MISCELLANEOUS WORKS

OF

LORD MACAULAY

EDITED BY HIS SISTER

LADY TREVELYAN

IN FIVE VOLUMES

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INDIAN PENAL CODE.

TO THE RIGHT HONORABLE GEORGE LORD AUCKLAND, G.C.B., GOVERNOR-GENERAL OF INDIA IN COUNCIL.

My Lord,—The Penal Code which, according to the orders of government of the 15th of June, 1835, we had the honor to lay before your Lordship in Council on the 2d of May last has now been printed under our superintendence, and has, as well as the Notes, been carefully revised and corrected by us while in the press.

The time which has been employed in framing this body of law will not be thought long by any person who is acquainted with the nature of the labor which such works require, and with the history of other works of the same kind. We should, however, have been able to lay it before your Lordship in Council many months earlier but for a succession of unfortunate circumstances against which it was impossible to provide. During a great part of the year 1836, the Commission was rendered almost entirely inefficient by the ill-health of a majority of the members; and we were altogether deprived of the valuable services of our colleague, Mr. Cameron, at the very time when those services were most needed.

It is hardly necessary for us to entreat your Lordship in Council to examine with candor the work which we now submit to you. To the ignorant and inexperienced, the task in which we have been engaged may appear easy and simple.

But the members of the Indian government are doubtless well aware that it is among the most difficult tasks in which the human mind can be employed; that persons placed in circumstances far more favorable than ours have attempted it with very doubtful success; that the best codes extant, if malignantly criticised, will be found to furnish matter for censure in every page; that the most copious and precise of human languages furnish but a very imperfect machinery to the legislator; that, in a work so extensive and complicated as that on which we have been employed, there will inevitably be, in spite of the most anxious care, some omissions and some inconsistencies; and that we have done as much as could reasonably be expected from us if we have furnished the government with that which may, by suggestions from experienced and judicious persons, be improved into a good code.

Your Lordship in Council will be prepared to find in this performance those defects which must necessarily be found in the first portion of a code. Such is the relation which exists between the different parts of the law that no part can be brought to perfection while the other parts remain rude. The penal code cannot be clear and explicit while the substantive civil law and the law of procedure are dark and confused. While the rights of individuals and the powers of public functionaries are uncertain, it cannot always be certain whether those rights have been attacked or those powers exceeded.

Your Lordship in Council will perceive that the system of penal law which we propose is not a digest of any existing system, and that no existing system has furnished us even with a groundwork. We trust that your Lordship in Council will not hence infer that we have neglected to inquire, as we are commanded to do by Parliament, into the present state of that part of the law, or that in other parts of our labors we are likely to recommend unsparing innovation, and the entire sweeping-away of ancient usages. We are perfectly aware of the value of that sanction which long prescription and national feeling give to institutions. We are perfectly aware that law-givers ought not to disregard even

the unreasonable prejudices of those for whom they legislate. So sensible are we of the importance of these considerations that, though there are not the same objections to innovation in penal legislation as to innovation affecting vested rights of property, yet, if we had found India in possession of a system of criminal law which the people regarded with partiality, we should have been inclined rather to ascertain it, to digest it, and moderately to correct it than to propose a system fundamentally different.

But it appears to us that none of the systems of penal law established in British India has any claim to our attention, except what it may derive from its own intrinsic excellence. All those systems are foreign. All were introduced by conquerors differing in race, manners, language, and religion from the great mass of the people. The criminal law of the Hindoos was long ago superseded, through the greater part of the territories now subject to the Company, by that of the Mahometans, and is certainly the last system of criminal law which an enlightened and humane government would be disposed to revive. The Mahometan criminal law has in its turn been superseded, to a great extent, by the British Regulations. Indeed, in the territories subject to the Presidency of Bombay, the criminal law of the Mahometans, as well as that of the Hindoos, has been altogether discarded, except in one particular class of cases; and even in such cases it is not imperative on the judge to pay any attention to it. The British Regulations, having been made by three different legislatures, contain, as might be expected, very different provisions. Thus, in Bengal, serious forgeries are punishable with imprisonment for a term double of the term fixed for perjury;* in the Bombay Presidency, on the contrary, perjury is punishable with imprisonment for a term double of the term fixed for the most aggravated forgeries;† in the Madras Presidency, the two offences are exactly on the same footing.‡ In the Bombay Presidency, the escape of a convict

* Bengal Regulation XVII. of 1817, section ix.

† Bombay Regulation XIV. of 1827, sections xvi. and xvii.

‡ Madras Regulation VI. of 1811, section iii.

is punished with imprisonment for a term double of the term assigned to that offence in the two other presidencies;* while a coiner is punished with little more than half the imprisonment assigned to his offence in the other two presidencies.† In Bengal, the purchasing of regimental necessaries from soldiers is not punishable except at Calcutta, and is there punishable with a fine of only fifty rupees.‡ In the Madras Presidency, it is punishable with a fine of forty rupees.§ In the Bombay Presidency, it is punishable with imprisonment for four years.‖ In Bengal, the vending of stamps without a license is punishable with a moderate fine; and the purchasing of stamps from a person not licensed to sell them is not punished at all.¶ In the Madras Presidency, the vendor is punished with a short imprisonment; but there also the purchaser is not punished at all.** In the Bombay Presidency, both the vendor and the purchaser are liable to imprisonment for five years, and to flogging.††

Thus widely do the systems of penal law now established in British India differ from each other; nor can we recommend any one of the three systems as furnishing even the rudiments of a good code. The penal law of Bengal and of the Madras Presidency is, in fact, Mahometan law, which has gradually been distorted to such an extent as to deprive it of all title to the religious veneration of Mahometans, yet which retains enough of its original peculiarities to perplex and encumber the administration of justice. In substance it now differs at least as widely from the Mahometan penal law as

* Bombay Regulation XIV. of 1827, section xxiv., and Regulation V. of 1831, section i. Bengal Regulation XII. of 1818, section v. clause 1. Madras Regulation VI. of 1822, section v. clause 2.

