fencing as an amusement comes under the former, whereas a surgical operation performed for the benefit of a person with his consent falls within the latter section. There is also this difference between Sections 87 and 88. The mere likelihood of causing death does not exclude the operation of consent to acts falling within Section 88, but it is enough that there was no intention to cause death. Section 89 extends the provisions of Section 88 to cases of infants under 12 years of age and to persons of unsound mind when consent is given by their guardians, with these following restrictions. If an act is *likely* to cause death or grievous hurt consent of the guardian would not justify it when done for any purpose other than the prevention of death or grievous hurt or the curing of any grievous disease.

At the risk of repetition I would state the position to be this—

- (a) A man may not consent to an *intentional* causing of death under any circumstances.
- (b) He may not consent to *intentional* causing of grievous hurt or to any act likely to cause death unless the act is for his benefit. In such a case the law does not stop to consider the extent of the benefit to be derived from the act.
- (c) If he is the guardian of a minor he may not consent to an act intended to cause death or which is an attempt to cause death under any circumstances. He may not

also consent to an act likely to cause death or intended to cause grievous hurt or which is an attempt to cause grievous hurt even for the benefit of the minor, unless the benefit be to the extent mentioned in the section, *viz.*, the prevention of death or grievous hurt or the curing of any grievous disease or infirmity.

- (d) Where the consent of a guardian is insufficient to justify an act it is also insufficient to justify the abetment of such an act.

It would seem that in the case of an adult person there is no restriction to consent to acts, whatever their nature, if they only amount to attempts or abetments, and the restriction regarding attempts or abetments only apply to consent by guardians.

In order to appreciate the effect of the provisions of the Code relating to consent it is necessary to explain to you what consent means and what are the general limitations to its applicability. 'Consent' is not defined in the Code but you all understand its meaning, and I do not think the legal meaning of that expression is materially different from its meaning as used in ordinary language. To consent is to agree to a thing being done. In law it is an agreement to the invasion of a right appertaining to the person so agreeing. Story explains consent to be an act of reason accompanied with deliberation of mind, weighing, as in a balance, the good and evil on each side. The explanation makes it clear that consent is a positive operation of the mind and is therefore distinguishable from mere submission, want of dissent or acquiescence,

Consent explained.

although these may be in proper cases very strong evidence of a consent.

'There is a difference,' said Coleridge J. in *R. v. Day* (9 C. & P. 722), 'between consent and submission; every consent involves a submission; but it by no means follows that a mere submission involves consent; it would be too much to say that an adult submitting quietly to an outrage was not consenting; on the other hand, the mere submission of a child when in the power of a strong man and most probably acted upon by fear, can by no means be taken to be such a consent as would justify the prisoner in the point of law.'

Consent is also distinct from mere approbation. Subsequent approval does not supply the place of consent.

In *R. v. Flattery* (2 Q. B. D. 410) it was also argued that submission was equivalent to consent, but the plea was overruled. It was held in *R. v. Nichol* (R. & R. 130) that if a master take indecent liberties with a female scholar without her consent, though she does not resist, he may be convicted of a common assault.

Section 90 of the Indian Penal Code explains what legal consent is and that controls the meaning of consent referred to in the three previous sections, as well as of consent which expressly or impliedly enters into the definition of offences under the Code.

The section provides as follows:—A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in

Sec. 90,
I.P.C.
Legal consent.

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

The rest of this lecture would be practically confined to an elucidation of the provisions of this section. I can deal with the matter only briefly, but if you desire to study the subject more fully I would refer you to Mr. Hukm Chand's exhaustive treatment of the subject in his book on the Law of Consent which is a master-piece of research and study.

You will notice that the language used in Section 90 is not the usual language in which the law regarding consent is dealt with in connection with laws relating to civil injuries. For instance, *free consent* is the word used in the Indian Contract Act as an essential element in all contracts (Section 10), and this is explained as meaning consent not caused by—

- (1) coercion, as defined in Section 15, or
- (2) undue influence, as defined in Section 16, or
- (3) fraud, as defined in Section 17, or
- (4) misrepresentation, as defined in Section 18, or
- or
- (5) mistake subject to the provisions of Sections 20, 21 and 22,

In criminal law it has a less restricted meaning. The word *free consent* is advisedly avoided. 'Fear of injury' used in Section 90 of the Code would vitiate a consent. These words would include most

Consent
Civil and
Criminal
cases distinguished.

Consent
under fear
of injury

cases of coercion as explained in Section 15 of the Indian Contract Act, but consent would not be vitiated by undue influence for instance, nor by all kinds of fraud, misrepresentation or mistake. Some of these would, no doubt, be included in the words 'misconception of fact' but not all. But if there is misconception of fact and the offender knows or has reason to believe that consent was given by reason of such misconception, the consent has no value. To explain more fully what I mean, suppose a man takes undue liberties with a woman having obtained her consent by a promise to pay money which he never intended to fulfil. The consent was obtained by fraud, but none the less, it is consent. The misconception of fact used in the section refers to misconception regarding the true nature of the act or regarding the effect or consequences of the acts.

Misconcep-
tion of fact.

As regards the degree of misconception which would invalidate a consent, the practical test that a Jury may be asked to apply is this:—Would the consent have been given had the misconception not existed? In *Sukaroo Kobiraj v. The Empress* (14 Cal. 566) the accused, a Kaviraj by profession, was convicted under Section 304A for having caused the death of a patient by operating on him for internal piles by cutting them out with an ordinary knife. It was held that the prisoner being admittedly uneducated in matters of surgery cannot be said to have acted in good faith and that the consent was of no avail in the absence of anything to show that the deceased knew the risk he was running in consenting to the operation.

Difficulty has arisen in dealing with case of consent obtained by fraud or misrepresentation or by suppression of material facts. In *R. v. Flattery* (2 Q. B. D. 410) in which under the pretext of performing a surgical operation prisoner had carnal connection with the prosecutrix, she submitting to what was done under the belief that he was treating her medically, the prisoner was held guilty. In this case there was misconception regarding the nature of the act. Mellor J. pointed out that submission was not to carnal connection, but to something else and quoted with approval the words of Wilde C.J. in *R. v. Case*. "She consented to one thing, he did another materially different, in which she had been prevented by his fraud from exercising her judgment and will." In an earlier case, *R. v. Barrow* (L. R. 1 C. C. 156), a somewhat different view was taken and the learned Judges felt doubtful as to the correctness of that decision.

Consent
under a
concept.

When, however, consent was obtained to a precise act complained of, though such consent was fraudulently obtained it was held that consent so obtained was a sufficient defence to a charge of rape. A woman about 42 years old consented to an act of sexual connection under the belief that the prisoner was a doctor and was making a medical examination of her. Ridley J. adopted the opinion expressed in Stephen's Digest of Criminal Law that rape is overcoming a woman by force, and that, if a woman gives conscious permission to the act of connection, the act does not amount to rape, though such permission may have been obtained by fraud, and although the woman may

Fraud.

not have been aware of the nature of the act—*R. v. O'Shay* (19 Cox 76).

In *R. v. Bennett* (4 F. & F. 1105) it was laid down that an indecent assault is within the rule that fraud vitiates consent, and that a person suffering from a foul disease who induced a girl ignorant of his condition to consent to a connection with him might be convicted of an indecent assault. Here there was misconception regarding the effect of the act. There are numerous cases of rape in which the effect of fraud on consent has been considered, but in judging of the effect of these cases you will bear in mind that cases of rape stand apart from the rest. Under the definition, consent is an answer to the charge, except where it has been obtained by putting the woman in fear of death or of hurt or when consent is given under the belief that the man having connection with her, was her husband, or when the party consenting is under twelve years of age. It will thus be seen that mere fraud will not vitiate consent in a charge of rape by the mere operation of the words of the definition. But notwithstanding the definition Section 90 so far as it is not inconsistent with the definition will, I suppose, operate. With reference to offences in which consent is not expressly limited as in rape, misconception such as is referred to in the English cases which I have cited, would be sufficient to invalidate a consent.

Consent of lunatics and infants.

I now proceed to consider the effect of unsoundness of mind on consent. There is in this matter a great difference between Civil and Criminal law. In a Civil case the degree of unsoundness need not be so great as is insisted on in Criminal

cases. The language of the section shows that to vitiate a consent by a person of unsound mind the degree of unsoundness must be the same as would furnish a defence to a criminal charge on the ground of insanity.

It has been held in cases of rape that if the connection was with a woman of weak intellect, incapable of distinguishing right from wrong, and the Jury found that she was incapable of giving consent, or of exercising any judgment upon the matter, and that (though she made no resistance) the defendant had carnal knowledge of her by force, and *without her consent*, that is a rape. *R. v. Fletcher* (1859), Bell, 63; 28 L. J. (M. C.) 85; 8 Cox, 131. It was, however, afterwards held that the mere fact of connection with an idiot girl who was capable of recognizing and describing the prisoner, and who was a fully developed woman, who, notwithstanding her imbecile condition, might have strong animal instincts, is not sufficient evidence of rape to be left to a Jury. (*Q. v. Barratt*, 2 C. C. R. 81; *R. v. Fletcher* (1866), L. R. 1 C. C. R. 39 explained and distinguished.)

In England the law is now settled and by 48 and 49 Vict., s. 5, sub-s. 2, connection, or an attempt to have connection, with "any female idiot or imbecile woman or girl, under circumstances which do not amount to rape, but which prove that the offender knew at the time of the commission of the offence that this woman or girl was an idiot or imbecile," is a misdemeanor punishable with two years' imprisonment.

Consent given can always be revoked but before the act consented to has commenced. A

Revoca
of conse

surgeon, for instance, after he has begun a surgical operation, need not stop because the patient asks him to desist. The right to revoke a consent is not affected by the fact that consent was given for a consideration. Consent to an act necessarily includes consent to all its natural consequences.

Section 91,
I.P.C.,
explained.

Section 91 lays down that the exception in Sections 87, 88 and 89 does not extend to acts which are offences independently of any harm which they may cause or be intended to cause or be known to be likely to cause to the person giving the consent or on whose behalf the consent is given. The principle is clear, consent may wipe off an injury to the person consenting, but if the gravamen of the offence is not the injury to the consenting party but something else, the consent can have no effect on the offence. You may refer to illustration appended to the section. The causing of a miscarriage is not an injury to the woman alone. The child *a ventre sa mere* is clothed with legal rights for certain purposes and the causing of a miscarriage is an offence against the life of the child. The mother's consent therefore would not avail. Similarly as I have pointed out in the beginning of this lecture, most public offences are also offences against individuals, they being a part of the general public. In such offences the consent of the individual is of no avail. Unnatural offences, offence of bigamy may be cited as examples. It is needless to repeat that where an offence is purely a public offence no question of consent arises. There are various

offences which are classed as offences against the public in one country, but are not so classed in another. For instance, incest is by itself no offence in India, but it is so in England by Statute. So that an incestuous connection with consent is no offence in India but would be an offence in England notwithstanding any consent.

There may be cases where it is not possible to get the consent of a person to an act intended for his benefit, but the circumstances are such where it can be inferred that if the man could he would have consented. Take, for instance, the case of a person who has met with an accident and is taken to hospital in an unconscious state. He cannot give consent to a very necessary surgical operation, but the consent may be assumed.

Implied
consent.

Section 92 accordingly provides that where a harm is caused in good faith to a person without that person's consent, where circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent (being an infant or a lunatic), and if there is no guardian or other person from whom consent can be obtained in proper time, any harm caused to such a person for his benefit is justified under certain conditions which are the same as those applying under Section 89 to a person who acts with the consent of a guardian of a minor or lunatic with this slight difference, that under this section even the causing of simple hurt is prohibited for any purpose other than the prevention of death or hurt. I am not sure that an express condition to this effect was necessary. The expected benefit must in all such cases outweigh the harm to be

Section
I.P.C., e
xplained.

inflicted, otherwise there is no benefit to the sufferer by such an act.

Section 93,
I.P.C., ex-
plained.

Section 93 presents no difficulty. It lays down that no communication made in good faith is a offence by reason of any harm to the person to whom it is made if it is made for the benefit of that person. The illustration makes the meaning clear. A surgeon in good faith communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. The surgeon has committed no offence, though he knew it to be likely that the communication might cause the patient's death. He might have thought it necessary to warn the patient that his end was near, so that he might make his will, for instance.

COMPULSION.

Section 94.
Compulsion.

I have told you in the beginning of these lectures that a voluntary act is necessary to constitute a crime. An involuntary act is no offence. But this is subject to important limitations. The voluntary nature of an act may be affected either by the act being done under threat of injury or other kind of mental compulsion or under actual physical compulsion in which case the man acts without a will and is nothing more than an instrument in the hands of others. "An act done by me against my will is not my act," is a well-known maxim of law. But where an act is not voluntary, not because another uses his limbs for the commission of a crime and the man so used is a mere passive instrument, but because of mental compulsion, the doctrine has to be applied

within certain limits. To illustrate what I mean—*A* catches hold of *B* and takes possession of all the money in his pocket, and says 'I would not return you the money unless you pick the pocket of *C*.' *B* picks the pocket of *C* in order to get back his money. Here undoubtedly there is mental compulsion, but not the kind of mental compulsion which the law considers to be a sufficient excuse for a crime. Section 94 of the Indian Penal Code deals with cases of compulsion. Shortly the effect of the section is that no amount of compulsion, by which is meant mental compulsion, *i.e.*, compulsion arising out of threat of injury can under any circumstances excuse the causing of death or the causing of any offence against the State punishable with death. To this extent the restriction is absolute. The law says in effect "if you have a choice between your death and the death of another person, you must choose the former." No amount of mental compulsion, no pressure of necessity, however great, can alter the situation. In *Rex v. Dudley* (14 Q. B. D. 273) a number of persons found themselves at sea in a boat without provisions to support life and after passing seven days without food and five days without water, the youngest of them a poor boy was chosen. He was killed and the survivors ate the flesh of the boy. They were held guilty of murder. This is an extreme case but is a good illustration of the principle. As was observed by Lord Coleridge who tried the case—"In this case the weakest, the youngest, the most unresisting was chosen. Was it more necessary to kill him than one of the grown men? The answer must

Mental
compulsion
and neces-
sity. *Rex v.*
Dudley.

be 'No.' It is not suggested that in this particular case the deeds were devilish; but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime. There is no safe path for Judges to tread, but to ascertain the law to the best of their ability and declare it according to their judgment; and, if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise the prerogative of mercy which the Constitution has entrusted to the hands fittest to dispense it." The law enunciated in this case is the law that is laid down in the Indian Penal Code. But any other offence short of murder and offences against the State punishable with death, will be excused, if the threat under which the act is committed is one which reasonably causes the apprehension of instant death, provided, however, "the person doing the act did not of his own accord or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became the subject of such constraint."

From the language of the section and the explanations given it appears that compulsion arising from mere necessity is not meant to be included. A man on the point of death by starvation may not plead his necessity as an excuse for theft.

The Indian cases on the applicability of this section are very few. In a case of perjury (10 W. R. 81) the defence of torture by the police for the purpose of falsely incriminating a certain person for murder was rejected, because "the accused were under no compulsion to make the statements

which they did and which would have the effect of sending an innocent man to the gallows."

In Maganlal's case (14 Bom. 115) it was held that "the witnesses, who in order to avoid pecuniary injury or personal molestation had offered or given bribes to a public servant were abettors of the offence of taking an illegal gratification, and their evidence should be treated as that of accomplices." In *Devji Govindji* (20 Bom. 215) it was held that "a policeman is no more justified in torturing a man to death, simply because he had been ordered to do so by his superior, than a robber can justify his act on the plea that he had to obey his fellow confederates." It follows therefore that the principle established by the Indian cases is that "no man from a fear of consequences to himself short of apprehension of immediate death arising from threat of injury has a right to make himself a party to committing mischief on mankind." (See also *Killykyatara* (1912), M. W. N. 1108, 19 I. C. 207).

"Necessity knows no law" is a very common saying. The doctrine of compulsion may in some cases be the doctrine of necessity only. But there are various degrees of necessity and the degree of necessity that may on principle be recognised as a valid excuse for crimes of all descriptions, is the necessity to save one's life when it is in *immediate* danger, but as I have said the Indian Penal Code does not recognise necessity as a source of compulsion.

It has been said that what is unavoidable should not be an offence. The principle is right but the whole question is what is avoidable and what is

not. Like "irresistible impulse," in cases of insanity, unavoidable necessity is often used to denote not the necessity that could not be avoided but merely the necessity that was not avoided.

The English law on the subject of compulsion is dealt with in Arts. 32 and 33 of Stephen's Digest. It would appear that under the English law not only the apprehension of immediate death, but also the apprehension of immediate grievous hurt saves a person from punishment. Art. 33 deals with a different class of compulsion, *viz.*, compulsion, the result of imperious necessity. The learned author strongly criticises the judgment of Lord Coleridge in *R. v. Dudley*, to which I have already referred. He is not prepared to accept as correct that any case can impose on a man a duty not to live, but to die and he thinks that the learned Judge based a legal principle upon a questionable moral and theological foundation. He can discover no principle in the judgment, which depends entirely on its peculiar fact. The boy was deliberately put to death with a knife in order that the body might be used as food. The learned author gives three examples to which it would be manifestly unjust to apply the law as laid down by Lord Coleridge. (1) Two shipwrecked men find themselves on a plank which can only support one of them. The stronger man pushes away the other. Here the successful man does no direct bodily hurt to the other. He leaves him the chance of getting another plank. (2) Several men are roped together on the Alps. They slip and the weight of the whole party is thrown on one, who cuts the rope in order to save himself.

*Rex. v.
Dudley,
criticised.*

Here the question is not that whether some shall die but whether one shall live. (3) The captain of a ship runs down a boat, as the only means of avoiding shipwreck. A surgeon kills a child in the act of birth, as the only way to save the mother. A boat being too full of passengers to float some are thrown overboard. Such cases, says the learned author, are best decided as they arise. The last case is not important as it is fully met by the provisions of Section 81 of the Indian Penal Code, and although when a person is placed in circumstances such as are referred to in illustrations (1) and (2) the threat of law will not operate to prevent a crime and on principle, it is useless to multiply the number of offences unnecessarily, but yet sometimes it is not useless even in matters of legal obligation to insist on a high ideal, though not likely to be attained. In illustration (1) suppose the man found himself in the same plank with a little girl who is helpless and who cannot swim, can it be said on the face of numerous examples of men who in cases of shipwreck, have refused to save their lives at the expense of women and children, that the ideal is too high even for the noblest of the human race?

There will be no doubt in cases like these the clemency of the sovereign would be exercised to prevent any real hardship.

Besides, as the learned author himself recognises, the case of *Dudley* is different from the three cases, he brings forward as examples. In the first two cases there is no intention to kill but to save oneself at the *risk* of others, and the criticism is only directed against the very general terms in which the law was enunciated. If the statement of law

English &
Indian law
compared.

in Art. 33 of the Digest is correct the law in England, recognising the validity of necessity as a source of compulsion, is on a footing more favourable to the accused than the Indian law. There are also other points in regard to which the English law is less stringent. You may notice that an offence under Section 121 (waging war) is one of the offences against the State for which death is the penalty, and therefore a person guilty of an offence under that section cannot plead compulsion as a defence under the Indian Penal Code under any circumstances. Whereas under the English law such a defence is available. *R. v. Macnaghten* (18 St. Tr. 391).

Another point of difference which I may notice is that English law proceeds on the assumption that a *femme covert* is completely under the influence of her husband, and if she does anything in his presence she must be held to act under such compulsion as to save her from any liability for crimes committed by her. Indian women are treated as being under no such compulsion, and I am not sorry that this is so. But even under the English law the immunity does not extend to cases of extreme gravity, such as murder and treason. The insular habits of the English people where every man's house is said to be his castle makes all the difference in the relation of husband and wife in the two countries.

ACTS CAUSING SLIGHT HARM.

Section 95,
I.P.C.
Trifles.

No reasonable man complains of mere trifles. No man can pass through a crowded thoroughfare without treading on somebody's toes or without

clashing against some body and no reasonable man would complain of such small annoyances. "*De minimis non curat lex*" is an old doctrine of Roman law. The provision is unnecessary for ordinary men, but there are eccentric people all over the world, and it is to guard against eccentricities that a formal provision of law of this kind is needed.

LECTURE XI

POSSESSION IN CRIMINAL LAW.

In the last four lectures I have dealt with the provisions of the chapter of General Exceptions in the Code except those which relate to the right of private defence of person and property. The right to defend property is the right to defend possession of property and not the mere right to possession. It is therefore necessary before proceeding further to explain to you what possession means. Criminal Law does not, as a rule, concern itself with complicated questions of title, though Civil Law, being remedial in its nature, takes full account of it, and attaches more importance to title than to possession. It is the policy of Criminal Law to protect possession howsoever it may have been obtained, except where it is obtained by an act which constitutes an offence by itself, and goes so far that it punishes even the rightful owner if not in possession, who tries to obtain possession by illegal means. The definition of offences against property shows that the gist of such offences is the deprivation of *possession*. The justification for attaching so much importance to possession and so little to question of title is the necessity for prompt action and for preventing breaches of the peace.

Theoretically, it is not the province of the Criminal Law to protect private rights as such. That is a function that is assigned to the Civil Courts, but in cases of movable property possession often

is the only evidence of title, and if the prompt remedy obtainable in the Criminal Courts, is not extended to the protection of possession in such cases, and such matters are left to the tardy process of adjudication by Civil Courts, the result would often be the disappearance of the thing itself and of all evidence of title, thus leading to general insecurity in the enjoyment of property and consequent alarm to society at large. It is somewhat different with immovable property which being of a permanent character, has a long history to support the title of the rightful owner. Criminal Law, therefore, provides to a greater extent for the protection of possession of movables and even protects the mere right to possession against dishonest conversion (Sections 403 and 408). In cases of immovable property Criminal Law attaches little importance to the mere right of possession which is left to the Civil Courts and protects possession only, and even that for the purpose of preventing in vast majority of cases breaches of the peace and to prevent insult, annoyance and intimidation to the person in possession, as such acts are from their very nature likely to lead to disturbances of the public peace. Whereas in the case of movable property the gist of the offence is the deprivation of possession, in the case of immovable property the mere deprivation of possession or attempt at such deprivation is not sufficient to constitute an offence.

The provisions of the Code relating to possession of property fall into two classes. First, and by far the most important are those that are intended to punish, and thereby to prevent

disturbances of possession. Then there are those special cases in which it is not the object of the law to protect possession, but punishment is provided for being merely in possession of certain things. Being in possession, is not an act, but a mere legal status. I have already told you that this departure from the ordinary principle that a crime must be an act or an omission, is justified either as a matter of caution to prevent future attempts or preparations to commit particular offences of a serious character or to punish an antecedent criminal act which possession in such cases implies. To the first class belongs a very large number of offences against property, such as theft, robbery, dacoity and offences involving trespass on immovable property. To the second class belong cases of possession of instruments for counterfeiting coins (Section 235), Government stamps (Section 256), trade marks (Section 485), currency notes (Section 489D) and possession of counterfeit coins (Sections 242, 243, 252, 253), of Government stamps (Section 259), of false weights and measures (Section 266), of obscene books (Section 293), counterfeit seals (Section 473), false currency notes (Section 489 C), etc. These and connected offences, you will observe, occupy a large part of the Code. There are also various special acts such as the Arms Act, the Opium Act, the Excise Act which deal with similar matters.

Offences relating to possession of immovable property are not so numerous as those relating to goods, and therefore, in Criminal Law more importance attaches to the latter than to the former, though the order is reversed when we come to civil

law. The question of possession of immovable property generally arises in connection with offences relating to trespass on land (Section 441). It arises though indirectly in connection with land riots, the prevalence of which is a normal condition of life in Bengal, in which often the common object charged is 'to enforce possession of land.' It also arises in connection with the various preventive measures under the Criminal Procedure Code regarding disputes concerning immovable property, and in connection with questions of restitution dealt with at the end of that Code.

This enumeration is far from being exhaustive, but is sufficient to indicate the importance of the subject. Naturally this difference in the object of the legislature in the two classes of cases referred to above leads to different considerations in fixing upon the meaning to be attached to the word 'possession' for these two wholly divergent purposes. The conditions necessary to constitute possession in the two cases are therefore not always the same.

"Possession" is not defined in the Code. Any definition, however carefully guarded, could not possibly be exhaustive of the various phases of the question, and a definition that was incomplete or arbitrary would have been worse than useless. In ninety-nine cases out of a hundred possession as understood by the lawyer is not different from possession as understood by the man in the street. In the one case that may present any difficulty, the question has to be considered in the light of commonsense and the

Possession not explained in the Code.

Unsatisfactory state of the law.

requirement of justice. An artificial definition, it may be apprehended, might have unnecessarily confused the issue in the ninety-nine cases which present no difficulty, and might have in the one case of difficulty rendered the line harsh and inelastic. "We believe it to be impossible," say the Law Commissioners in their Report, "to mark with precision by any words, the circumstances which constitute possession. It is easy to put cases about which no doubt whatever exists, and about which the language of the lawyers and of the multitude would be the same. It will hardly be doubted, for example, that a gentleman's watch lying on a table in his room, is in his possession, though it is not in his hand, and though he may not know whether it is on his writing-table or on his dressing table. As little will it be doubted that a watch which a gentleman lost a year ago on journey, and which he never heard of since, is not in his possession. It will not be doubted that when a person gives a dinner, his silver forks, while in the hands of his guests, are still in his possession, and it will be as little doubted that his silver forks are not in his possession when he has deposited them with a pawn-broker as a pledge. But between these extreme cases lie many cases in which it is difficult to pronounce with confidence, either that property is or that it is not in a person's possession." The Law Commissioners add that they leave the question to the understanding of mankind in general, but they do not for reasons that are not convincing throw light on those cases of doubt and difficulty which the intelligence of the layman is not sufficient to solve without

the aid of the lawyer. The ordinary man understands actual physical possession, and he also has some elementary idea of possession falling short of actual physical control. He understands that his watch in his pocket is in his possession, but does he understand whether he is still in possession when he has dropped it into the Ganges? He understands that so long as his watch is in the custody of his servant it is in his possession, but does he understand who is in possession when it is in the course of transit? It is clear that the law recognises not only *de facto* possession, but also constructive or legal possession which latter it is often difficult to distinguish from the mere right to possession.

The situation has been aggravated by the fact that the word "possession" must be given different meanings in different connections, otherwise grave hardships and injustice would follow which could not have been in the contemplation of the legislature.

To illustrate my meaning, *A* is and he knows he is, in possession of the house which he is actually occupying, but does he know that he is not in possession of the same house even when he is occupying it if *B* had the possession the day before, and *A* had gained access into the house by deceiving the servant in charge? It has been held that *B* has the right in such a case of turning *A* out with force in defence of his so-called possession.

In these cases the real question is not whether possession in the common acceptance of the term is with *A* or *B* though we put in it that form, but the real question is whether as a matter of

policy it is not desirable to ignore the wrongful though actual possession of the trespasser, and proceed on the footing that though the *de facto* possession of *B* was lost, by a legal fiction he still continues in possession and is entitled to defend it by force. The question of policy was a question for the legislature, but instead of expressly enunciating that policy which would have been the more straightforward course they have left it to those charged with the administration of justice to give such an extended meaning to the term 'possession' as would make the law consonant with justice and requirements of society, and yet it is claimed that possession as used in the Code is not different from possession as understood by the man in the street. It is this policy of the legislature that is responsible for the introduction of the doctrine of constructive possession in criminal law with all the difficulties and complexities attendant on it. These difficulties could have been avoided if a fixed meaning had been assigned to the word "possession."

The same difficulty arises in construing other Acts of the legislature.

Take another case—*A* has a ring in one of his secret drawers; even without his knowledge of its existence, he is in possession, but if instead of a ring it were a piece of contraband opium he could not be held guilty of being in possession within the meaning of the Opium Act without proof of knowledge of its existence.

Though 'possession' is not defined, we get a glimpse of the underlying idea from the illustrations some of which are not always very

Possession explained

illuminating. I may here observe parenthetically that the scheme of explaining statutes by illustrations was novel, and in the words of Sir Lawrence Peel "many are useless, offering light in light day; some darken whilst they attempt to give light; some do not throw the light where the darkness prevails; some are *ignes fatui* to mislead; some are trivial and bordering even on the ludicrous, and a very few are open to more serious objections." Most of these illustrations will be found under the definition of theft in Section 378. These may be checked by a reference to illustrations to Sections 403 and 408. You may take it that if a case is covered by the illustrations to Section 403 or Section 405, in that case the person against whom the offence is committed is not in possession. Cases of criminal misappropriation are those in which the person in possession has lost his possession unintentionally or by an act of removal not amounting to an offence and this is followed by dishonest misappropriation or conversion; and cases of criminal breach of trust are those in which possession is intentionally delivered to another who abuses the trust by similar misappropriation or conversion. In both the cases the owner is not in possession, but if he were, the case would be one of theft and not of criminal breach of trust or of criminal misappropriation.

It is worthy of notice that although the definition of theft has been explained by many illustrations which throw light on the conception of the possession of movable property under the Code, no such illustrations are to be found under the definition of criminal trespass which would have thrown

light on the conception of possession of immovable property. The explanation may be found in the relative unimportance of the question to which I have already referred. The question of possession in regard to immovable property, though less important, is however much more difficult and complex than that regarding movable property.

Left unfettered by any rigid definition we are free in the investigation of the question to consider it in the light of common sense and try to avoid on the one hand any interpretation that would result in the condonation of acts that ought to be punished, or would on the other hand bring within the meshes of the criminal law acts the punishment of which would shock the conscience of an ordinary man. Having regard to the nebulous state of the law it would be satisfactory to analyse our ideas and formulate them, and then test them by reference to concrete cases and in the light of judicial decisions.

In Stephen's Digest "possession" of movables is thus explained:—"A movable thing is said to be in the possession of a person when he is so situated with respect to it, that he has the power to deal with it as owner to the exclusion of all other persons, and *when the circumstances are such that he may be presumed to intend to do so in the case of need.*" The qualifications mentioned in the words which I have *italicised* may be open to doubt, but to this I shall revert later. You will, in connection with this definition, bear in mind that the conception of possession of movables upon which the Criminal Laws of England are founded is materially different from that of the

Indian Penal Code. One reason is, that larceny under the English law is a more comprehensive term than theft of the Indian Penal Code. Cases falling within the definition of criminal misappropriation in the Code are within the definition of larceny by an extension of the meaning of the word "possession" and by insisting on the condition that possession in order to be legal must also be rightful. This difference in the conception of possession between the English common law and the Indian Penal Code will fully appear from a study of a few typical English decisions on which are based some of Sir Fitzjames Stephen's illustrations, whereby he tries to elucidate the meaning of possession as defined by him.

Larceny and
Theft.

In a case in which a Bureau was delivered for repairs to a carpenter the latter discovered money in a secret drawer, the existence of which the owner was not aware and then converted it to his own use; the question arose whether upon the facts stated there was felonious taking. Lord Eldon found the question so difficult that he did not trust himself to say anything until he had seen all the cases and consulted several of the Judges. Afterwards in delivering judgment the Lord Chancellor observed:—"To constitute felony there must of necessity be a felonious taking. Breach of Trust will not do. But from all the cases in *Hawkins* there is no doubt, this Bureau being delivered to the Defendant for no other purpose than repair, if he broke open any part, which it was not necessary to touch for the purpose of repair, but with an intention to take and appropriate to his own use what he should find,

that is a felonious taking within the principle of all the modern cases ; as not being warranted by the purpose, for which it was delivered. If a Pocket Book containing Bank Notes was left in the Pocket of a Coat sent to be amended, and the tailor took the Pocket Book, there is not the least doubt, that is a Felony. So, if the Pocket Book was left in a Hackney Coach, if ten people were in the Coach in the course of the day, and the Coachman did not know to which of them it belonged, he acquires it by finding it certainly, but not being trusted with it for the purpose of opening it ; that is a Felony according to the modern Cases. There is a vast number of other Cases. Those with whom I have conversed upon this point, who are of very high authority, have no doubt upon it." *Cartwright v. Green* (VIII Ves. 405).