† Bombay Regulation XIV. of 1827, section xviii. Bengal Regulation XVII. of 1817, section ix. Madras Regulation II. of 1822, section v.

‡ Calcutta Rule, Ordinance and Regulation, passed 21st August, registered 13th Nov., 1821.

§ Madras Regulation XIV. of 1832, section ii. clause 1.

‖ Bombay Regulation XXII. of 1827, section xix.

¶ Bengal Regulation X. of 1829, section ix. clause 2.

** Madras Regulation XIII. of 1816, section x. clause 10.

†† Bombay Regulation XVIII. of 1827, section ix. clause 1.

the penal law of England differs from the penal law of France. Yet technical terms and nice distinctions borrowed from the Mahometan law are still retained. Nothing is more usual than for the courts to ask the law officers what punishment the Mahometan law prescribes in a hypothetical case, and then to inflict that punishment on a person who is not within that hypothetical case, and who by the Mahometan law would be liable either to a different punishment or to no punishment. We by no means presume to condemn the policy which led the British government to retain, and gradually to modify, the system of criminal jurisprudence which it found established in these provinces. But it is evident that a body of law thus formed must, considered merely as a body of law, be defective and inconvenient.

The penal law of the Bombay Presidency is all contained in the Regulations; and is almost all to be found in one extensive Regulation.* The government of that presidency appears to have been fully sensible of the great advantage which must arise from placing the whole law in a written form before those who are to administer and those who are to obey it; and, whatever may be the imperfections of the execution, high praise is due to the design. The course which we recommend to the government, and which some persons may perhaps consider as too daring, has already been tried at Bombay, and has not produced any of those effects which timid minds are disposed to anticipate even from the most reasonable and useful innovations. Throughout a large territory, inhabited, to a great extent, by a newly conquered population, all the ancient systems of penal law were at once superseded by a code, and this without the smallest sign of discontent among the people.

It would have given us great pleasure to have found that code such as we could with propriety have taken as the groundwork of a code for all India. But we regret to say that the penal law of the Bombay Presidency has over the penal law of the other presidencies no superiority, except

* Bombay Regulation XIV. of 1827.

that of being digested. In framing it, the principles according to which crimes ought to be classified and punishments apportioned have been less regarded than in the legislation of Bengal and Madras. The secret destroying of any property, though it may not be worth a single rupee, is punishable with imprisonment for five years.* Unlawful confinement, though it may last only for a quarter of an hour, is punishable with imprisonment for five years.† Every conspiracy to injure or impoverish any person is punishable with imprisonment for ten years;‡ so that a man who engages in a design as atrocious as the Gunpowder Plot, and one who is party to a scheme for putting off an unsound horse on a purchaser, are classed together, and are liable to exactly the same punishment. Under this law, if two men concert a petty theft, and afterwards repent of their purpose and abandon it, each of them is liable to twenty times the punishment of the actual theft.§ All assaults which cause a severe shock to the mental feelings of the sufferer are classed with the atrocious crime of rape, and are liable to the punishment of rape; that is, if the courts shall think fit, to imprisonment for fourteen years.‖ The breaking of the window of a house, the dashing to pieces a china cup within a house, the riding over a field of grain in hunting, are classed with the crime of arson, and are punishable, incredible as it may appear, with death. The following is the law on the subject, "Any person who shall wilfully and wrongfully set fire to or otherwise damage or destroy any part of a dwelling-house or building appertaining thereto, or property contained in a dwelling-house, or building or enclosure appertaining thereto, or crops standing or reaped in the field, shall be liable to any of the punishments specified in section iii. of this Regulation."¶ The section to which reference is made contains a list of the pun-

* Regulation XIV. of 1827, section xlii. clause 2.
† Regulation XIV. of 1827, section xxxiii. clause 1.
‡ Regulation XVII. of 1828.
§ Regulation XIV. of 1827, section xxxix.
‖ Regulation XIV. of 1827, section xxix. clause 1.
¶ Regulation XIV. of 1827, section xlii. clause 1.

ishments authorized by the Bombay code, and at the head of that list stands "Death."

But these errors, the effects probably of inadvertence, are not, in our opinion, the most serious faults of the penal code of Bombay. That code contains enactments which it is impossible to excuse on the ground of inadvertence—enactments the language of which shows that when they were framed their whole effect was fully understood, and which appear to us to be directly opposed to the first principles of penal law. One of the first principles of penal law is this, that a person who merely conceals a crime after it has been committed ought not to be punished as if he had himself committed it. By the Bombay code, the concealment after the fact of murder is punishable as murder; the concealment after the fact of gang-robbery is punishable as gang-robbery;* and this, though the concealment after the fact of the most cruel mutilations, and of the most atrocious robberies committed by not more than four persons, is not punished at all.

If there be any distinction which more than any other it behooves the legislator to bear constantly in mind, it is the distinction between harm voluntarily caused and harm involuntarily caused. Negligence, indeed, often causes mischief, and often deserves punishment. But to punish a man whose negligence has produced some evil which he never contemplated as if he had produced the same evil knowingly and with deliberate malice is a course which, as far as we are aware, no jurist has ever recommended in theory, and which we are confident that no society would tolerate in practice. It is, however, provided by the Bombay code that the "unintentional commission of any act punishable by that code shall be punished according to the court's judgment of the culpable disregard of injury to others evinced by the person committing the said act; but the punishment for such unintentional commission shall not exceed that prescribed for the offence committed."†

* Regulation XIV. of 1827, section i. clause 1.

† Regulation XIV. of 1827, section i. clause 8.

We have said enough to show that it is owing not at all to the law, but solely to the discretion and humanity of the judges, that great cruelty and injustice is not daily perpetrated in the Criminal Courts of the Bombay Presidency.

Many important classes of offences are altogether unnoticed by the Bombay code; and this omission appears to us to be very ill supplied by one sweeping clause, which arms the courts with almost unlimited power to punish as they think fit offences against morality, or against the peace and good order of society, if those offences are penal by the religious law of the offender.* This clause does not apply to people who profess a religion with which a system of penal jurisprudence is not inseparably connected. And from this state of the law some singular consequences follow. For example, a Mahometan is punishable for adultery: a Christian is at liberty to commit adultery with impunity.

Such is the state of the penal law in the Mofussil. In the mean time the population which lives within the local jurisdiction of the courts established by the Royal Charters is subject to the English Criminal Law, that is to say, to a very artificial and complicated system—to a foreign system—to a system which was framed without the smallest reference to India—to a system which, even in the country for which it was framed, is generally considered as requiring extensive reform—to a system, finally, which has just been pronounced by a Commission composed of able and learned English lawyers to be so defective that it can be reformed only by being entirely taken to pieces and reconstructed.†

Under these circumstances we have not thought it desirable to take as the groundwork of the code any of the systems of law now in force in any part of India. We have, indeed, to the best of our ability, compared the code with all those systems, and we have taken suggestions from all; but we have not adopted a single provision merely because it

* Regulation XIV. of 1827, section i. clause 1.

† Letter to Lord John Russell from the Commissioners appointed to inquire into the state of the Criminal Law, dated 19th January, 1837.

formed a part of any of those systems. We have also compared our work with the most celebrated systems of Western jurisprudence, as far as the very scanty means of information which were accessible to us in this country enabled us to do so. We have derived much valuable assistance from the French code, and from the decisions of the French courts of justice on questions touching the construction of that code. We have derived assistance still more valuable from the code of Louisiana, prepared by the late Mr. Livingston. We are the more desirous to acknowledge our obligations to that eminent jurist, because we have found ourselves under the necessity of combating his opinions on some important questions.

The reasons for those provisions which appear to us to require explanation or defence will be found appended to the Code in the form of notes. Should your Lordship in Council wish for fuller information as to the considerations by which we have been guided in framing any part of the law, we shall be ready to afford it.

One peculiarity in the manner in which this code is framed will immediately strike your Lordship in Council—we mean the copious use of illustrations. These illustrations will, we trust, greatly facilitate the understanding of the law, and will at the same time often serve as a defence of the law. In our definitions we have repeatedly found ourselves under the necessity of sacrificing neatness and perspicuity to precision, and of using harsh expressions because we could find no other expressions which would convey our whole meaning, and no more than our whole meaning. Such definitions standing by themselves might repel and perplex the reader, and would perhaps be fully comprehended only by a few students after long application. Yet such definitions are found, and must be found, in every system of law which aims at accuracy. A legislator may, if he thinks fit, avoid such definitions, and by avoiding them he will give a smoother and more attractive appearance to his workmanship; but in that case he flinches from a duty which he ought to perform, and which somebody must perform. If this necessary but most disagreeable work

be not performed by the law-giver once for all, it must be constantly performed in a rude and imperfect manner by every judge in the empire, and will probably be performed by no two judges in the same way. We have therefore thought it right not to shrink from the task of framing these unpleasing but indispensable parts of a code. And we hope that when each of these definitions is followed by a collection of cases falling under it, and of cases which, though at first sight they appear to fall under it, do not really fall under it, the definition and the reasons which led to the adoption of it will be readily understood. The illustrations will lead the mind of the student through the same steps by which the minds of those who framed the law proceeded, and may sometimes show him that a phrase which may have struck him as uncouth, or a distinction which he may have thought idle, was deliberately adopted for the purpose of including or excluding a large class of important cases. In the study of geometry it is constantly found that a theorem which, read by itself, conveyed no distinct meaning to the mind, becomes perfectly clear as soon as the reader casts his eye over the statement of the individual case taken for the purpose of demonstration. Our illustrations, we trust, will in a similar manner facilitate the study of the law.

There are two things which a legislator should always have in view while he is framing laws; the one is, that they should be, as far as possible, precise: the other, that they should be easily understood. To unite precision and simplicity in definitions intended to include large classes of things, and to exclude others very similar to many of those which are included, will often be utterly impossible. Under such circumstances it is not easy to say what is the best course. That a law, and especially a penal law, should be drawn in words which convey no meaning to the people who are to obey it, is an evil. On the other hand, a loosely-worded law is no law, and to whatever extent a legislature uses vague expressions, to that extent it abdicates its functions, and resigns the power of making law to the courts of justice.

On the whole, we are inclined to think that the best course is that which we have adopted. We have, in framing our definitions, thought principally of making them precise, and have not shrunk from rugged or intricate phraseology when such phraseology appeared to us to be necessary to precision. If it appeared to us that our language was likely to perplex an ordinary reader, we added as many illustrations as we thought necessary for the purpose of explaining it. The definitions and enacting clauses contain the whole law. The illustrations make nothing law which would not be law without them. They only exhibit the law in full action, and show what its effects will be on the events of common life.

Thus the code will be at once a statute-book and a collection of decided cases. The decided cases in the code will differ from the decided cases in the English law-books in two most important points. In the first place, our illustrations are never intended to supply any omission in the written law, nor do they ever, in our opinion, put a strain on the written law. They are merely instances of the practical application of the written law to the affairs of mankind. Secondly, they are cases decided not by the judges but by the legislature, by those who make the law, and who must know more certainly than any judge can know what the law is which they mean to make.