The same view was taken in *Merry v. Green* (1841, 7 M. & W. 623) of which the facts were shortly these : A person purchased, at a public auction, a Bureau in which he afterwards discovered in a secret drawer, a purse containing money, which he appropriated to his own use. At the time of the sale no person knew that the Bureau contained anything whatever : Tindal C.J. in his summing up told the Jury that as the property had been delivered to the plaintiff as the purchaser, in his opinion there was no felonious taking, but on a rule obtained to set aside the verdict it was held that if the buyer had express notice that the Bureau alone, and not its contents, if any, was sold to him ; or if he had no reason to believe that anything more than the Bureau itself was

sold, the abstraction of the money was a felonious taking, and he was guilty of larceny in appropriating it to his own use. This was a case of some doubt, but there was no doubt that so long as the Bureau was in possession of the owner, he was in possession of the purse although he was not aware of its existence. The doubt which the Lord Chief Justice felt was whether when the Bureau was delivered to the purchaser such delivery had not the effect of putting the buyer in possession of the purse also. Having regard to the definition of Criminal Misappropriation the question, if it had arisen in India, would have been dealt with differently.

Baron Parke in delivering the judgment of the Court said :—

"It was contended that there was a delivery of the Secretary, and the money in it, to the plaintiff as his own property, which gave him a lawful possession, and that his subsequent misappropriation did not constitute a felony. But it seems to us, that though there was a delivery of the Secretary, and a lawful property in it thereby vested in the plaintiff there was no delivery as to give a lawful possession of the *purse and money*. The vendor had no intention to deliver it, nor the vendee to receive it ; both were ignorant of its existence : and when the plaintiff discovered that there was a secret drawer containing the purse and money, it was a simple case of finding, and the law applicable to all cases of finding applies to this.

The old rule, that "if one lose his goods and another find them though he convert them *animo*

furandi to his own use, it is no larceny," has undergone in more recent times some limitations: one is, that if the finder knows who the owner of the lost chattel is, or if, from any mark upon it, or the circumstances under which it is found, the owner could be reasonably ascertained, then the fraudulent conversion, *animo furandi*, constitutes a larceny. The learned Judge then quoted with approval the decision of Lord Eldon to which I have already referred. This case also if it had arisen under the Indian Penal Code would have been dealt with under Section 403, and on the footing that the true owner had lost his possession.

In *R. v. Thompson* (1862, L. & C. 225) a stranger had placed himself near a lady who wanted to purchase a ticket and was entrusted by her with money for that purpose. The prisoner received the sovereign but instead of applying for a ticket attempted to run away. The learned Judges all agreed that this was a case of larceny. Wightman J. said: "The true doctrine is that, if the owner delivers a chattel to another for a temporary purpose, and himself continues present the whole time, that other has only the custody of the chattel, and not the possession of it, and, if he converts it to his own use, may be convicted of larceny at common law." Under the Penal Code the offence would have been one of cheating. It would be difficult to hold that even after delivery of the money the owner continued *in possession*.

Thus the English cases on the question of possession are not safe guides for determining possession under the Penal Code and the absence

of any light from the Code itself and the dubious light thrown by the English decisions make the study of the subject a difficult one. We will be on safe ground if in the consideration of the question, we attach to the word "Possession," the sense in which it is commonly understood and give it such extension of meaning as is necessary to make the existing law effective for securing peaceful enjoyment of property.

With these preliminary remarks I shall proceed to examine our ideas of possession. I have told you that possession of movable property differs in some respects from the possession of immovable property. It would, therefore, be convenient to deal with the possession of movables first.

When we speak of possession we have in mind a thing to be possessed, a person in possession and a particular time to which possession is referable. In some cases, though not always within the range of vision, appears another person who contests that possession. Where we have not to count with this last factor the matter becomes really simple.

The essential idea of possession is control, actual or potential. When it is actual physical control no doubt or difficulty arises. A watch which is in my pocket or a horse which I am riding are both in my possession. The idea is most elementary and requires no discussion, but even the layman's view of possession is not confined to this elementary idea but extends beyond this, and comprises the equally elementary idea that even where the actual physical control does not exist if a person is so situated in regard to

Idea of
possession
analysed.

Movables.

a thing that he can obtain actual physical control of it, he is in possession. No one doubts that the money in his chest, the watch in his box, the furniture in his house or the horse in his stable are in his possession. It is equally clear that mere permissive use or occupation is not possession. A guest sitting by me at the dinner-table is not in possession of the chair or of the knives and forks he is using or of the plates out of which he is eating. He has only the custody of the things for the time being and nothing more. So also the servants in charge of the goods. Mere custody is not possession.

So far the cases present no difficulty and the question would appear to be purely a question of fact, but difficulty arises in determining in cases of more complex nature whether the facts proved regarding the relation between a given possessor and a given thing suffice to establish the control necessary to establish possession. The power of control varies in degree and the question of difficulty that arises is, where actual physical control is wanting, whether the extent of a person's power of control is such in a particular case as to enable us to attribute possession to him or whether the impediment in the way of the exercise of the power is such as to negative such possession, and where there is another party claiming similar possession who has the better or more effective control.

The power of control is not the mere physical power, but it is also the legal power which is greater than the mere physical power backed as it is by the power of State, and control is established in

the person having the legal right so long as complete physical control has not passed to another. A child is playing in a park. He has put down his toy and is standing at some distance from it. A powerful ruffian is close by and has the intention to assume control. The latter is undoubtedly in a better position to control, but suppose there is a stanger standing by more powerful than the ruffian, who in a struggle between the child and the ruffian would naturally take up the side of the child, you will have no difficulty in saying who has the better control. This third party who is stronger than the ruffian can and will, if necessary, overpower him to secure the control of the child. This third party, though he may not be always physically present, represents the power of the State, be it in the shape of the policeman or the magistrate, and the question of control between the child and the ruffian cannot be decided without considering what side this third party will take. Thus the question of right and legal possession become inseparable from the consideration of the question.

Any impediment, however great, not arising from any adverse claim set up by another as a rule, does not matter at any rate so long as there is the power to exclude others from obtaining the control, nor is this power to control at will affected by distance or by the time necessary to obtain it.

A person living in London may have a house in Calcutta in which he has left his furniture and has locked the gate; neither the distance nor the time affect the question of his possession.

I drop my ring into a tank which belongs to me. It may not be possible to find the ring at all by ordinary efforts, but as I have the power of exclusion, possession is with me in spite of all the difficulties of control, but if the tank belongs to another and he prevents me from going into it, then the possession of the ring is no longer with me but it has passed to the owner of the tank. If, however, I drop my ring into the Ganges and am looking for it, I am in possession, but when I have abandoned the idea of recovering it and have come back from the spot, I cease to be in possession.

The power of control is very often dependent on the legal right to control and exclude others, and a person who has the legal right is deemed to have the control so long as the control has not passed to some one else or the person having the right to control has not abandoned the idea of such control. Such a abandonment may be presumed from circumstances. If I lose a ring in the streets of Calcutta not knowing where I have dropped it, I cannot say I am in possession of the ring. But if I drop a rupee and hearing the noise as it falls turn round to pick it up and another picks it up and runs away, he is guilty of theft.

A is the owner of a horse which has strayed from the stable and is grazing at some distance from A's house, A is still in possession. But if it has been lost in the Himalayas and cannot be recovered with ordinary efforts or if A has given up the idea of recovering it and has acquiesced in the loss of possession, he is no longer in possession. Under such circumstances it cannot be said that

A has either the ability to control the animal or ability to exclude others from taking possession of it.

The question of abandonment is a question of intention, but intention is not an essential idea in all cases of possession. For instance, to establish the power of control, it is not necessary that the person who has the power should be aware of the existence of the thing with reference to which the power is claimed. Such ignorance excludes the operation of intention. This may be illustrated by the case of *Elwes v. Brigg Gas Co.* (33 Ch. D. 562). That was a case in which a free-holder gave a lease reserving mines, minerals and water-courses. The lessee's servants in excavating for foundations discovered a pre-historic boat or rather a 'dug-out' canoe which had been under the earth for many centuries. The canoe was removed. It was held that the free-holder had the prior right to possession and had not divested himself of it by granting the possession and use of the soil for a special purpose. If the free-holder had been in possession of the land here could be no doubt that he was also in actual possession of the canoe, notwithstanding the fact that he was not aware of its existence. Take another instance of the same kind. A person is in possession of a tank. There may be pearls in that tank of which he is not be aware, he is in possession of the pearls: and any one removing them from the tank will be guilty of theft. In cases of this kind the power to control is established by the power of exclusion. The owner of the tank has the right and therefore the power to exclude others from

entering it. In the same way if something is washed on my land by the sea, possession vests in me, and this would be so even if the title in the thing so washed is established in some one else. If a strong wind blows and cast iron sheets from my neighbour's shed into my land, and I remove or appropriate them, that would be criminal misappropriation but not theft.

Right of
exclusion.

The right of exclusion generally arises from the ownership of land or buildings, but there may be cases where the owner by his own conduct may have waived the right, and in such a case possession cannot be established by mere ownership of the house or land. In *Bridges v. Hawkesworth* (21 L. J. Q. B. 75) a parcel of Bank-notes was left in a shop by a customer. Another customer picked it up before the owner of the shop knew anything about it. The finder made over the parcel to the shop-keeper for the purpose of ascertaining the true owner, but the true owner could not be found. Three years later when all hopes of discovering the real owner had been abandoned the finder asked the shop-keeper for return of the notes but he refused. It was held that the finder was entitled to recover. In this case the title of the finder depended entirely on his possession, and that question depended on whether the possession of the parcel was with the shop-keeper before it was picked up, and it was held that the notes never were in custody of the shop-keeper nor within the protection of his house before they were found, as they would have been, had they been intentionally deposited there. The general proposition is supposed to be, that things left in any

part of a building pass at once into the legal possession of the occupier, but the Court found neither authority nor reason for any such rule. I venture to think the rule of law is unexceptional, but the rule could not be applied to that case, because the owner by allowing customers to enter the shop without any restriction waived the right of exclusion on which the general proposition is based. A distinction has been made between cases of this kind and cases where the owner had deliberately deposited a thing in a part of the shop and had forgotten to take it back. It has been held that in such a case possession and a qualified right to possession is acquired by the shop-keeper and the first person who picks it up is not a real finder. Cases of this kind have been treated as cases of bailment without a contract. (Pollock and Wright, p. 39).

The general right of the finder to any article which has been lost as against all the world except the true owner was established in the case of *Armory v. Delamire*. His possession establishes his title except against the real owner.

Different considerations arise in cases of living animals. My horse is in my possession not only so long as it is in my stable but continues in my possession even when it has entered the compound of my neighbour or when it is grazing in my neighbour's field; and this possession continues so long as I have not abandoned the idea of bringing it back. The presumption is that all tame animals have what is called the *animus revertendi*, but when this cannot be attributed, possession does not continue. For instance, the fish in my tank is

out of my possession as soon as it has left the tank, and so also a wild animal that I have captured, as soon as it has gone out of my control and has lapsed into a state of nature. In the case of wild animals the right of property is established by capture. Mere pursuit is not enough. If I shoot a bird and it falls into my neighbour's compound and he takes possession of it, he is guilty neither of theft nor of criminal misappropriation. His title is established by his possession as I had no possession at any time.

Physical possession must be exclusive.

Physical possession must be exclusive or it is nothing. If I throw away a piece of cloth outside my house and two persons catch it by the two ends and struggle for it, possession is not established in either until one of them has got it exclusively, and before he has done so and so long as the struggle goes on if a third party snatches it away, he cannot be guilty of theft.

Title deeds.

The possession of means whereby control can be obtained is sometimes equivalent to possession. This is undoubtedly so for the purpose of the possession which law would protect. For instance, the possession of railway receipts whereby delivery can be obtained may amount to actual possession, and so also the possession of the keys of a godown in which goods have been locked up. When I have locked up my box and having kept the key with me sent it for repairs or sent it to a pawnbroker without intending to pawn the contents, the box is no doubt in the possession of the bailee, but contents of the box are in my possession so long as the key is with me. The question of any large extension of the doctrine of construc-

Railway receipt.

tive possession in criminal cases is not free from difficulty, and such extension becomes the more objectionable when the question arises for determination not for the purpose of protecting possession but for purposes of punishing it. The decisions of the Calcutta High Court on this point are somewhat conflicting. In the case of *Kasi Nath Bania v. The Emperor* (9 C. W. N. 719) Henderson and Geidt JJ. held that where a railway receipt for a parcel of opium was found locked up in accused's box under circumstances which show that he was aware of the contents of the parcel, the possession of the receipt amounted to a possession of the opium within the meaning of Section 9 of the Opium Act. It was observed that though the accused was not in actual or physical possession, it was in his potential possession. In the case of *Ashruf Ali v. The King-Emperor* (14 C. W. N. 233) the correctness of this decision was doubted and Jenkins C.J. observed that if unfettered by authority he would have been disposed to hold that there was no possession. In the still later case of *Kali Charan Mookerjee v. King-Emperor* (18 C. W. N. 309), Mukerjee and Beachcroft JJ. observed that the doctrine of constructive possession must be very cautiously applied, specially in the department of criminal jurisprudence. The same question came up for consideration in the case of *Fong Kun (Khan) Chinaman v. King-Emperor* (23 C. W. N. 671) but not decided. If it be held that the possession of a railway receipt is possession of the goods, it would be necessary to avoid hardships to qualify the doctrine by insisting that the possessor

of the receipt must be aware that the receipt in his possession is in respect of a particular article. This would unnecessarily complicate the question of possession which ordinarily does not involve such knowledge. This question was discussed in *Queen v. Hill* (1 Den C. C. R. 453 1849) in which a different view was taken. In that case the facts were these: *A* and *B* stole some fowls. *A* sent them by coach in a hamper without a direction to *Birmingham* stating that a person would call there for them. *C*, wife of *A*, called, and on the hamper being shown to her claimed it. It was not delivered to her, and she was apprehended. It was held that on these facts she was wrongly convicted of feloniously receiving. "Whoever," said the learned Judges, "had possession of the fowls at the coach office, when the prisoner claimed to receive them, never parted with the possession, and the prisoner was immediately taken into custody. The prisoner by claiming to receive the fowls, which never were actually, or potentially in her possession, never in fact or law received them, therefore the conviction was wrong."

Delivery of possession.

Besides cases in which one person takes actual physical control of a thing belonging to another by force or fraud, there are various ways by which possession legally passes from one person to another. It passes by a voluntary act of the party in possession and sometimes by coercive legal process. The former is called delivery of possession. Delivery of possession may be effected by the possessor actually handing over the goods to another person, but very often possession passes by any

act showing an intention to part with possession. In such cases the delivery of indices of title, such as railway receipts, etc., or the delivery of the key by which the transferee can obtain control over the goods is sufficient to put an end to the possession of the one and establish the possession of the other.

I think in all such cases it would simplify matters if it be held that when goods are in transit through common carriers, possession vests with the common carriers, and the consignee does not come into possession until the goods are actually delivered to him.

Goods in transit.

The possession by a person's wife, clerk or servant, is his possession when such possession is held on his account. This is laid down in Section 27 of the Code. The section is not exhaustive of all cases in which one has the custody and another has the possession. The case will not be different if custody instead of being with the servant or wife is with the son or any other dependent member of a family.

The distinction in English law between custody and possession is not expressly recognised in the Indian Penal Code. In a note appended to his Digest, Sir James Stephen, after explaining what possession means, points out that the custody of a servant or person in a similar position does not exclude the possession by another, but differs from it in the presumable intention of the custodian to act under the orders of the possessor with reference to the thing possessed, and to give it up to him if he requires it. Although the distinction between custody and possession is not expressly

Custody Possession.

made in the Code, the difference between the two has been recognised in Section 27, to which I have already referred. The distinction is also indicated in the following illustrations to Section 378:—

(d) *A* being *Z*'s servant, and entrusted by *Z* with the care of *Z*'s plate, dishonestly runs away with the plate, without *Z*'s consent, *A* has committed theft.

(e) *Z*, going on a journey, entrusts his plate to *A*, the keeper of a warehouse, till *Z* shall return, *A* carries the plate to a goldsmith and sells it. Here the plate was not in *Z*'s possession. It could not, therefore, be taken out *Z*'s possession and *A* has not committed theft, though he may have committed criminal breach of trust.

Servant
and
Bailee.

The possession of a servant is different from the possession of a bailee inasmuch as the servant is bound at the will and pleasure of his master to make over to him any article which the master may have entrusted, whereas a bailee is not so bound, and this makes the distinction between the two cases illustrated above. When one has pledged his ring with a pawnbroker it cannot be said that he is still in possession. The distinction lies in the obvious difference in the degree of control that the owner has over property in possession of a servant and of a bailee. The possession of both is qualified possession. One is more precarious than the other. Whereas in the case of a servant, wife or any other dependent the control is so precarious that it may be terminated at the will of the owner at any time, it is different with a bailee. Therefore, where possession is qualified and subject to conditions, and it is not

wholly within the will of the owner to resume control at his will, the law attributes possession not to the owner but to the bailee. Whether it was necessary to retain the distinction between custody and possession is doubtful. Perhaps criminal breach of trust sounds more respectable, but the degree of criminality is much the same, and there is little to choose between one who commits theft and another who is guilty of criminal breach of trust. However, the distinction has been made and we must keep that in mind.

A "bailment" is defined in Section 148 of the Contract Act as the "delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished be returned or otherwise disposed of according to the discretions of the person delivering them." I have already pointed out that in exceptional cases there may be a bailment without a contract.

The principles governing possession of immovable property are not different from those that apply to possession of movables. The elementary ideas are the same—power of control and exclusion. From the very nature of things there is less room for actual physical control in the case of the former specially where large tracts are concerned, and there is therefore in those cases greater necessity for the application of the doctrine of constructive possession, and yet it may not be necessary in applying the doctrine to criminal cases to extend it very far, for there is in cases of property of this class little or no danger in leaving the remedy to the Civil Courts. But still it would obviously be

Possess
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property

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very inconvenient to leave all cases of this nature to the Civil Courts. If a man has a house in which he lives and some one during his temporary absence occupies it, it would lead to serious inconvenience and hold out a premium to people of a particular class to cause disturbances of the peace if Criminal Courts decline to deal with them. There can be little doubt that the dread of punishment is a more effective check on wrongs than the dread of having to make reparation. But where a dispute relates to a plot of agricultural land for instance with no crops on it the necessity for the interference of Criminal Courts is not so clear. In such cases the civil remedy which includes mesne profits should ordinarily be ample, and as a rule in such cases if a plea of *bona fides* is established there is no conviction. The policy of the Code may be gathered from the fact that a trespass on immovable property to be indictable must be with the intention of committing an offence or causing insult, annoyance or intimidation to the party in possession. If a person has an extensive piece of waste land over which he is exercising no actual acts of possession, a trespass on such land would not necessarily indicate such an intention, whereas such an intention would naturally be attributed to cases of trespass on land or buildings in actual occupation of another at the time of the trespass. Where trespass is committed on land with crops or on jungle land containing valuable trees, the circumstances may be such as to give rise to the inference that there was an intention to commit an offence, and the trespass would presumably be a criminal trespass.

Waste land.

Cultivated land.

In order to establish possession over immovable property proof of actual physical occupation at a particular moment is seldom available except where the property is a house or building or land forming the compound of a house. The question of constructive possession was fully discussed in the Full Bench case of the Calcutta High Court in *Mahomed Ali Khan v. Khaja Abdul Gunny* (9 Cal. 744), and I make no apology in reproducing some observations contained in the judgment of the learned Judge :

“ But possession is not necessarily the same thing as actual user. The nature of the possession to be looked for, and the evidence of its continuance, must depend upon the character and condition of the land in dispute. Land is often either permanently or temporarily incapable of actual enjoyment in any of the customary modes as by residence or tillage or receipts of a settled rent. It may be incapable of any beneficial use, as in the case of land covered with sand by an inundation ; it may produce some profit, but trifling in amount, and only of occasional occurrence as is often the case with jungle land. In such cases it would be unreasonable to look for the same evidence of possession as in the case of a house or a cultivated field. All that can be required is that the plaintiff should show such acts of ownership as are natural under the existing condition of the land, and in such cases, when he has done this, his possession is presumed to continue as long as the state of the land remains unchanged, unless he is shown to have been dispossessed.

Possession not necessarily actual user.

Submerged
land.

“Lands again may by natural causes be placed wholly out of reach of their owner, as in the case of diluvion by a river. In such a case, if the plaintiff shows his possession down to the time of the diluvion, his possession is presumed to continue as long as the lands continue to be submerged. *Kally Churn Sahoo v. Secretary of State for India* (I. L. R., 6 Cal. 725); *Mono Mohun Ghose v. Mothura Mohun Roy* (I. L. R., 7 Cal. 225).

“When lands which have been in such a condition as to be incapable of enjoyment in the ordinary modes are reclaimed and brought under cultivation, the change is in many instances gradual and difficult of observation while in progress. Diluviated land may take years to reform. Jungle land is often brought under cultivation furtively by squatters clearing a patch here and a patch there at irregular intervals of time. So that it may be a matter of extreme difficulty to prove as to any piece of land, the exact date at which its condition became altered. And as the plaintiff who has complied with the conditions we have indicated, is in the absence of dispossession presumed to continue in possession as long as the state of the land remains unchanged, it is essential to inquire on whom the burden of proof of the date of the change lies.

“The true rule appears to us to be this: That where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time, and under such circumstances that that state naturally would, and probably did, continue till within twelve years before suit, it may properly be presumed that it

did so continue, and that the plaintiff's possession continued also, until the contrary is shown. This presumption seems to us to be reasonable in itself, and in accordance with the legal principles now embodied in Section 114 of the Evidence Act.”

A similar view was taken by the Privy Council in the case of *Secretary of State v. Krishnomoni* (29 Cal. 518), in which their Lordships held that when land in the possession of a trespasser diluviates, the moment it does so the possession of the trespasser ceases and the possession is restored to the rightful owner.

These and other cases show how far the doctrine of constructive possession has been carried in civil law. In criminal law, although we cannot wholly ignore such possession, you will be convinced that it is not necessary to go the whole length of that doctrine. A dividing line has to be found. The relative situation of the possessor and the thing possessed and the reasonableness of the inference that the trespass was likely to cause annoyance, insult or intimidation determines this line when it arises in connection with the excuse of the right of private defence of property.

India is an agricultural country and in dealing with the question of possession regarding agricultural lands the test generally adopted, and I may say quite rightly, is who grew the crops, or if the question arises at a time when there are no crops on the land, then the question is asked who grew the last crop or ploughed the land. In large number of cases of mischief (Section 426) for cutting and removing paddy the same question arises daily for the consideration of

Courts in Bengal and dealt with in the same way.

Joint
owners.

Among joint owners of immovable property possession of one is possession of the other. A co-sharer is in actual physical possession for himself to the extent of his share only and has possession of the rest for the other co-sharers; but this is so only so long as he has not signified his intention to hold to the exclusion of the other sharers. It often happens that a co-sharer for the more useful enjoyment of his property holds exclusive possession of a part of the joint property. In such a case if the other co-owner disturbs his possession he is guilty of trespass, but so long as such exclusive possession is not asserted and acquiesced in possession will be deemed to be the possession of all the owners.

Possession
of part.

Possession of a part often amounts to a possession of the whole, but this is more a question of fact than of law. As observed by Lord Blackburn in *Lord Advocate v. Lord Blantyre* (L. R. 4 Ap. Cas. 770—791). "Every act shown to have been done on any part of that tract by the barons or their agents which was not lawful, unless the barons were owners of that spot on which it was done, is evidence that they were in possession as owners of that spot on which it was done. No one such act is conclusive, and the weight of each act as evidence depends on the circumstances; one very important circumstance as to the weight being, whether the act was such and so done that those who were interested in disputing the ownership would be aware of it. And all that tends to prove possession as owners of parts of the tract tends to prove

ownership of the whole tract; provided there is such a common character of locality as would raise a reasonable inference that if the barons possessed one part as owners they possessed the whole, the weight depending on the nature of the tract, what kind of possession could be had of it, and what the kind of possession proved was." But as pointed out by Macpherson and Panerjee JJ. in *Mohini Mohun Roy v. Premoda Nath Roy* (24 Cal. 256) "the rule operates with full force only in favour of the rightful owner and should be applied with caution and reservation if at all in favour of a wrong-doer for the reason among others that the right to the whole which makes the possession of a part equivalent to the possession of the whole, and forms the connecting link between the whole and the part in the one case is wanting in the other." The application of the doctrine is, however, largely dependent on the nature of the property, its situation and the intention with which only the part is possessed, and the opportunity which the possession of the part gives to the possessor of such part to obtain control over the whole. If, for instance, *A* has a piece of waste land on three sides of which are the lands of *B*, and *A*'s only means of access is on one side and that side is occupied by *B* which has the effect of blocking *A*'s passage into the land that would amount to complete ouster of *A*; but on the other hand if there is a piece of waste land belonging to *A* between the lands of *A* and *B*, and *B* encroaches on a portion of the waste land adjacent to his own land, in such a case it cannot be inferred that *B*'s intention was to assert possession of the whole, and even if it were, such

an intention could have no effect inasmuch as the possession of the part did not render less effective the power of control which *A* had in respect of the rest of the land. As observed by Bramwell L.J. in *Coverdale v. Charlton* (4 Q. B. D. 104; 4 Ap. Cas. 798). "It is difficult to say that there is a *de facto* possession when there is no possession except of those parts of the land which are in actual possession and there is an interference with the enjoyment of the parts which are not in actual possession. If there were an enclosed field and a man had turned his cattle into it, and had locked the gate, he might well claim to have a *de facto* possession; if there were an unenclosed common of a mile in length, and he turned (out) one horse on one end of the common, he could not be said to have a *de facto* possession of the whole length of the common."

The possession of the rightful owner is not affected by casual or secret acts of trespass as was observed by their Lordships of the Judicial Committee in *Radhamoni Debi v. The Collector of Khulna* (I. L. R., 27 Cal. 943) "in order to prove title to land by adverse possession it is not sufficient to show that some acts of possession have been done for the possession required, must be adequate in continuity, in publicity and in extent, to show that it is possession adverse to the competitor."

For a fuller study of the subject I would refer you to Pollock and Wright's *Essay on Possession*. Much of what I have said in the course of the discussion may not receive support from reported decisions or recognised text books. As observed by Lord Loreburn in *Glasgow Corporation v.*

Lorimer (L.R., A.C. 1911, p. 209) "Decided cases are chiefly valuable when they establish a principle, where they do not establish a principle but merely record the application of a principle to a particular set of facts they may be instructive as to the point of view from which the Judge regards the facts, but they are of little importance from any other point of view." And I have purposely avoided overloading the subject by referring to them too often. My object has been to place before you the various aspects of the question to enable you intelligently to examine it in all its bearings, and I shall be quite content if I have to any extent succeeded in my efforts.

LECTURE XII.

RIGHT OF PRIVATE DEFENCE.

I now come to deal with the provisions of the Indian Penal Code relating to the right of private defence of person and property. The extreme frequency of riots in India, specially in Bengal, has kept the subject prominently before the Courts with the result that it is rich in reported decisions and almost every aspect of the law has received judicial notice. It would not be possible within the scope of my lectures to deal adequately with the case-law that has gathered round the subject, and all that I propose to do is to discuss its main features and consider a few of the more important decisions bearing on it. The right is recognised in every system of law and the extent of the right varies in inverse ratio to the capacity of the State to protect the life and property of the subject. The reason is obvious. This duty is primarily the duty of the State. But no State, no matter how large its resources, can afford to depute a policeman to dog the steps of every *budmash* in the country or to be present at every riot or affray. This necessary limitation on the resources of the State has given to the subject *pro tanto* the right to take the law into his own hands and to provide for his own safety. The right of private defence must, therefore, be greater in extent among the turbulent population of the Frontier Provinces than in the rest of India, and even greater in the interior of Bengal than in the

Preliminary.

town of Calcutta, where you get a policeman to come to your help at every turn of the road.

As observed by Holloway J. in a Madras case “the natural tendency of the law of all civilized States is to restrict within constantly narrowing limits the right of self-help, and it is certain that no other principle can be safely applied to a country (like this).”

The peculiar policy of the Law Commissioners apparently dictated by their experience of Bengal is thus stated in their report—

“It may be thought that we have allowed too great a latitude to the exercise of this right; and we are ourselves of opinion that if we had been framing laws for a bold and high spirited people, accustomed to take the law into their own hand, and to go beyond the line of moderation in repelling injury, it would have been fit to provide additional restrictions. In this country the danger is on the other side. The people are too little disposed to help themselves. The patience with which they submit to the cruel depredations of gang robbers and to trespass and mischief committed in the most outrageous manner by bands of ruffians, is one of the most remarkable, and at the same time, one of the most discouraging symptoms which the state of society in India presents to us. Under these circumstances we are desirous rather to rouse and encourage a manly spirit among the people than to multiply restrictions on the exercise of the right of self-defence. We are of opinion that all the evil which is likely to arise from the abuse of that right is far less serious than the evil which would arise from the

execution of one person for overstepping what might appear to the courts to be the exact line of moderation in resisting a body of dacoits."

From what I have said it follows that there is no right of private defence where there is time to have recourse to the protection of the public authorities. The right is a right of defence both of person and property, not necessarily of one's own person and property, but also of the person and property of others. In this respect the English law was at one time narrower. According to that law, it would appear, that a man was justified in using force against an assailant or wrong-doer in the following cases: first, in defence of himself; secondly, in defence of his immediate kindred. (*Reg. v. Rose*, 15 Cox 540.) The later tendency has, however, been to widen the circle by including in it besides the first two classes any one else under a person's immediate protection (*Foster* 274). The circle is a gradually expanding one. But some restriction perhaps still exists in England. In America the law is that whatever one may do for himself he may do for another.

As to the right of private defence of property the value of property of all kinds depends on the security with which it can be enjoyed. In primitive days when there was no settled Government and Society had not properly organised itself, when might was right, the only law was—

" That they should take who have the power,
And they should keep who can. "

With a settled Government and a vigilant police, property has gained in value and to the same

extent the temptation to deprive others of their possession has become greater. The highly complicated machinery of the Indian Courts, the proverbial law's delays, the advantage which the law confers on a person in possession, in other words the advantage which a defendant always has over the plaintiff in a civil suit, all these furnish the strongest possible incentive to disturbances of public peace by attempts to obtain forcible possession.

The first thing to remember is that the right of private defence can under no circumstances justify anything which strictly is no defence but an offence. Therefore if, whilst defending yourself, you put your enemy to flight and then pursue him and inflict an injury on him, you are no longer on the defensive and cannot claim the right. However it may sometimes happen that an attack is the most effective way of making a defence. An attack in such a case is justifiable.

In the same way you cannot claim the right of private defence if you have yourself courted the attack. Nor can such a right be claimed by a person who deliberately joins in a riot and finds himself attacked and his life in danger. The law was laid down by Sir John Edge C.J. in an unreported case (*Queen v. Rupa*, in 20 All. 459) in the following terms:—" When a body of men are determined to vindicate their rights or supposed rights by unlawful force, and when they engage in a fight with men, who, on the other hand, are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence arises.

Limits of the right.

Neither side is trying to protect itself, but each side is trying to get the better of the other." This view was quoted with approval by Kershaw C.J. and Knox J. in *Queen Empress v. Prag Dutt* (20 All. 459). See also 7 W. R. Cr. 34. I have said that you cannot invoke the right of private defence against an attack that you have yourself courted. This, however, does not mean that there is any duty upon a man to protect himself by flight. "This is so far true that an assailed party cannot, unless driven to the wall, take his assailant's life. But as an elementary proposition it is not true that if I can evade an attack by flight, then I must fly to evade it. The fundamental principle is that right is not required to yield to wrong." (Wharton, Section 99).

"A person lawfully defending himself or his habitation is not bound to retreat or to give way to the aggressor before killing; but if the aggressor is captured or is retreating without offering resistance and is then killed, the person killing him is guilty of murder." (Halsbury IX, p. 587). The law is the same in India—"The learned Judge suggests that the first accused could have escaped further injury by resorting to less violence or running away. But this is placing a greater restriction on the right of private defence than the law requires." (*Alingal v. Emperor* 28 Mad. 454). "But a man," says Mayne, "is not bound to modulate his defence step by step, according to the attack, before there is reason to believe the attack is over. He is not obliged to retreat but may pursue his adversary till he finds himself out of danger, and if in the conflict between

them he happens to kill, such killing is justifiable."