The power of construing the law in cases in which there is any real reason to doubt what the law is amounts to the power of making the law. On this ground the Roman jurists maintained that the office of interpreting the law in doubtful matters necessarily belonged to the legislature. The contrary opinion was censured by them with great force of reason, though in language perhaps too bitter and sarcastic for the gravity of a code. "Eorum vanam subtilitatem tam risimus quam corrigendam esse censuimus. Si enim in præsenti leges condere soli imperatori concessum est, et leges interpretari solo dignum imperio esse oportet. Quis legum ænigmata solvere et omnibus aperire idoneus esse videbitur nisi is cui legislatorem esse concessum est? Explosis itaque his

ridiculosis ambiguitatibus tam conditor quam interpres legum solus imperator juste existimabitur."*

The decisions on particular cases which we have annexed to the provisions of the code resemble the imperial rescripts in this, that they proceed from the same authority from which the provisions themselves proceed. They differ from the imperial rescripts in this most important circumstance, that they are not made *ex post facto*, that they cannot therefore be made to serve any particular turn, that the persons condemned or absolved by them are purely imaginary persons, and that, therefore, whatever may be thought of the wisdom of any judgment which we have passed, there can be no doubt of its impartiality.

The publication of this collection of cases decided by legislative authority will, we hope, greatly limit the power which the courts of justice possess of putting their own sense on the laws. But we are sensible that neither this collection nor any other can be sufficiently extensive to settle every question which may be raised as to the construction of the code. Such questions will certainly arise, and, unless proper precautions be taken, the decisions on such questions will accumulate till they form a body of law of far greater bulk than that which has been adopted by the legislature. Nor is this the worst. While the judicial system of British India continues to be what it now is, these decisions will render the law not only bulky, but uncertain and contradictory. There are at present eight chief courts subject to the legislative power of your Lordship in Council, four established by Royal Charter, and four which derive their authority from the Company. Every one of these tribunals is perfectly independent of the others. Every one of them is at liberty to put its own construction on the law; and it is not to be expected that they will always adopt the same construction. Under so inconvenient a system there will inevitably be, in the course of a few years, a large collection of decisions diametrically opposed to each other, and all of equal authority.

* Cod. Just. lib. i. tit. xiv. 12.

How the powers and mutual relations of these courts may be placed on a better footing, and whether it be possible or desirable to have in India a single tribunal empowered to expound the code in the last resort, are questions which must shortly engage the attention of the Law Commission. But whether the present judicial organization be retained or not, it is most desirable that measures should be taken to prevent the written law from being overlaid by an immense weight of comments and decisions. We conceive that it is proper for us, at the time at which we lay before your Lordship in Council the first part of the Indian code, to offer such suggestions as have occurred to us on this important subject.

We do not think it desirable that the Indian legislature should, like the Roman emperors, decide doubtful points of law which have actually been mooted in cases pending before the tribunals. In criminal cases, with which we are now more immediately concerned, we think that the accused party ought always to have the advantage of a doubt on a point of law, if that doubt be entertained after mature consideration by the highest judicial authority, as well as of a doubt on a matter of fact. In civil suits which are actually pending, we think it, on the whole, desirable to leave to the courts the office of deciding doubtful questions of law which have actually arisen in the course of litigation. But every case in which the construction put by a judge on any part of the code is set aside by any of those tribunals from which at present there is no appeal in India, and every case in which there is a difference of opinion in a court composed of several judges as to the construction of any part of the code, ought to be forthwith reported to the legislature. Every judge of every rank whose duty it is to administer the law as contained in the code should be enjoined to report to his official superiors every doubt which he may entertain as to any question of construction which may have arisen in his court. Of these doubts, all which are not obviously unreasonable ought to be periodically reported by the highest judicial authorities to the legislature. All the questions thus reported to the government might with advantage be referred for examina-

tion to the Law Commission, if that Commission should be a permanent body. In some cases it will be found that the law is already sufficiently clear, and that any misconstruction which may have taken place is to be attributed to weakness, carelessness, wrongheadedness or corruption on the part of an individual, and is not likely to occur again. In such cases it will be unnecessary to make any change in the code. Sometimes it will be found that a case has arisen respecting which the code is silent. In such a case it will be proper to supply the omission. Sometimes it may be found that the code is inconsistent with itself. If so, the inconsistency ought to be removed. Sometimes it will be found that the words of the law are not sufficiently precise. In such a case it will be proper to substitute others. Sometimes it will be found that the language of the law, though it is as precise as the subject admits, is not so clear that a person of ordinary intelligence can see its whole meaning. In these cases it will generally be expedient to add illustrations, such as may distinctly show in what sense the legislature intends the law to be understood, and may render it impossible that the same question, or any similar question, should ever again occasion difference of opinion. In this manner every successive edition of the code will solve all the important questions as to the construction of the code which have arisen since the appearance of the edition immediately preceding. Important questions, particularly questions about which courts of the highest rank have pronounced opposite decisions, ought to be settled without delay; and no point of law ought to continue to be a doubtful point more than three or four years after it has been mooted in a court of justice. An addition of a very few pages to the code will stand in the place of several volumes of reports, and will be of far more value than such reports, inasmuch as the additions to the code will proceed from the legislature, and will be of unquestionable authority; whereas the reports would only give the opinions of the judges, which other judges might venture to set aside.

It appears to us also highly desirable that, if the code shall be adopted, all those penal laws which the Indian legislature

may from time to time find it necessary to pass should be framed in such a manner as to fit into the code. Their language ought to be that of the code. No word ought to be used in any other sense than that in which it is used in the code. The very part of the code in which the new law is to be inserted ought to be indicated. If the new law rescinds or modifies any provision of the code, that provision ought to be indicated. In fact, the new law ought, from the day on which it is passed, to be part of the code, and to affect all the other provisions of the code, and to be affected by them as if it were actually a clause of the original code. In the next edition of the code, the new law ought to appear in its proper place.

For reasons which have been fully stated to your Lordship in Council in another communication, we have not inserted in the code any clause declaring to what places and to what classes of persons it shall apply.