The law relating to the right of private defence is dealt with in Sections 96—106. Section 96 lays down the general proposition that nothing is an offence which is done in the exercise of the right of private defence. The other sections define the limits within which the right can be exercised, the persons against whom it can be exercised and the extent of injury that can be inflicted justifiably upon the person against whom the right avails.

Every person has the right to defend (i) his own body and the body of any other person against any offence affecting the human body; (ii) the property movable or immovable of himself or of any other person against theft, robbery, mischief, or criminal trespass or attempts to commit any of these offences.

Dacoity is only an aggravated form of robbery and is therefore not expressly mentioned, but it was necessary to mention robbery as besides theft it includes extortion.

If an act is otherwise an offence the right of private defence arises against the author of the act, even though he is not punishable by reason of his personal incapacity to commit a crime or because he acts without the necessary *mens rea*. For instance, if a lunatic attacks you or runs away with your purse, or if a sane and adult person runs away with your purse believing that it is his own, your right of private defence is not affected thereby (Section 98).

Right of private defence.

Summary of the law.

Section 97.

Section 98.

Section 99.

Section 99 deals with a variety of questions, all of which are by no means connected and might have been conveniently split up into two or more sections. I shall take the different matters separately. First as regards the right of private defence against public servants, it follows from the provisions of Section 97 and independently of the provisions of Section 99, that so long as a public servant acts legally in the exercise of his official powers, there is no right of private defence for the simple reason that his act is not an offence. If his acts are wholly illegal, he is in the same position as any private individual and is not entitled to any special protection. The provisions of the 1st clause of Section 99 are intended to extend the protection to those acts of a public servant which are not strictly justifiable by law and yet not wholly unauthorised, if done in good faith under colour of his office, provided the act does not reasonably cause apprehension of death or grievous hurt.

The protection afforded to a public servant also extends to those who act under the direction of such public servant.

A person, however, is not deprived of the right of private defence against a public servant or against those acting under his direction, unless such person knows that the person against whom he is exercising the right is a public servant or is acting under the direction of a public servant. Explanations (1) and (2).

The law, however, does not require a person to submit to any act of a public servant which is not strictly legal if such act gives rise to an apprehension of death or of grievous hurt.

The rest of the section deals with two wholly distinct matters. It is first laid down that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. As I have already told you that the right of private defence is a right which the State hands over to the individual, because the State is not always able to give its protection in proper time, and it follows from this that where such timely help can be obtained no one should take the law into his own hands.

The next provision is that the right in no case extends to the infliction of more harm than it is necessary to inflict for the purpose of defence.

Sections 100, 101, 103 and 104 may be taken together. These relate to the extent of injury that may be inflicted on an assailant in the exercise of the right. Wherever the right exists it extends to the causing of any injury short of death necessary for the purpose of defence, but in certain special cases even the causing of death is justified. These special cases are—

Sections 100,
101, 103 and
104.

- (1) assaults which reasonably cause apprehension of death or grievous hurt or of rape or unnatural offence, kidnapping or abduction or wrongful confinement in particular circumstances ;
- (2) robbery, house-breaking by night, mischief by fire to any building, tent or vessel used for purposes of dwelling or custody of property ;
- (3) theft, mischief or house-trespass under such circumstances as may reasonably cause the apprehension that

death or grievous hurt would be the consequences if the right of private defence is not exercised.

The first relates to the defence of person and (2) and (3) to defence of property.

Sections 102
and 105.

Sections 102 and 105 fix the time when the right commences and the time during which it continues. Section 102 provides that the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises, even though the offence may not have been committed and continues as long as such apprehension continues. According to Section 105 the right of defence of property commences when a reasonable apprehension of danger to the property commences. Its continuance depends on the nature of the offence. In cases of theft it continues till the offender has effected his retreat with the property or either the assistance of public authorities is obtained, or the property has been recovered. In cases of robbery it continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint, or as long as the fear of instant death, hurt or of instant personal restraint continues. In cases of criminal trespass or mischief the right continues as long as the offender continues in the commission of criminal trespass or mischief.

In cases of house-breaking by night it continues as long as the house-trespass which has been begun by such house-breaking continues.

Section 106.

Section 106 lays down that where an assault causes apprehension of death the person so threatened may take the risk of doing any harm

to an innocent person. The illustration shows the meaning.

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

The above is a summary of the law as is contained in the Code.

Before discussing the more controversial questions that have arisen in connection with the right of private defence, I should like to make a few observations on the law generally.

An important question for consideration is what is meant by the words "the property of himself or of any other person." Does it mean property rightfully belonging to a person or property which is in his possession? There can be little doubt that it means the latter, for without possession no trespass on any movable property can amount to theft, robbery or mischief, and no trespass on immovable property could amount to criminal trespass. In a case in which a person had seized a cow with the object of impounding it and was attacked by the owner, Mr. Justice Seton-Karr held that the person who had seized the cow had the right to defend his possession under Section 101 of the Indian Penal Code. Here, there was only possession but no right of property. The cow belonged to the assailants and the person who seized the cow had nothing but possession to defend.

Defence of
possession
not of righ

In this particular case the decision might have been equally based on the right of defence of person.

Where the rightful owner is not in possession but tries to obtain possession by illegal means he may, under certain circumstances, be guilty of the offences enumerated in Section 97, and even the wrongdoer in possession in such a case has the right to defend his possession against the rightful owner.

Burden of proof.

The right of private defence is a plea of avoidance and the burden of proof is on the person who sets up the right (Section 105, Evidence Act). But this does not mean that he must adduce evidence in support of the plea. He may if he chooses elicit facts upon cross examination of the witnesses for the prosecution to make good his defence. The right need not be specifically pleaded, but if it arises it must receive judicial notice—*Queen v. Sohan* (2 W. R. Cr. 59).

How pleaded

A somewhat different view was taken in *Jamsheer Sirdar v. Queen-Empress* (1 C. L. R. 62). It was observed: "It is obvious that, under the provisions of the Evidence Act, Section 105, an answer setting up the right of private defence, must be supported by evidence giving a full and true account of the transaction from which the charge against an accused person arises. No accused person can at the same time deny committing an act and justify it. The law does not admit of justification by putting forward hypothetical cases; it must be by proof of the actual facts."

In *Queen-Empress v. Timmal* (21 All. 122), it was laid down that an accused person who at his trial has not pleaded the right of private defence, but has raised other pleas inconsistent with such a defence, cannot in appeal set up a case, founded upon the evidence taken at his trial, that he acted in the exercise of the right of private defence, neither is the Court competent to raise such a plea on behalf of the appellant.

But in the more recent cases both in Calcutta and Allahabad the decision in *Queen v. Sohan* has been followed. In the Full Bench case *King-Emperor v. Upendra Nath Dass* (19 C. W. N. 654), Jenkins C.J. in delivering the judgment of the Court observed: "This burden can be discharged by the evidence of witnesses for the prosecution as well as by evidence for the defence on such a plea being set up; and the accused are clearly entitled to claim an acquittal if, on the evidence for the prosecution, it is shown that they have committed no offence."

See also *Emperor v. Wajid Hossain* (32 All. 451).

I have already said that there is no obligation on a man to escape from danger instead of defending himself, but here a reflection arises in connection with the provisions of Section 98 whether a modification of the principle would not have been wiser. If a mad man attacks you, would it not be more reasonable to insist that if you knew the man was mad and had a chance of escape that you should avail yourself of it. It would have done no harm, for in such a case no one would accuse you of cowardice. However the question is one for the legislature, and, I have no doubt,

Duty to retreat before killing.

this is the course which the ordinary man would adopt when attacked by a lunatic instead of killing him.

This duty to retreat and thereby avoid killing an assailant is not a new idea that I am putting forward before you for the first time.

In America it has in some cases been held that it is a question for the jury whether from the evidence the slayer had, apparent to his comprehension as a reasonable man, the means at hand to avoid killing the deceased without incurring imminent danger of losing his own life or of suffering great bodily harm.

The law in England, however, on this point is the same as in India and has been thus stated in Halsbury's Laws of England: "A person lawfully defending himself or his habitation is not bound to retreat or to give way to the aggressor before killing him; he is even entitled to follow him and to endeavour to capture him; but if the aggressor is captured or is retreating without offering resistance and is then killed, the person killing him is guilty of murder."

Sections 97 and 99 have given rise to much controversy and perhaps no portion of the Code has more often been considered judicially than these two sections.

In Bengal land riots are matters of daily occurrence and the *chur* lands in Eastern Bengal are the most fruitful sources of riots attended with murder and other grave offences. The most typical cases are these:

A has a plot of land on which he has grown his crops. Before the time of harvesting has come

Land riots
in Bengal.

A typical
case.

B attended with a number of *lathials* takes advantage of *A*'s absence, enters the land and begins to cut the crops to establish his possession; sometimes it is a plot of land on which at the time of occurrence there are no crops, and *B* goes to plough up the land or finding the land already ploughed and sown he uproots the seedlings for fresh sowing to create evidence of possession. *A* hears of the trespass, collects men, and when he comes to the land he finds a number of persons there prepared to resist *A*'s entry. This leads to a riot in which either *A* or *B* gets the worst of it. Sometimes it is the case of a *chur* which is just becoming fit for cultivation when the people of a neighbouring village, having no right, take it into their heads to go and squat there. In the course of the night old huts from the village are removed to the *chur* and erected there. To make their possession sacrosanct they introduce their women folk into those huts. The next morning the people of another village who rightly claim the *chur* as accretion to the land of their village coming to know of it, rush to the *chur* with a number of *lathials*, burn the huts or take possession of them, and then claim to have erected the huts themselves. Men from both sides are found wounded and sometimes killed. Both parties are prosecuted and placed on their trial for offences under Section 147 or 148 with the addition of graver offences of grievous hurt or murder sometimes independently and sometimes by operation of Section 149, in which the common object alleged is to enforce a right or a supposed right. Both parties defend the charge by saying that they

were already in possession and therefore, could not be said to have the common object of enforcing a right which means securing such right by means of force, and they claim the protection of the right of private defence of property. It often happens that the party really in possession heard of the encroachment or of the intention to encroach an hour or two before or may be the previous evening, that the Police Station is very close, so that the persons in possession, if they chose, instead of turning out in force to eject the trespassers, might have gone to the Thana and asked for Police interference.

Questions.

On these facts four different questions often arise :—

- (i) When the owner in possession found the trespassers already in occupation, had he still a possession to defend ?
- (ii) Was he a member of an unlawful assembly having an unlawful common object or in other words was it the object of the assembly to enforce a right or supposed right ?
- (iii) Was he bound to apply for the protection of the public authorities ?
- (iv) Was the apprehension of danger continuing when the right was exercised ?
- (v) Was the apprehension sufficiently grave to justify the amount of injury caused ?

On the first question the authorities are not clear, but the principle has been definitely laid down in several English cases. In *Browne v. Dawson* (1840) (12 A. & E. 624) the facts were shortly these :—Plaintiff, a school master, was in

When is
possession
lost.

possession of a room in a school house. On the 29th of June he was dismissed and the premises were peaceably taken possession of by the trustees of the school and locked up by them. On the 30th the plaintiff returned and re-entered by force. On the 4th of July he was required by notice to depart ; and persisting in remaining there he was ejected on the 11th for which an action was brought. Lord Denman C.J., in delivering the judgment of the Court, said: "A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession, against the person whom he ejects, and drive him to produce his title, if he can without delay re-instate himself in former possession. Here by the acquiescence of the plaintiff, the defendants had become peaceably and lawfully possessed as against him, he had re-entered by a trespass : if they had immediately sued him for that trespass, he certainly could not have made out a plea denying their possession. What he could not have done on the 1st July he could as little have done on the 11th, for his tortiously being on the spot was never acquiesced in for a moment ; and there was no delay in disputing it. But, if he could not have denied their possession in the action supposed, it follows clearly that they might deny this in the present action ; for both parties could not be in possession."

In a later case of *Scott v. Mathew Browne & Co. Ltd.* (1884), (51 L. T. 746), Mr. Justice Key quoted this decision with approval and commenting on the decision in *Beddall v. Maitland* (1881), (17 Ch. D. 174, 188), in which it was said that when a man

is in possession he may use force to keep out a trespasser, but when a trespasser has gained possession the rightful owner cannot use force to put him out, but must appeal to the law for assistance, the learned Judge observed: "Can a man come into my house when I am out, and then say that he claims to be there, and I cannot use force to turn him out? I cannot think that the law would admit of any one taking such a position."

In *Collins v. Thomas* (1859), (1 F. & F. 416), it was held that a person having no possessory title to premises, but fraudulently pretending to have such title, and so allowed by the servant of the true owner to enter, does not thereby acquire possession, but may be forcibly expelled by him on discovery of the fraud; and if in such a case assaults are committed in consequence, the question for the jury will be, whether there has been an excess of violence. A subsequent attempt by force to re-enter and so causing an affray, was an indictable offence, for which the party might be given in charge.

What amounts to acquiescence in such cases cannot be answered merely with reference to the period during which the trespasser has been suffered to remain in occupation. In *Queen v. Sachee* alias *Sachee Boler* (7 W. R. 112) fifteen days' possession, in *Moher Sheikh v. Queen-Empress* (21 Cal. 392) four or five days' possession and in *Jairam's* case possession for a few hours was held sufficient, whereas in the case of *Chandulla Sheikh* (18 C. W. N. 275) fourteen hours' possession was held insufficient. That question must depend

on various circumstances, but there can be little doubt that if the rightful owner goes to the law for his remedy he loses the right of ejecting the trespasser by force.

If the right of defence of property is once recognised in cases of this kind in India, the Indian Courts will not be bound by the limitation regarding the amount of force laid down in those cases. The Indian cases have not gone generally the whole length of the principle stated above, though they have sometimes gone very near it, as will appear from the cases which I propose to discuss under the fourth head. In dealing with the English cases I have quoted, a distinction may reasonably be drawn between cases of wrongful entry into a house and similar entry into waste or cultivable land. On this basis the somewhat narrow view of possession taken in *Jairam's* case (35 Cal. 103) may perhaps be defended. I shall consider this case hereafter. *Browne's* case was however quoted with approval in *Chandulla Sheikh v. The King-Emperor* (18 C. W. N. 275).

The question when a trespass puts an end to the possession of the rightful owner has been often discussed in connection with the interpretation of Section 141 of the Indian Penal Code, which defines the common objects which render an assembly unlawful. In cases where the common object of the assembly was stated to be "to enforce a right or supposed right," the question has been discussed whether such an intention could be attributed to a person who was in possession immediately before the riot and to those who came to his help.

Enforce a right.

This brings us to the consideration of the second question, which though not having a direct bearing on the question of self-defence is intimately connected with it. In the case of *Queen-Empress v. Mitto Singh* (3 W. R. Cr. 41), Mr. Justice Campbell, discussing the provisions of Section 141 with special reference to the words, to enforce a right or supposed right, observed: "I think the latter provision applies to an active enforcement of a right not in possession, and not to the defence of a right in possession."

In the case of *Pachkauri v. Queen-Empress* (24 Cal. 686) Ghose and Gordon JJ. took the same view: "It seems to us that if the party of the accused were rightfully in possession of the land on the date in question, and if they found it necessary to protect themselves from aggression on the part of the complainant's party, they were justified in taking such precautions as they thought were required, and we think that in doing so they could not rightly be held to be members of an unlawful assembly."

In the more recent case of *Silajit Mahto v. Emperor* (36 Cal. 865) Jenkins C.J. and Mukerjee J. said: "Upon the facts which have been established, the common object here was not to enforce any right or supposed right. It was rather to maintain undisturbed the actual enjoyment of a right. If so, no question of unlawful assembly arises." The same view was taken in *Ramnandan Prosad v. The Emperor* (17 C. W. N. 1132.)

The decisions on this point have been uniform so far as the principle is concerned, and if there has

been any difference of opinion, it has been in respect of the application of the principle to the facts or a particular case.

In the case of *Emperor v. Ambica Lal* (35 Cal. 443) where the complainant's party consisting of 12 or 13 persons went with *kodali* to a *bund* erected on the land of the master of the accused, in order to cut it, as it obstructed the flow of water from their lands and destroyed their crops, and the accused hearing of this at once assembled to the number of 50 or 60, and at the time the accused arrived at the scene the complainant's party had either finished the cutting or ceased to do so, and the accused attacked the complainant's party and chased them and killed one man who was not connected with the cutting in any way. Rampini and Sharfuddin JJ. said: "Then it is obvious that the accused's party was from the beginning an unlawful assembly. They went up armed with *lathies* intending to enforce their right at all hazards. Even if it be admitted for argument's sake to have been a lawful assembly at first, it became an unlawful assembly the moment the complainant's party stopped cutting the opening in the *bund* and the accused chased and beat the complainant's party and killed Chatar Dass." If the *bund* was on the land of the accused's maliks and the complainant's party attempted to cut it, the accused were certainly justified in preventing mischief being done to that property. It was another matter altogether if they attacked the complainant's party after they had ceased cutting the *bund* and chased them and killed one of them. Till that moment the assembly cannot

be said to have been an unlawful one. Other decisions may be quoted bearing on the question, but it would serve no useful purpose to multiply them.

Protection
of public
authorities.

On the third question different views have been taken having regard to the different facts and circumstances of a case. The necessity to have recourse to the public authorities for protection cannot be for the mere purpose of regaining or recovering possession of the property, but for the purpose of preventing the trespass on such property, otherwise the restriction will practically take away the right of private defence altogether, as one can always have recourse to the Civil or Criminal Courts for recovering possession from a trespasser. Upon this point Wharton says: "It has been said that the right does not exist when the party attacked had an opportunity of calling on the public authorities to intervene. This, however, is not universally true. As there are few attacks which the injured party could not have more or less clearly expected, it would be incumbent on him, if the position here contested is sound, to call on the Government for protection in every case, or else to lose the right. But to call on the Government for aid is only necessary when such aid can be promptly and effectively given. There are many cases of suspicion also, in which a prudent man would decline to call in Governmental aid, feeling that the case is not sufficiently strong to justify so extreme a remedy. As a rule, therefore, we cannot say that self-defence cannot be resorted to, when the party asserting the right could have protected himself by calling in the Government.

* * * *

There is no pebble in our way which we could not remove by action of law. But there is no pebble on the high way as to which an action of law would not be absurd. We kick it out of the way. Just as we exert the right of self-defence in innumerable other cases in which going to law would be equally absurd. And we may in like manner forcibly remove an intruder from a house or a railway car without stopping to call in a Magistrate or tear from a wall an insulting libel, or push back from a highway an overhanging bough. If so, we may defend life and limb, though the attack is one we may have so far anticipated as to have been able to call in official aid in advance." (Wharton I ss. 97 a.)

In *Birjoo Singh v. Khub Lall* and others (19 W. R. Cr. 66) Couch C.J. said: "The Magistrate seems to have considered that it was the duty of the Rajapur people to offer no opposition whatever to the cutting of the *bund*, that they were to go away to seek the Magistrate, who might be at a great distance and to obtain an order from him, and if they failed in that they were to be left to a civil suit to recover compensation for the injury to their crops from persons whom it might be difficult to identify as those who actually committed the mischief, and from whom, if identified, it might not be possible to recover the amount of the compensation. I think that is a view which cannot be supported."

In this case it does not appear that the information which the accused obtained was either

definite enough upon which he was bound to act or was received in good time to enable him to go to the authorities to prevent the trespass.

In *Narsingh Pattabhai* (14 Bom. 441) it was laid down that the apprehension which justifies a recourse to the authorities ought to be based on some information of a definite kind as to the time and place of the danger actually threatened. The accused No. 1 received information, one evening, that the complainants intended to go on his land on the following day and uproot the *jarasi* seed sown in it. At about 3 o'clock next morning he was informed that the complainants had entered on his land and were ploughing up the seed. Thereupon he at once proceeded to the spot, followed by the other accused and remonstrated with the complainant. It was held that the accused were not bound to act on the information received on the previous evening and seek the protection of the public authorities as they had no reason to apprehend a night attack on their property. In dealing with the Law Birdwood J. said: "The right of private defence of property commences when a reasonable apprehension of danger to the property commences. Before such apprehension the owner of the property is not called upon to apply for protection to the public authorities. The apprehension which justifies a recourse to the authorities ought generally to be based on some information of a definite kind, as to the time and place of danger actually threatened."

In *Pachkauri's* case to which I have already referred, although it appeared that the party of the accused had become aware that the complainant's party wanted to take forcible possession of the land, the accused were held to be justified in collecting a large number of men and going to plough the land, and in taking necessary precaution to protect their possession when the complainant's party attacked them.

On the other hand if definite information, such as a reasonable man can act upon is received in time to enable the party to have recourse to the protection of public authorities and he abstains from so doing, he loses the right of private defence.

In the case of *Queen v. Moizuddin* (11 W. R. Cr. 41) the finding of the Sessions Judge was as follows:—"I am unable to say that they are to blame for arming themselves or preparing themselves for the possible contingency of a fight in defence of their property. There is not sufficient evidence to show that there was a certainty of their being attacked on the morning of the 4th June last, and they were aware of it, otherwise it would have been their duty to have had recourse to the protection of the police." Markby J. said: "I would observe, however, that had the Sessions Judge found that Moizuddin (who had struck the fatal blow) and his companions had neglected to take the precautions which the law has pointed out to persons who apprehended a breach of the peace, I should have said the plea of self-defence failed altogether."

A similar view was taken in *Queen v. Jeolall* (7 W. R. Cr. 34), in which it was found that both parties knew what was likely to happen for both turned out in force, and the learned Judges observed: "There was a Police Station within easy distance, to which they could have applied for assistance if they had a claim to it, and in any case the Civil Courts were open to them to recover damages from Jeebun for a breach of his contract."

The following observations in the case of *Queen v. Mana Singh* (7 W. R. 103) may lead to a misconception unless read in the light of the facts found: "There was time," said the learned Judges, "to have had recourse to the protection of the public authorities; indeed, if they had not gone to the disputed land, there would have been no riot at all."

In the case of *Baijanath Dhanuk* (36 Cal. 296) when the accused went armed with swords, spears and *lathies* where labourers of the opposite party were reaping some *masuri* crops and attacked them, it was held that the right of private defence existed though it was exceeded, one man being killed.

In the case of *Jairam Mahton v. Emperor* (35 Cal. 103) it was held that no man has the right to take the law into his own hands for the protection of his person or property if there is a reasonable opportunity of redress by recourse to the public authorities.

That was a case in which the accused were not in actual possession before, but on the basis of a title acquired from the landlord entered the land by force and attempted to plough the land

when they were attacked by the complainant's party who had been in possession for a long time before the occurrence. The Court held that under the circumstances the accused being actually in possession had the right to defend their possession, but as they must have anticipated that their action was likely lead to a riot, the Court (*Mitra and Caspersz JJ.*) observed: "If a person has the right to possession and was in law constructively in possession, but was not in actual occupation just before the occurrence, he may ordinarily have recourse to the proper authorities for the prevention of any wrong to him, and he should not be allowed to plead the right of private defence of property." It may be doubted if in this case the accused had any possession to defend.

A different view was taken in the case of *Kabiruddin v. Emperor* (35 Cal. 368) in which *Sharfuddin J.* observed: "It is contended on behalf of the appellants that they, having arrived on the spot first, had the right to remain there, and if disturbed in that right they were entitled to set up the plea of the right of private defence. I cannot accept the above proposition, as such an enunciation of law would be dangerous to the peace of the country. It would justify a regular race between two factions as to who should arrive first." "The right of private defence would become a force," said *Sharfuddin and Cox JJ.* in *Chandulla Sheikh v. The King-Emperor* (18 C. W. N. 275), "if it depended on a race between two factions, to see who should arrive first." The principle laid down in *Browne's* case was followed.

As regards the fourth question, it is obvious that when the apprehension of danger is over the right is at an end (Section 105). The danger may disappear in more ways than one. The attacking party may take to flight at the sight of a superior force or may retire having accomplished its purpose. In either case an attack on the retiring party would not be defence but offence.

Continuance
of the right.

In the case of *Emperor v. Ambika Lall* already referred to, it was said that the assembly became an unlawful assembly the moment the complainant's party stopped cutting the opening in the *bund*, and the accused chased and beat the complainant's party and killed Chater Dass.

When it
ceases.

Where an old woman caught stealing was given severe blows which caused her death, it was held by a majority of the Judges that the case was one of murder (5 W. R. Cr. 33). The ground no doubt was that the danger to property if any had disappeared when the woman was caught, after which no right of private defence could be claimed.

Where a person wilfully killed another who was endeavouring to escape after detection in the act of house-breaking by night for the purpose of committing theft, it was held that the case was one of murder, and that there was no right of private defence (5 W. R. Cr. 73).

Where *A* trespassed into the land of *B* whose servants seized and confined *A* till the following day, it was held that the action could not be justified by any right of private defence (13 W. R. Cr. 64).

When the first four questions are answered in favour of the accused the right of private defence is established and then the fifth question arises for consideration, namely, whether the apprehension of danger was sufficiently grave to justify the amount of injury caused.

In the case of *Ganouri Lal v. Queen Empress* (16 Cal. 206) the whole question relating to the right of private defence was discussed. The facts were that some of the complainant's servants went upon accused's land for repairing or erecting a *bund*. The accused collected *lathies* and injured five persons. It was held by Pigot and Macpherson JJ., that the accused were rightly convicted of rioting—as complainant's act amounted to a civil trespass, and there was no immediate or pressing necessity of a kind, showing that there was no time to have recourse to the protection of public authorities. This in effect was a case in which the right of private defence was considered to have been exceeded. If only sufficient force were used to eject the complainant's party without causing them any serious injury the plea of the right of private defence would, I am sure, have prevailed. It has been thought that this case has the effect of unduly narrowing the right.

Excessi
exercis
the rig

Whether more harm has been inflicted than was necessary for the purpose of defence is purely a question of fact. In the following cases it was held that the right was not exceeded :—

Right
exceeds

- (a) When a person finding a thief enter his house at night held him by his

face down and the latter died of suffocation (3 W. R. Cr. 12).

- (b) Where the accused struck a blow with a *lathi* causing death when he was attacked with a spear (11 W. R. Cr. 41).
- (c) Where accused gave a blow with *lathi* to a thief stealing crops which were frequently stolen (12 W. R. Cr. 15).
- (d) Where accused in resisting a sudden attack upon them for cutting their crops inflicted a wound with a bamboo from the effects of which the man died (14 W. R. Cr. 69).
- (e) Where a number of men attacked a kutchery in which there were cash and other properties of the zemindar, and one of the servants shot dead one of the assailants (22 W. R. Cr. 51).
- (f) Where the deceased struck a blow on the accused which felled him to the ground and the accused inflicted a blow on the head of the deceased fracturing his skull and causing death (13 C. W. N. 1180).

In the following cases it was held that the right of private defence had been exceeded :—

Right
exceeded

- (a) Where a thief was caught at night with half his body and his head inside the wall of a house and was struck with a pole five times on the neck. It was held that more harm was done than was necessary. The accused were convicted of culpable homicide not amounting to murder (6 W. R. 50).

- (b) Where accused wanted to construct a path through joint land belonging to himself and the deceased, and was stopped by the deceased which led to exchange of hot and violent words and the deceased wrested the *kodali* from the hands of the accused who having recovered it struck a violent blow driving the *kodali* right through the skull into the brain which resulted in death 18 days after, it was held that although the prisoner was justified in meeting force by force, he caused more injury than was necessary (6 W. R. Cr. 89).
- (c) Where deceased attempted to commit house-breaking by night, was subjected to gross maltreatment and strangled by the accused when he was fully in their power and helpless, it was held that there was no right of private defence (14 W. R. Cr. 68).
- (d) Where a gun was fired from a distance of five and twenty yards when there could not be any imminent danger to the party of the accused, the act was held not justified (17 W. R. Cr. 46).
- (e) Where a Head Constable unlawfully arrested one of a party of gipsies, and all of them turned out, some four or five being armed with sticks and stones and advanced in a threatening manner towards the Head Constable and were

fired with a gun and one of the gipsies was killed, and it appeared that the crowd would have retired if the gipsy who was arrested had been released, it was held that the right of private defence had been exceeded (3 All. 253).

(f) Where *A* caused crops to be sown on land, as to the enjoyment of which there was a dispute between her and *B*. Persons having proceeded to reap the crop on behalf of *B*, the servants of *A* went to the place with a police officer and some armed constables. The police officer ordered the reapers to leave off and disperse, but they did not do so, whereupon he ordered one of the constables to fire and he fired into the air. Some of the reapers remained and assumed a defiant attitude. The police officer without attempting to make any arrests and without warning the reapers that, if they did not desist, they would be fired at, gave orders to shoot and one of the constables fired and mortally wounded one of the reapers. It was held that there was no right of private defence as the police officer did not act with good faith (21 Mad. 249).

(g) Where the accused three of whom were armed with a sword, *garasa* (scythe) and a *lohanda* (iron stick) respectively and the rest with *lathies*, went in a

large body to the disputed land, where the labourers of the opposite party were reaping the crops, attacked them, fatally wounded one and severely injured another, it was held that the accused who ordered the attack and those who used the sword, *garasa* and *lohanda* had exceeded the right of private defence, and so also the others who continued in the unlawful assembly thereafter and aided and abetted the former (36 Cal. 296).

Where the right is exceeded and the injury caused is not justified, the person causing such injury is in the same position as if he had no right of private defence at all.

In cases of murder, however, an excessive exercise of the right reduces the offence to culpable homicide not amounting to murder (Section 300, Exception 2).

A careful study of the important decisions of the various High Courts on the question of the right of private defence, would show that though sometimes they appear to be conflicting, they are fairly in agreement on all essential questions of principle, the difference being generally due to the answer given, in view of the circumstances of each case, to the four questions which I have discussed. For instance, some Courts have held upon particular facts of the case before them that the information that an attack was contemplated was sufficiently definite, and that there was ample time to seek the protection of the authorities. In other cases a different inference has been drawn. In

some cases it has been inferred that the danger to property was sufficiently grave to justify the use of force, and that the injury caused was not more than what was necessary. A contrary view has been taken in some other cases. But these differences are differences in respect of inferences of facts drawn by Judges in particular cases. So far as the law is concerned there has been on the whole very little difference of opinion.

The five questions which I have discussed in connection with typical cases of land riots that arise so often in Bengal will serve to elucidate the principles which govern all cases relating to the right of private defence whether they arise upon attempts to commit criminal trespass on land or upon attempts to commit theft, robbery and other offences of the same kind in respect of movable property. The essential principles are the same in all.

The only other question of any difficulty that remains to be considered is the right of private defence against public servants when they purport to act in their official capacity.

Section 97, as you have seen, gives the right of private defence only against *offences* affecting the human body or certain *offences* against property. Therefore no right of private defence arises against any act done by a public servant in execution of his duties as such public servant even without the special provisions of Section 99, which are intended to protect only those acts of a public servant which, though not wholly illegal, are not strictly legal. There are cases where a public servant does something which the law does not

Right
against
public
servants.

authorise him to do, or does an act authorised by law without fulfilling the conditions upon which alone the law gives him such authority, or cases where by mistake he exercises his authority against the wrong person. In such cases if the act is one which is wholly unauthorised, a public servant is in the same position as a private individual. Where, however, he acts in good faith and under the colour of his office and the act is one not wholly unauthorised and yet not strictly legal, then he can claim the protection of the first clause of Section 99 unless the act reasonably causes the apprehension of death or of grievous hurt, in which case the person against whom the authority is sought to be exercised is not required to submit to anything which is not strictly legal.

That a public servant should enjoy some amount of immunity, even where he exceeds his authority, is obvious. It would be disastrous if an officer of a court could be assaulted with immunity, because he omitted certain non-essential formalities and his procedure was not quite regular. It will be equally disastrous, if a public servant were allowed recklessly to exercise his authority without proper care and caution, and in defiance of those provisions of the law which are intended to safe-guard the liberty of the subject. In a large number of cases the dividing line is not easy to discover. There are very few reported decisions on the subject in which any definite principle has been laid down for our guidance.