Your Lordship in Council will see that we have not proposed to except from the operation of this code any of the ancient sovereign houses of India residing within the Company's territories. Whether any such exception ought to be made is a question which, without a more accurate knowledge than we possess of existing treaties, of the sense in which those treaties have been understood, of the history of negotiations, of the temper and of the power of particular families, and of the feeling of the body of the people towards those families, we could not venture to decide. We will only beg permission most respectfully to observe that every such exception is an evil; that it is an evil that any man should be above the law; that it is a still greater evil that the public should be taught to regard as a high and enviable distinction the privilege of being above the law; that the longer such privileges are suffered to last, the more difficult it is to take them away; that there can scarcely ever be a fairer opportunity for taking them away than at the time when the government promulgates a new code binding alike on persons of different races and religions; and that we greatly doubt whether any consideration, except that of public faith solemnly pledged, deserves to be weighed against the advantages of equal justice.

The peculiar state of public feeling in this country may render it advisable to frame the law of procedure in such a manner that families of high rank may be dispensed, as far as possible, from the necessity of performing acts which are here regarded, however unreasonably, as humiliating. But though it may be proper to make wide distinctions as respects form, there ought in our opinion to be, as respects substance, no distinctions except those which the government is bound by express engagements to make. That a man of rank should be examined with particular ceremonies or in a particular place may, in the present state of Indian society, be highly expedient. But that a man of any rank should be allowed to commit crimes with impunity must in every state of society be most pernicious.

The provisions of the code will be applicable to offences committed by soldiers, as well as to offences committed by other members of the community. But for those purely military offences which soldiers only can commit, we have made no provision. It appears to us desirable that this part of the law should be taken up separately, and we have been given to understand that your Lordship in Council has determined that it shall be so taken up. But we have, as your Lordship in Council will perceive, made provision for punishing persons who, not being themselves subject to martial law, abet soldiers in the breach of military discipline.

Your Lordship in Council will observe that in many parts of the penal code we have referred to the code of procedure, which as yet is not in existence; and hence it may possibly be supposed to be our opinion that, till the code of procedure is framed, the penal code cannot come into operation. Such, however, is not our meaning. We conceive that almost the whole of the penal code, such as we now lay it before your Lordship, might be made law, at least in the Mofussil, without any considerable change in the existing rules of procedure. Should your Lordship in Council agree with us in this opinion, we shall be prepared to suggest those changes which it would be necessary immediately to make.

In conclusion, we beg respectfully to suggest that, if your

Lordship in Council is disposed to adopt the code which we have framed, it is most desirable that the native population should, with as little delay as possible, be furnished with good versions of it in their own languages. Such versions, in our opinion, can be produced only by the combined labors of enlightened Europeans and natives; and it is not probable that men competent to execute all the translations which will be required would be found in any single province of India. We are sensible that the difficulty of procuring good translations will be great; but we believe that the means at the disposal of your Lordship in Council are sufficient to overcome every difficulty; and we are confident that your Lordship in Council will not grudge anything that may be necessary for the purpose of enabling the people who are placed under your care to know what that law is according to which they are required to live.

We have the honor to be, my Lord,
Your Lordship's most obedient humble servants,

T. B. Macaulay,
J. M. Macleod,
G. W. Anderson,
F. Millett.

Indian Law Commission,
October 14, 1837.

NOTES.

NOTE (A).

ON THE CHAPTER OF PUNISHMENTS.

First among the punishments provided for offences by this code stands death. No argument that has been brought to our notice has satisfied us that it would be desirable wholly to dispense with this punishment. But we are convinced that it ought to be very sparingly inflicted, and we propose to employ it only in cases where either murder or the highest offence against the State has been committed.

We are not apprehensive that we shall be thought by many persons to have resorted too frequently to capital punishment; but we think it probable that many, even of those who condemn the English Statute-book as sanguinary, may think that our code errs on the other side. They may be of opinion that gang-robbery, the cruel mutilation of the person, and possibly rape, ought to be punished with death. These are doubtless offences which, if we looked only at their enormity, at the evil which they produce, at the terror which they spread through society, at the depravity which they indicate, we might be inclined to punish capitally. But atrocious as they are, they cannot, as it appears to us, be placed in the same class with murder. To the great majority of mankind nothing is so dear as life. And we are of opinion that to put robbers, ravishers, and mutilators on the same footing with murderers, is an arrangement which diminishes the security of life.

There is in practice a close connection between murder and most of those offences which come nearest to murder in enormity. Those offences are almost always committed under such circumstances that the offender has it in his power to add murder to his guilt. They are often committed under such circumstances that the offender has a temptation to add murder to his guilt. The same opportunities, the same superiority of force, which enabled a man to rob, to mangle or to ravish, will enable him to go farther, and to despatch his victim. As he has almost always the power to murder, he will often have a strong motive to murder, inasmuch as by murder he may often hope to remove the only witness of the crime which he has already committed. If the punishment of the crime which he has already committed be exactly the same with the punishment of murder, he will have no restraining motive. A law which imprisons for rape and robbery, and hangs for murder, holds out to ravishers and robbers a strong inducement to spare the lives of those whom they have injured. A law which hangs for rape and robbery, and which only hangs for murder, holds out, indeed, if it be rigorously carried into effect, a strong motive to deter

men from rape and robbery; but as soon as a man has ravished or robbed, it holds out to him a strong motive to follow up his crime with a murder.

If murder were punished with something more than simple death; if the murderer were broken on the wheel or burnt alive, there would not be the same objection to punishing with death those crimes which in atrocity approach nearest to murder. But such a system would be open to other objections so obvious that it is unnecessary to point them out. The highest punishment which we propose is the simple privation of life; and the highest punishment, be it what it may, ought not, for the reason which we have given, to be assigned to any crime against the person which stops short of murder. And it is hardly necessary to point out to his Lordship in Council how great a shock would be given to public feeling if, while we propose to exempt from the punishment of death the most atrocious personal outrages which stopped short of murder, we were to inflict that punishment even in the worst cases of theft, cheating, or mischief.