From this point of view the most important case in Bengal is that of *Bisu Halder v. The Emperor* (11 C. W. N. 836), where on the complaint of one

G that his wife was wrongfully confined by his father-in-law, a warrant was issued under Section 96, Cr. P. C., which is wholly inapplicable to cases of wrongful confinement. The Police attempting to execute this warrant at the house of the father-in-law was obstructed by him; it was held that the warrant being wholly illegal, Section 99 could not apply. Stephen and Coxe JJ. said: "The question then arises whether the resistance offered in this case comes within the terms contemplated by the first paragraph of Section 99 of the Code, the effect of which would be to deprive the petitioners of a right of private defence he would otherwise have, and this depends on the further question whether the conduct of the Police was not something more than 'not strictly justifiable by law' according to the words of the section, there being no question of their acting in good faith under colour of office. We think the provision of this section does not extend to the case. In Mr. Mayne's Commentary on Criminal Law, Section 225, it is stated that the words 'not strictly justifiable by law' seem to point to cases where there is an excess of jurisdiction, as distinct from a complete absence of jurisdiction, to cases where the official has done wrongly what he might have done rightly, not to cases where the act could not possibly have been done rightly. This seems to us to be a sound exposition of the law and to express exactly what has happened in this case and therefore Section 99 does not apply."

General principle.

This decision may be taken as an authoritative exposition of the principle applicable to cases of this kind. The difficulty, however, arises in

determining in particular cases whether the act falls within the one class or the other; or in other words whether the act is wholly and clearly unjustifiable or whether it was a mere irregularity not affecting the merits of the case.

The following are some of the more important cases in which the acts of public servants were held to be wholly illegal and without jurisdiction and as such not entitled to protection:—

- (a) Where a peon was under orders of a Forest Settlement Officer impressing carts for the use of the latter and was resisted. *In re the petition of Rakhmaji* (9 Bom. 538). Acts wh^o illegal.
- (b) Where a surveyor attempted to divide a joint property the subject of a Civil Court decree being deputed for the purpose by the Collector of the District—*Queen-Empress v. Tulsiram* (13 Bom. 168). Birdwood and Parsons JJ. observed: "The protection which extends to acts not strictly justifiable in law, does not extend to an act which is altogether illegal."
- (c) Where a police constable entered upon the premises of a person of suspicious character, and knocked at his door to ascertain if he was there—*Dorasamy Pillai v. Emperor* (27 Mad 52).

In the last case Bhashyam Ayyanger J. said: "The constable in entering upon the accused's dwelling house and knocking at his door at midnight with the intention of finding out whether

the accused, who is regarded as a suspected character by the police, was in his house, was technically guilty of housetrespass under Section 442 of the Indian Penal Code. The course adopted by the constable was certainly one which would cause annoyance to the inmates of the house, and is also insulting to the accused and under Section 104 the accused was justified in voluntarily causing to the complainant the slight harm he inflicted on him and the constable cannot be regarded under Section 99, Indian Penal Code, as acting in good faith."

(d) Where a vaccinator attempted forcibly to vaccinate a child against the wishes of its father and was assaulted. *Bahal v. Emperor* (28 All. 481). See also *Mangobind Muchi v. Empress* (3 C. W. N. 627).

(e) Where a constable went to search for purposes mentioned in Section 165, Cr. P. Code, without any written authority, *Idu Mondal v. Emperor* (6 C. L. J. 753).

(f) Where a police officer conducting a search outside his jurisdiction, with a constable who had jurisdiction, but who had no order from his own Sub-Inspector, was assaulted, it was held that no offence under Section 353 I. P. C. had been committed (13 A. L. J. 691).

(g) Where a *surveillance* on a domiciliary visit being paid to him by a police officer, refused to allow his thumb impression

to be taken and on the officer attempting to take it, produced a *lathi* saying he would not allow the impression to be taken and if any one asked for it he would break his head, it was held that Section 99 of the Penal Code applied to the case. *Birbal Khalifa v. Emperor* (30 Cal. 97).

(h) Where an excise Sub-Inspector attempted to search the house of a person on information of his being in possession of Gujrat Ganja which not being an excisable article the action of the excise officer in entering and searching the house of the petitioner was without legal authority, it was held that Section 99 of the Indian Penal Code could not protect the excise officer in such a case and an assault on him under the circumstances was no offence. *Jagarnath Mandhata* (1 C. W. N. 233).

Regarding the legality of warrants of arrests, attachment, etc., the law in England is thus stated—

"Arrest on a warrant for misdemeanour is not legal unless it is effected by or in the presence of the person named or designed thereon, and he has the warrant with him for production if necessary." (Russell 737). In a case in which a warrant was given to a constable to arrest *P*, which the constable gave to his son, who went in pursuit of *P*, the constable himself remaining behind at about a quarter of a mile and *P* gave a wound with a knife which, it appeared, he did not hold for resisting

Irregular
warrants.

English law.

illegal violence, Parke B. said: "The arrest was illegal as the father was too far off to be assisting in it; and there is no evidence that the prisoner had prepared the knife beforehand to resist illegal violence. If a person receives illegal violence, and he resists that violence with anything he happens to have in his hand, and death ensues, that would be manslaughter." (*R. v. Patience*, 7 C. & P. 775). But in order that the officer executing a warrant may claim protection for his act, it is necessary that the process should be legal. "It must not be defective in the frame of it, or bad on the face of it, and must issue in the ordinary course of justice from a Court or Magistrate having jurisdiction in the case" (Russell 738), but it is not necessary to show the validity of the proceeding prior to the grant of the warrant.

Then, again, the protection does not extend to an officer who arrests a person who is intended to be arrested, but whose name is not correctly stated in the warrant. Thus in a case where a Justice issued his warrant directing a constable to arrest *J. H.*, charged with stealing a mare, the constable arrested *R. H.*, who was the party against whom the warrant had been issued and who had been intended to be arrested and who had been supposed to be *J. H.*, his name being really *R. H.*, *J. H.* being his father's name, and the constable was resisted, Coltman J. told the jury that the law would not justify the constable's act, the warrant being against *J.* and not against *R.*, although *R.* was the party intended to be taken." (*Hoye v. Bush*, 1 M. & Gr. 775) (Russell, Vol. II, 739-40).

In another case in which the Christian name of the person intended to be taken was omitted without assigning any reason for the omission, the warrant was held to be bad (*R. v. Hood*, 1 Mood. 281) (Russell 740).

The law in England seems to be stricter in favour of the subject.

There are cases in which a warrant is wholly *ultra vires*, not being issued by any authority competent to issue such warrant, or as is more often the case, issued in the exercise of a power which does not exist in the particular case, or is so defective in form or the manner of its execution so reckless or improper as to render the proceeding wholly illegal. On the other hand, there are cases in which a warrant is issued by an authority competent to issue such warrant, but is only slightly defective in form or the manner of its execution is to a certain extent irregular, so that it could not be said that either the warrant or the procedure in execution was in strict conformity with law. The execution of a warrant falling within the first class is a wholly unauthorised act to which the law affords no protection. It is only to cases of the second kind that the law gives protection to the public officer concerned, provided he acts in good faith and without malice, and the mistake or omission does not unduly restrict the liberty of the subject. In all cases of irregularity the question of protection depends on the degree of irregularity.

Illegal
warrant.

In *Queen-Empress v. Jogendra Nath Mukerjee* (24 Cal. 320) where a District Magistrate issued a warrant for the arrest and production of a witness

for the purpose of giving evidence to an investigation held by the police, and in attempting to execute such warrant the police arrested the wrong person, and were assaulted in the attempt, it was held by Ghose and Gordon JJ., that there being no provision in the Code of Criminal Procedure whereby a Magistrate could issue a summons or warrant for the arrest of a person to be brought before a police officer to give evidence in an investigation before him, the warrant was illegal, and hence the conviction under Sections 143 and 186 could not be upheld. But generally irregular acts of public servants in connection with the execution of warrants have been held to be protected.

The following are some of the cases in which this principle has been adopted :—

- (a) Where a warrant issued for the arrest of a debtor under the provisions of Section 251 of Civil Procedure Code was initialled and not signed, as it should have been done under the law, and the officer executing the same was forcibly resisted—*Queen-Empress v. Janki Prasad* (8 All. 293). It was said by Oldfield J. that the act of the accused did not cease to be an offence on the ground that the act was done in the exercise of the right of private defence, as there is no such right under Section 99 of the Indian Penal Code against an act done or attempted to be done by a public servant acting in good faith under

Warrants
not strictly
legal protec-
ted.

colour of his office, though the act may not be strictly justifiable by law.

- (b) Where a man was arrested by some police officers without having the warrant with them and without the warrant being duly endorsed to them and the man arrested was rescued by the accused who caused hurt to two constables—*Queen-Empress v. Dalip* (18 All. 246). In this case the Court whilst holding that the arrest was illegal was of opinion that the accused could not claim the right of private defence, inasmuch as they were acting in good faith and under the colour of their office.
- (c) Where a Sub-Inspector of Salt and Abkari attempted, without a search warrant, to enter a house in search of property, the illicit possession of which is an offence under the Madras Abkari Act, and was obstructed and resisted where it was not shown that the officer was acting otherwise than in good faith and without malice—*Queen-Empress v. Pukot Kotu* (19 Mad. 349).
- (d) Where a warrant of distress had been issued for the attachment of the property of defaulters who had failed to pay a house tax, and the officer executing the warrant attached a bucket, a spade belonging to the defaulting potter, although the attachment of

such properties was illegal. *Queen-Empress v. Poomalai Udayan* (21 Mad. 296). Subramania Ayyar and Davies JJ. in considering whether the circumstances justified the resistance said: "We clearly think that it did not, as the act, however irregular or illegal it may have been, was the act of a public servant acting in good faith under the colour of his office, and against such an act the accused had no right of self-defence under Section 99 of the Indian Penal Code, inasmuch as there was no apprehension of death or of grievous hurt." The remarks in this case are somewhat broader than the words of the Section would seem to justify.

- (e) Where a proclamation had been issued for the attachment of the property of certain absconding persons, and during the attachment an objection was raised that the property attached did not belong to the absconders, and the accused assuming a threatening attitude prevented the police officer from attaching the property—*Bhai Lal Chowdhury v. Emperor* (29 Cal. 417). Prinsep and Stephen JJ. said: "We may add with reference to the facts found in the case that even supposing that the property attached was not the property of the absconders, the rightful owner had no right

of private defence of his property, inasmuch as the evidence shows that the police officer was acting in good faith under colour of his office, and even supposing that the order of attachment might not have been properly made, that would in itself be no sufficient ground. The law, as expressed in Section 99, Explanation 2 of the Indian Penal Code, is clear on this point."

- (f) Where an order was made to the police purporting to be under Section 145 of the Criminal Procedure Code directing them to take charge of some crops in dispute, and the police went to the spot where the crop was stored and proposed to guard it, and the accused and some men of their party put them into confinement—*Bhola Mahto v. Emperor* (9 C. W. N. 125).

It was observed that although the order may not have been strictly lawful, the action of the accused was violently aggressive and not merely self-protection.

The question as to what constitutes good faith was raised in the case of *Bhawoo Jivaji v. Mulji Dayal* (12 Bom. 377). There the accused, a police constable, was on duty one morning and about 7 A.M., he saw the complainant carrying under his arm three pieces of cloth. Suspecting that the cloth was stolen property, he went up to the

Good faith

complainant and questioned him, and getting an answer which he considered to be unsatisfactory he took hold of one of the pieces to examine it more closely. The complainant objected and there was a scuffle between them, and the accused arrested the complainant. Birdwood and Farran J.J. said: "If he had an honest suspicion, as we think he had, even though the same facts might not have raised any suspicion in the mind of a police officer of higher grade, still he acted, we think, with due care putting in questions, the answers to which might clear away his suspicion. The putting of questions under these circumstances was in itself an indication of good faith as defined in Section 52, Indian Penal Code.....He himself, as we think, believed that he was legally justified in detaining the cloth; and though he was entirely mistaken as to the character of the complainant, we think that his belief as to his legal right was a *bona fide* belief and that he is protected by Section 79, Indian Penal Code. If he acted with due care and attention, such as ought to be expected from a constable in his position, in the circumstances in which he was placed, then he acted in good faith; and even though his act might not have been strictly justifiable by law that is, even though there might not have been a complete basis of fact to justify a reasonable suspicion that the cloth was stolen property—still the complainant had no right of private defence, as the accused was a public servant acting under colour of his office, and his act was not one which caused the apprehension of death or of grievous hurt."

There are numerous cases in which convictions under section 186 have been set aside by reason of slight defects in the warrants or irregularity in the procedure, but the considerations that arise in dealing with cases under that section are materially different and do not help in the interpretation of section 99. Decisions under section 353 have however a more direct bearing on the provisions of section 99 relating to public servants.

Section 186
and 353 Dis-
tinguished.

CHAPTER XIII.

THE TRIAL.

In my previous lectures I have discussed the principles relating to the substantive law of crimes. In my introductory lecture, I have explained to you what crimes are and how they differ from civil injuries. I have told you that a crime must be an act or an omission and that an omission to be punishable must be one in breach of a legal duty, I have explained what those omissions are, what is meant by an act that an act or omission must be that of a rational human being capable of distinguishing right from wrong, and that the criminal act must be the outcome of an evil intent. Incidentally I have discussed the question of the liability of corporations for crimes. I have tried at some length to explain to you what evil intent means, and in Lecture III, I have discussed the question of inchoate crimes, and have told you that ordinarily a mere intention or even a preparation to commit a criminal act is not punishable, and that among inchoate acts what is punishable is an attempt, which in the technical sense in which it is used in criminal law is something representing a stage after preparation. I have dealt at some length upon the difference between attempts and preparations. I have also explained to you in this connection the meaning of abetments and conspiracies to commit crimes. I have devoted the whole of the fifth lecture to an explanation of *mens rea* as a necessary ingredient

in crimes, and have discussed the circumstances in which *mens rea* may be imputed to a person charged with a criminal act. I have then attempted to explain in some detail the meaning of the various terms used in the Indian Penal Code to denote the *mens rea* for various classes of offence defined in the Code.

In Lectures VII, VIII and IX, I have dealt with the provisions of Chapter IV of the Code which may be said generally to deal with matters which negative *mens rea* or in other words with the conditions of non-imputability. In connection with the Chapter of General Exceptions I have dealt with the following matters :—

- (1) Mistakes of law and fact. Sections 76 and 79.
- (2) Exemption from liability of judicial officers and those acting under their orders. Sections 77-78.
- (3) Accident. Section 80.
- (4) Harm caused to prevent greater harm. Section 81.
- (5) Mental incapacity—
 Infancy—Sections 82 and 83.
 Insanity—Section 84.
 Drunkenness—Sections 85 and 86.
- (6) Consent. Sections 87, 88, 89, 90, 91 & 92.
- (7) Compulsion. Section 94.
- (8) Acts causing slight harm. Section 95.
- (9) Right of private defence. Sections 96-104.

As the last question is one of great importance I have dealt with this separately in Lecture XII, and have for a better understanding of the subject

devoted a lecture explaining the meaning of possession in criminal law.

In these twelve lectures all the important questions of principle have come under consideration.

When the principles governing the Law of Crimes are understood the next thing to consider is the method of trial.

In India there is no division of crimes between treasons, felonies and misdemeanours. There is only a division between Summons cases and Warrant cases. A warrant case is the case of an offence punishable with death, transportation or imprisonment for a term exceeding six months (Section 4 clause *w*). All other cases are Summons cases.

The
Complaint.

There are some cases in which the party injured must himself complain otherwise the court cannot take cognizance in the case. These are offences relating to contracts of service, those relating to marriage or defamation. There are certain other offences of a political character in which the sanction of the Local Government is necessary for initiating criminal proceedings. Then there are certain other offences relating to proceedings in courts of Justice or which concern public servants which cannot be entertained by a Magistrate without the sanction of the Court or without the complaint of the public servant concerned (Section 195). In the last mentioned cases Civil and Revenue Courts are also authorised to send offenders for trial to the nearest Magistrate at their own instance.