It will be seen that, throughout the code, wherever we have made any offence punishable by transportation, we have provided that the transportation shall be for life. The consideration which has chiefly determined us to retain that mode of punishment is our persuasion that it is regarded by the natives of India, particularly by those who live at a distance from the sea, with peculiar fear. The pain which is caused by punishment is unmixed evil. It is by the terror which it inspires that it produces good; and perhaps no punishment inspires so much terror in proportion to the actual pain which it causes as the punishment of transportation in this country. Prolonged imprisonment may be more painful in the actual endurance; but it is not so much dreaded beforehand; nor does a sentence of imprisonment strike either the offender or the by-standers with so much horror as a sentence of exile beyond what they call the Black Water. This feeling, we believe, arises chiefly from the mystery which overhangs the fate of the transported convict. The separation resembles that which takes place at the moment of death.

The criminal is taken forever from the society of all who are acquainted with him, and conveyed by means of which the natives have but an indistinct notion, over an element which they regard with extreme awe, to a distant country of which they know nothing, and from which he is never to return. It is natural that his fate should impress them with a deep feeling of terror. It is on this feeling that the efficacy of the punishment depends; and this feeling would be greatly weakened if transported convicts should frequently return, after an exile of seven or fourteen years, to the scene of their offences, and to the society of their former friends.

We may observe that the rule which we propose to lay down is already in force in almost every part of British India. The courts established by the Royal Charters and courts-martial are at present the only courts which sentence offenders to transportation for any term short of life. In the case of European offenders who are condemned to long terms of imprisonment, we allow the government to commute imprisonment for transportation not perpetual. But in that case we are of opinion that in general the transported criminal ought not, after the expiration of the term for which he is transported, to be allowed to return to India. This rule and the reasons for it will be considered hereafter.

Of imprisonment we propose to institute two grades, rigorous imprisonment and simple imprisonment. But we do not think the penal code the proper place for describing with minuteness the nature of either kind of punishment.

We entertain a confident hope that it will shortly be found practicable greatly to reduce the terms of imprisonment which we propose. Where a good system of prison discipline exists, where the criminal, without being subject to any cruel severities, is strictly restrained, regularly employed in labor not of an attractive kind, and deprived of every indulgence not necessary to his health, a year's confinement will generally prove as efficacious as confinement for two years in a jail where the superintendence is lax, where the work exacted is light, and where the convicts find means of enjoying as many luxuries as if they were at liberty. As the

intensity of the punishment is increased, its length may safely be diminished. As members of the committee which is now employed in investigating the system followed in the jails of this country, we have had access to information which enables us to say with confidence that, in this department of the administration, extensive reforms are greatly needed, and may easily be made. The researches of that committee will, we hope, enable the Law Commission hereafter to prepare such a code of prison discipline as, without shocking the humane feelings of the community, may yet be a terror to the most hardened wrong-doers. Whenever such a code shall come into operation, we conceive that it will be advisable greatly to shorten many of the terms of imprisonment which we have proposed.

It will be seen that we have given to the government a power of commuting sentences in certain cases without the consent of the offender. Some of the rules which we have laid down on this subject will be universally allowed to be proper. It is evidently fit that the government should be empowered to commute the sentence of death for any other punishment provided by the code. It seems to us also very desirable that the government should have the power of commuting perpetual transportation for perpetual imprisonment. Many circumstances of which the executive authorities ought to be accurately informed, but which must often be unknown to the ablest judge, may, at particular times, render it highly inconvenient to carry a sentence of transportation into effect. The state of those remote provinces of the empire in which convict settlements are established, and the way in which the interest of those provinces may be affected by any addition to the convict population, are matters which lie altogether out of the cognizance of the tribunals by which those sentences are passed, and which the government only is competent to decide.

The provisions contained in clauses 43 and 44 are more likely to cause difference of opinion. We are satisfied that both humanity and policy require that those provisions, or provisions very similar to them, should be adopted.

The physical difference which exists between the European and the native of India renders it impossible to subject them to the same system of prison discipline. It is most desirable, indeed, that in the treatment of offenders convicted of the same crime and sentenced to the same punishment, there should be no apparent inequality. But it is still more desirable that there should be no real inequality, and there must be real inequality unless there be apparent inequality. It would be cruel to subject a European for a long period to a severe prison discipline, in a country in which existence is almost constant misery to a European who has not many indulgences at his command. If not cruel, it would be impolitic. It is unnecessary to point out to his Lordship in Council how desirable it is that our national character should stand high in the estimation of the inhabitants of India, and how much that character would be lowered by the frequent exhibition of Englishmen of the worst description, placed in the most degrading situations, stigmatized by the courts of justice, and engaged in the ignominious labor of a jail.

As there are strong reasons for not punishing Europeans with imprisonment of the same description with which we propose to punish natives, so there are reasons equally strong for not suffering Europeans who have been convicted of serious crimes to remain in this country. As we are satisfied that nothing can add more strength to the government, or can be more beneficial to the people, than the free admission of honest, industrious and intelligent Englishmen, so we are satisfied that no greater calamity could befall either the government or the people than the influx of Englishmen of lawless habits and blasted character. Such men are of the same race and color with the rulers of the country; they speak the same language, they wear the same garb. In all these things they differ from the great body of the population. It is natural and inevitable that in the minds of a people accustomed to be governed by Englishmen, the idea of an Englishman should be associated with the idea of government. Every Englishman participates in the power of government, though he holds no office. His vices reflect dis-

grace on the government, though the government gives him no countenance.

It was probably on these grounds that Parliament, at the same time at which it threw open a large part of India to British-born subjects of the King, directed the local legislature to provide against those dangers which might be expected from an influx of such settlers. No regulation can, in our opinion, promote more effectually, or in a more unexceptionable manner, the end which Parliament had in view than that which we now propose.