Subject to these provisions of the Code a Magistrate can take cognizance of an offence in one

of the three ways mentioned in section 190 of the Criminal Procedure Code, *i.e.*—

- (a) Upon a complaint
- (b) Upon a police report.
- (c) Upon information from any person other than a police officer or upon the Magistrate's own information.

In a case instituted upon complaint the Court first examines the complainant and then makes any further inquiry that it thinks necessary, and then either dismisses the complaint or issues process against the accused. When the accused appears if the case is one triable exclusively by the Court of Sessions, the Magistrate holds an inquiry and if a *prima facie* case is made out he commits the case for trial to the Court of Sessions and the accused is tried there, generally, with the aid of a Jury, and in a few Districts with the aid of Assessors.

The procedure in the trial of summons and warrant cases is slightly different. In a summons case the Magistrate is not bound to frame a charge but it is sometimes done and the accused is asked as soon as he appears if he is guilty and if he admits his guilt he is convicted and sentenced forthwith; but if he does not admit then evidence is taken on behalf of the prosecution and also such evidence as the accused may choose to adduce. The Magistrate then, as a rule, examines the accused without administering an oath to him after which he either acquits or convicts and passes sentence. In cases instituted on complaint if on the day fixed or on any adjourned date of hearing the complainant is absent, the accused is acquitted. In cases of frivolous and vexatious charges

Principle
oath to
accused.

instituted on complaint or on information to a police officer or to a Magistrate, the Magistrate may on acquitting the accused direct the payment of compensation to him. This power is common to both Summons and Warrant cases.

The procedure in warrant cases is somewhat different. Being of a more serious character the accused is entitled to know the precise charge that he has to meet. So long as he does not know, he can not be called upon to enter on his defence, and obviously the precise nature of the charge can not be indicated until the Magistrate knows what the evidence is. The result therefore is that whereas in a summons case the accused is asked to plead at the very beginning, he is not asked to do so in a warrant case. When he appears the evidence for the prosecution is first recorded. The Magistrate then examines the accused, the object of such examination being to give the accused an opportunity of explaining away any circumstance that may appear against him in the evidence. The Magistrate may then if he has not already discharged the accused, discharge him, if in his opinion there is not sufficient evidence for framing a charge against him; but if the evidence is sufficient the Magistrate frames a charge. If he thinks the case against the accused is not established he may at any stage discharge him, but if he comes to that conclusion after the charge is framed he acquits the accused. An order of discharge may be set aside by a superior Court but an order of acquittal can only be set aside by the High Court.

Accused as
a witness.

The charge must contain the following particulars:— The Charge

- (a) The offence with which the accused is charged is to be described by name, if any, and by the Section of the Code under which it falls.
- (b) Particulars as to time and place of the offence alleged, the person against whom or the thing in respect of which it was committed and such other matters as may be sufficient to enable the accused to know the precise charge which he has to meet.

If the charge is defective, a conviction based upon such a charge may be set aside by a court of appeal or revision if the defect did in fact mislead the accused and has occasioned a failure of justice. But before judgment is pronounced the charge may always be altered or amended. When a charge is framed the accused then enters upon his defence. He is asked to say whether he is guilty or has a defence to make. He is not bound to answer any questions. It is his privilege to stand mute if he chooses. Even if he pleads guilty the law, in its tenderness towards an accused person, leaves it to the discretion of the Magistrate to convict the accused upon his own plea or not to do so. If the accused refuses to plead or does not plead or claims to be tried, he is asked whether he wishes to cross examine the witnesses for the prosecution. He has this right even if he has cross examined the witnesses before charge, and the only ground upon which this right can be

refused, is that it is made for the purpose vexation or delay. Accused then, if he chooses, calls evidence in his defence and in doing so is entitled to all reasonable assistance of the court. If the Magistrate finds the accused not guilty, he acquits the accused, but if he finds him guilty he convicts and sentences him.

Discharge.

An order of discharge is no bar to a fresh trial on the same facts. In a warrant case the absence of the complainant does not put an end to the trial except where the offence is compoundable, in which case it is in the discretion of the Magistrate to discharge the accused at any time before the charge is framed. What offences are compoundable are stated in section 345 of the Criminal Procedure Code. In a summons case there is no distinction between a discharge and an acquittal.

Nolle
Prosequi.

It is the right of the Crown at any stage of a trial but before judgment is pronounced, to enter a *nolle prosequi*. Section 333 gives the power to the Advocate-General in cases tried before the High Court. In other cases the Public prosecutor performs a similar function, (Section 494).

There are certain offences which are triable summarily as provided for in Chapter XXII of the Criminal Procedure Code.

In cases triable by the High Court or the Court of Sessions there is an enquiry by a Magistrate preliminary to commitment. When committed the accused is tried either with the aid of assessors or with the aid of a Jury. The Judge is not bound to accept the opinion of assessors, but he can not convict or acquit an accused against the opinion of

a Jury or a majority of the Jurors as the case may be. If he differs he refers the case to the High Court.

He is not in any case bound to accept the verdict. But in cases tried by the High Court the Judge is bound to accept the unanimous verdict of the Jury or the opinion of the majority when divided in the proportion of 6 : 3.

The Crown as well as the accused have the absolute right of challenging a certain number of Jurymen in trials before the High Court, but for the Mufassil this can only be done on good cause shown. In a trial by Jury when the evidence is closed the case is argued on behalf of the prosecution and defence. If the accused adduces no evidence he has the last word. When the arguments are over the Judge charges the Jury, summing up the evidence for the prosecution and defence and laying down the law.

The Judge is required in a Jury trial to record only the heads of charge to the Jury. Judges of the High Court are not bound to make any such record. The Jury is bound by the directions of the Judge regarding all questions of law, but as to facts they are the sole Judges. The Judge decides all questions of law including questions as to admissibility of documents, their construction and other matters mentioned in Section 298 Criminal Procedure Code.

An appeal lies to the High Court from a conviction in Sessions Cases both on questions of law and fact, but in the case of trial by a Jury an appeal lies only on questions of law. A question of sentence is a question of law. The local Government has

Sec. 418.

the right of appeal even in cases tried by a Jury and the appeal lies both on questions of law and fact. The accused has the right of appeal in some cases but not in all (Chap. XXXI). A sentence of death can not be carried into execution without confirmation by the High Court whether the accused appeals or not. The matter always comes upon a reference under section 307 and even when the trial is by Jury, the High Court has to consider the case both on law and facts.

Evidence.

This is a very general summary of the procedure at the trial. The evidence in criminal cases must as a rule, be recorded in the presence of the accused. Evidence recorded by one Magistrate cannot be used by another if the accused insists on a trial *de novo* (Sec. 350).

The question of evidence in criminal cases requires special consideration. Although the provisions of the Evidence Act, where there is no indication to the contrary, apply both to evidence in civil and criminal cases, there is a marked difference between the two regarding the method of its treatment. First, as regards the quantum of evidence, whereas a mere preponderance of probability due regard being had to the burden of proof, is a sufficient basis of decision, in criminal cases a much higher degree of assurance is required. There is first the general presumption of innocence which has to be rebutted in every case. This is not an artificial rule of law, but is founded on the undoubted fact established by universal experience that the human mind is naturally averse to crimes and that

the graver the offence the greater is the aversion. The most confirmed pickpocket may not hesitate to commit an act of theft, but however depraved he may be, he would still retain an aversion to kill a child for the sake of its ornaments. Naturally the degree of evidence required to convince the mind must vary in proportion to the gravity of the offence charged. The graver the crime, the clearer and the plainer ought to be the proof of it. This seems to be common sense. It is a principle upon which we act in the ordinary concerns of our life. We take greater care and insist on greater satisfaction when we purchase a horse than we do when purchasing a sheep and very much more care when purchasing a piece of valuable land. Theoretic objections have however been raised to the application of the principle by an eminent Judge, who said—

“.....Nothing will depend upon the comparative magnitude of the offence ; for be the alleged crime great or small, every man standing in the situation in which the prisoner is placed, is entitled to have the charge against him clearly and satisfactorily proved.” *R. v. Ings.* 33 St. Tr. 1135.

The next point for consideration is the infinitely greater misery and suffering which the sentence of a criminal Court entails than the decree of a Civil Court. In the former often a man's life is at stake whereas in the latter it is only his property. These considerations have given rise to the well known maxim of law that it is better that ten guilty men should escape than that one innocent man should suffer (Per Holyroyd J. in *Sara Hobson's Case*).

Onus of
Proof.

The principles enunciated above have greatly influenced the rules relating to the onus of proof and degree of certainty required for a conviction in criminal cases. It has been laid down repeatedly and has never been questioned, that though in civil cases a mere preponderance of evidence would suffice that is not enough for criminal cases. Probability may constitute sufficient ground for a verdict and if the matter is doubtful the Jury may found their verdict upon that which appears the most probable. Willes J. in *Cooper v. Slade* (6 H. L. C. 77).

'What is necessary in such cases' said Baron Parke in *R. v. Sterne* (Sum. Ass. 1843 M. S.) 'is such moral certainty as convinces the mind of the tribunal as reasonable men beyond all doubt.'

The same principle has been enunciated in various cases in India.

Sir Elijah Impey C. J. in charging the Jury in *Nanda Coomar's* case observed:—"You will consider on which side the weight of evidence lies, always remembering that in criminal and more especially in Capital cases you must not weigh the evidence in a golden scale; there ought to be a great difference of weight in the opposite scale before you find the prisoner guilty."

In *Reg. v. Madhab Chandra* (21 W. R. cr. 13) better known as the Mohunt of Tarakeswar's case. "It seems to me" said Birch J. "that the only distinction, if any, which can be drawn between civil and criminal cases as to the amount of proof requisite is this. In ordinary Civil Cases a Judge of fact must find for the party in whose favour there is a preponderance of proof, although the

evidence be not entirely free from doubt. In criminal cases no weight of preponderant evidence is sufficient short of that which excludes all reasonable doubt. The party accused is entitled to the benefit of the legal presumption in favour of innocence, and in doubtful cases that may suffice to turn the scale in his favour, the burden of proof is undoubtedly upon the prosecutor; if upon such proof as he adduces there is reasonable doubt remaining, the accused is entitled to the benefit of it."

The doubt however is not the doubt of a timid and vacillating mind, but an honest and conscientious doubt. In no country, much less in India, does a court of justice meet a case where the evidence makes an inference of guilt absolutely certain and the law does not require that degree of certainty but reasonable certainty is all that is necessary—such certainty upon which one would act in his own grave and important concerns. L. C. Baron Pollock in *Reg. v. Manning*.

The prisoner being put on his trial for a criminal offence it is for the prosecution to make out a distinct case against him; not for the prisoner in the first instance to justify himself and show that he had just and lawful grounds. The prosecution must establish everything essential for the establishment of the charges and the inculcating facts must be shown to be inconsistent with the hypothesis of innocence.

Where for instance it was established that a criminal act was committed either by A or B in the absence of definite proof that any one of them in particular was responsible for the act, the

benefit of the doubt would be given to both and both would be acquitted. (*Nibaran Chandra Roy v. King-Emperor*, 11 C. W. N. 1085).

It is also a rule of law dictated by considerations such as those I have already stated that a penal statute must be strictly construed. In *R. v. Bond* (1 B. & Ald. 390 at 392) Abbot J. said "It would be extremely wrong that a man should, by a long train of conclusions be reasoned into a penalty when the express words of the Act of Parliament do not authorise it."

Willes J. said in *Britt. v. Robinson* (L. R. 5 C. and P. 503 at 513) "That criminal enactments are not to be extended by construction and that when an offence against the law is alleged and when the court has to consider whether the alleged offence falls within the language of a criminal Statute, the court must be satisfied not only that the spirit of the legislative enactment has been violated but also that the language used by the legislature includes the offence in question and makes it criminal." These cases were referred to and the principle underlying them was applied by Pontifex and Field JJ. in the case of *Empress v. Kola Lalang* (8 Cal. 214).

As regards guilty knowledge that is often incapable of direct proof and has to be inferred from surrounding circumstances, the presumption being that every man knows the consequences of his own act. The first thing to establish is that an offence has been committed or in other words that the *corpus delicti* has been proved. It is then and then alone that the question whether the offence was committed by a particular person at all arises; e.g.,

in a case of theft it must be shown that some thing has been stolen; or in a case of murder that some person has been killed. "This" says Stephen in his Introduction to the Indian Evidence Act "is the foundation of the well-known rule that the *corpus delicti* should not in general in criminal cases be inferred from other facts, but should be proved independently." As observed by Norman J. in *Queen v. Ahmed Ally* (11 W. R. cr. 27). "Every criminal charge involves two things: *first*, that a crime has been committed; and *secondly*, that the accused is the author of it. It is almost a universal rule that crime is not to be presumed "*Diligenter cavendum est iudice suppleacem picipite antequam crimine constiterit.*" If a criminal fact is ascertained,—an actual *corpus delicti* established presumptive proof is admissible to fix the crime, remembering at the same time that criminal intent or knowledge is not necessarily imputable to every body who acts against the law. "Has the Crown proved substantively that he had a guilty knowledge? The Sessions Judge says that every man must be presumed to know the law. So he must in a certain sense. But it does not follow that criminal intent or knowledge is necessarily to be imputed to every man who acts contrary to the law" (Per Macpherson J. in *Queen v. Nobokisto Ghose*, 8 W. R. cr. 87 at 92).

It is a settled rule that it is unsafe to convict Accomplices on the uncorroborated testimony of an accomplice, it is not a rule of law, but only a rule of practice, which is said to have all the reverence of law, evolved out of a long course of judicial experience. An accomplice is a guilty associate in a crime.

The same principle applies to a person, who knows of a crime being intended or committed, but takes no steps to prevent it or to disclose it. The corroboration must be by independent evidence, connecting the accused with the crime. One accomplice cannot be corroborated by another. As I have said this is a rule of practice only so that if a Jury convict upon the uncorroborated testimony of an accomplice the conviction is not against law and cannot be set aside on appeal. But if the judge fails to caution the Jury that would amount to a misdirection.

Confession.

A confession made by an accused person if caused by any inducement, threat or promise, proceeding from a person in authority is wholly inadmissible. Confessions to be admissible must be voluntary. A confession is not defined in the Evidence Act, but the definition suggested by Sir James Stephen, the author of the Act, is this "A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed the crime." A confession made to a Police Officer cannot be proved as against a person accused of any offence, and no confession made by a person whilst he is in the custody of a police officer is admissible, unless it is made in the immediate presence of a Magistrate. But when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not as relates distinctly to the fact thereby discovered, may be proved.

The confession of an accused even when voluntary is only evidence against him, not evidence against others, even when on trial with the accused unless the confession is such that the accused thereby implicates himself to the same extent as he implicates the others. Where he tries to minimise his own share in the criminal act, the confession cannot be considered against the co-accused. The same rule applies to a statement made by an accused in the course of his examination at the trial. It is common experience that accused persons often retract a confession after having made it, and courts generally refuse to place any reliance upon such retracted confession except against the person making it. The accused can never be examined on oath nor can he be cross-examined. Even the Court cannot compel him to answer any questions.

The rule is different in France, but in England the law has been altered by the Criminal Evidence Act 1898 and the accused is a competent though not a compellable witness. There is a suggestion to introduce a similar rule of law in this country.

That an accused person is of good character is relevant, but unless such evidence has been given in a case, the fact that he has a bad character is irrelevant.

There is nothing exactly of the nature of the doctrine of *Res-Judicata* applicable to Criminal Cases. But there is the principle of *autrefois acquit*, which forbids any person being put to jeopardy for the same act twice over. There are limitations to this rule which will be found in Sec. 403 of the Cr. P. Code.

*Autrefois
acquitt.*

Sentence.

Lastly of the question of sentence. In all systems of modern law a wide latitude is given to the courts in this matter. It is one of the most unsatisfactory features of the law as introducing a large element of uncertainty in the administration of criminal justice. Attempts to standardise sentences have hitherto met with little success. In the Indian Penal Code the only instance of a fixed sentence is to be found in section 302, (murder). In cases of murder there are only two alternative sentences which a court is competent to pass, namely, a sentence of death or transportation for life.

Under Section 401 the Governor-General in Council or the Local Government is authorised conditionally or unconditionally to suspend the execution of any sentence passed by any court or remit the whole or part of any such sentence.

ERRATA.

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