We recommend that, whenever a person, not both of Asiatic birth and of Asiatic blood, commits an offence so serious that he is sentenced to two years of simple imprisonment, or to one year of rigorous imprisonment, it shall be competent to the government to commute that punishment for banishment from the territories of the East India Company.

If a person of unmixed European blood should commit an offence so heinous as to be visited with a sentence of imprisonment for seven years or more, we would give to the government the power of substituting an equal term of transportation for that term of imprisonment, and of excluding the offender, after the expiration of the term of transportation, from the territories of the East India Company. The government would, doubtless, make arrangements for transporting such offenders to some British colony situated in a temperate climate.

In the great majority of cases we believe that this commutation of punishment would be most welcome to a European offender. But however this may be, we are satisfied that it is for the interest, both of the British government and of the Indian people, that the executive authorities should possess the power which we propose to confide to them.

The forfeiture of property is a punishment which we propose to inflict only on persons guilty of high political offences. The territorial possessions of such persons often enable them to disturb the public peace, and to make head against the government; and it seems reasonable that they should be deprived of so dangerous a power.

Fine is one of the most common punishments in every part of the world; and it is a punishment the advantages of which are so great and obvious, that we propose to authorize the courts to inflict it in every case, except where forfeiture of all property is necessarily part of the punishment. Yet the punishment of fine is open to some objections. Death, imprisonment, transportation, banishment, solitude, compelled labor, are not, indeed, equally disagreeable to all men. But they are so disagreeable to all men that the legislature, in assigning these punishments to offences, may safely neglect the differences produced by temper and situation. With fine, the case is different. In imposing a fine, it is always necessary to have as much regard to the pecuniary circumstances of the offender as to the character and magnitude of the offence. The mulct which is ruinous to a laborer is easily borne by a tradesman, and is absolutely unfelt by a rich zemindar.

It is impossible to fix any limit to the amount of a fine which will not either be so high as to be ruinous to the poor, or so low as to be no object of terror to the rich. There are many millions in India who would be utterly unable to pay a fine of fifty rupees; there are hundreds of thousands from whom such a fine might be levied, but whom it would reduce to extreme distress; there are thousands to whom it would give very little uneasiness; there are hundreds to whom it would be a matter of perfect indifference, and who would not cross a room to avoid it. The number of the poor in every country exceeds in a very great ratio the number of the rich. The number of poor criminals exceeds the number of rich criminals in a still greater ratio. And to the poor criminal it is a matter of absolute indifference whether the fine to which he is liable be limited or not, unless it be so limited as to render it quite inefficient as a mode of punishing the rich. To a man who has no capital, who has laid by nothing, whose monthly wages are just sufficient to provide himself and his family with their monthly rice, it matters not whether the fine for assault be left to be settled by the discretion of the courts, or whether a hundred rupees be fixed as the maximum. There are no degrees in impossibility. He is no more able

to pay a hundred rupees than to pay a lac. A just and wise judge, even if intrusted with a boundless discretion, will not, under ordinary circumstances, sentence such an offender to a fine of a hundred rupees. And the limit of a hundred rupees would leave it quite in the power of an unjust or inconsiderate judge to inflict on such an offender all the evil which can be inflicted on him by means of fine.

If, in imitation of Mr. Livingston, we provide that no fine shall exceed one fourth of the amount of the offender's property, no serious fine will ever be imposed in this country without a long and often a most unsatisfactory investigation, in which it would be necessary to decide many obscure questions of right purposely darkened by every artifice of chicanery. And even if this great practical difficulty did not exist, we should see strong objections to such a provision in a very large class of cases. Take the case of a corrupt judge who has accumulated a lac of rupees by his illicit practices. A fine which should deprive such a man of the whole of his fortune would not appear to us excessive: and certainly we should think it most undesirable that he should be allowed to retain 75,000 rupees of his ill-gotten gains. Again, take the case of a man who has been suborned to commit perjury, and has received a great bribe for doing so. Such a man may have little or no property, except what he has received as a bribe; yet it is evidently desirable that he should be compelled to disgorge the whole. No man ought ever to gain by breaking the law; and if Mr. Livingston's rule were adopted in this country, many would gain by breaking the law. To punish a man for a crime, and yet to leave in his possession three fourths of the consideration which tempted him to commit the crime, is to hold out at once punishments for crime, and inducements to crime. It appears to us that the punishment of fine is a peculiarly appropriate punishment for all offences to which men are prompted by cupidity; for it is a punishment which operates directly on the very feeling which impels men to such offences. A man who has been guilty of great offences arising from cupidity — of forging a bill of exchange, for example, of keeping a receptacle for

stolen goods, or of extensive embezzlement—ought, we conceive, to be so fined as to reduce him to poverty. That such a man should, when his imprisonment is over, return to the enjoyment of three fourths of his property, a property which may be very large, and which may have been accumulated by his offences, appears to us highly objectionable. Those persons who are most likely to commit such offences would often be less deterred by knowing that the offender had passed several years in imprisonment, than encouraged by seeing him, after his liberation, enjoying the far larger part of his wealth.

We have never seen any general rule for the limiting of fine which we are disposed to adopt. The difficulty of framing a rule has evidently been felt by many eminent men. The authors of the Bill of Rights, with many instances of gross abuse fresh in their recollection, could devise no other rule than that excessive fines should not be imposed. And the authors of the Constitution of the United States, after the experience of another century, contented themselves with repeating the words of the Bill of Rights.

It will be seen that in cases which are not very heinous we propose to limit the amount of fine which the courts may impose. But in serious cases we have left the amount of fine absolutely to their discretion; and we feel, as we have said, that, even in the cases where we have proposed a limit, such a limit will be no protection to the poor, who in every community are also the many. We feel that the extent of the discretion which we have thus left to the courts is an evil, and that no sagacity and no rectitude of intention can secure a judge from occasional error. We conceive, however, that if fine is to be employed as a punishment—and no judicious person, we are persuaded, would propose to dispense with it—this evil must be endured. We shall attempt in the code of procedure to establish such a system of appeal as may prevent gross or frequent injustice from taking place.

The next question which it became our duty to consider was this:—when a fine has been imposed, what measures shall be adopted in default of payment? And here two modes of proceeding, with both of which we were familiar, naturally

occurred to us. The offender may be imprisoned till the fine is paid, or he may be imprisoned for a certain term, such imprisonment being considered as standing in place of the fine. In the former case, the imprisonment is used in order to compel him to part with his money; in the latter case, the imprisonment is a punishment substituted for another punishment. Both modes of proceeding appear to us to be open to strong objections. To keep an offender in imprisonment till his fine is paid is, if the fine be beyond his means, to keep him in imprisonment all his life; and it is impossible for the best judge to be certain that he may not sometimes impose a fine which shall be beyond the means of an offender. Nothing could make such a system tolerable except the constant interference of some authority empowered to remit sentences; and such constant interference we should consider as in itself an evil. On the other hand, to sentence an offender to fine and to a certain fixed term of imprisonment in default of payment, and then to leave it to himself to determine whether he will part with his money or lie in jail, appears to us to be a very objectionable course. The high authority of Mr. Livingston is here against us. He allows the criminal, if sentenced to a fine exceeding one fourth of his property, to compel the judge to commute the excess for imprisonment at the rate of one day of imprisonment for every two dollars of fine, and he adds, that such imprisonment must in no case exceed ninety days. We regret that we cannot agree with him. The object of the penal law is to deter from offences, and this can only be done by means of inflictions disagreeable to offenders. The law ought not to inflict punishments unnecessarily severe; but it ought not, on the other hand, to call the offender into council with his judges, and to allow him an option between two punishments. In general, the circumstance that he prefers one punishment raises a strong presumption that he ought to suffer the other. The circumstance that the love of money is a stronger passion in his mind than the love of personal liberty is, as far as it goes, a reason for our availing ourselves rather of his love of money than of his love of personal liberty for the purpose of restraining him from crime.

To look out systematically for the most sensitive part of a man's mind, in order that we may not direct our penal sanctions towards that part of his mind, seems an injudicious policy.

We are far from thinking that the course which we propose is unexceptionable; but it appears to us to be less open to exception than any other which has occurred to us. We propose that, at the time of imposing a fine, the court shall also fix a certain term of imprisonment which the offender shall undergo in default of payment. In fixing this term, the court will in no case be suffered to exceed a certain maximum, which will vary according to the nature of the offence. If the offence be one which is punishable with imprisonment as well as fine, the term of imprisonment in default of payment will not exceed one fourth of the longest term of imprisonment fixed by the code for the offence. If the offence be one which by the code is punishable only with fine, the term of imprisonment for default of payment will in no case exceed seven days.

But we do not mean that this imprisonment shall be taken in full satisfaction of the fine. We cannot consent to permit the offender to choose whether he will suffer in his person or in his property. To adopt such a course would be to grant exemption from the punishment of fine to those very persons on whom it is peculiarly desirable that the punishment of fine should be inflicted, to those very persons who dislike that punishment most, and whom the apprehension of that punishment would be most likely to restrain. We therefore propose that the imprisonment which an offender has undergone shall not release him from the pecuniary obligation under which he lies. His person will, indeed, cease to be answerable for the fine; but his property will for a time continue to be so. What we recommend is, that at any time during a certain limited period the fine may be levied on his effects by distress. If the fine is paid or levied while he is imprisoned for default of payment, his imprisonment will immediately terminate, and if a portion of the fine be paid during the imprisonment, a proportional abatement of the imprisonment will take place.

It may, perhaps, appear to some persons harsh to imprison a man for non-payment of a fine, and, after he has endured his imprisonment, to take his property by distress in order to realize the fine. But this harshness is rather apparent than real. If the offender, having the means of paying the fine, chooses rather to lie in prison than to part with his money, his case is the very case in which it is most desirable that the fine should be levied, and he is the very convict who has least claim to indulgence. The confinement which he has undergone may be regarded as no more than a reasonable punishment for his obstinate resistance to the due execution of his sentence. If the offender has not the means of paying the fine while he continues liable to it, he will be quit for his imprisonment. There remains another case; that of an offender who, being really unable to pay his fine, lies in prison for a term, and within six years after his sentence acquires property. This case is the only case in which it can, with any plausibility, be maintained that the law, as we have framed it, would operate harshly. Even in this case, it is evident that our law will operate far less harshly than a law which should provide that an offender sentenced to a fine should be imprisoned till the fine should be paid. Under both laws imprisonment is inflicted, under both a fine is exacted. But the one law liberates the offender on payment of the fine, and also fixes a limit beyond which he cannot be detained in jail, whether the fine be paid or no. The other law keeps him in confinement till the money is actually paid. It is, therefore, at least as severe as ours on his property, and is immeasurably more severe on his person.

In fact, we treat an offender who has been sentenced to fine more leniently than the law now treats a debtor either in England or in this country. By the English law, an insolvent not in trade is kept in confinement till he has surrendered all his property, till he has answered interrogatories respecting it, till the court is satisfied that he has paid all that he can pay. Even when his person is liberated, his future acquisitions still continue to be liable to the claims of his creditors. The law throughout British India is in principle the

same with the law of England. The offender who has been sentenced to fine must be considered as a debtor, and, as a debtor, not entitled to any peculiar lenity. It will be difficult to show on what principles a creditor ought to be allowed to employ, for the purpose of recovering a debt from a person who is perhaps only unfortunate, a more stringent mode of procedure than that which the State employs for the purpose of realizing a fine from the property of a criminal. If a temporary imprisonment for debt ought not to cancel the claim of the private creditor, neither ought a temporary imprisonment in default of payment of a fine to cancel the claims of public justice.

It is undoubtedly easy to put cases in which this part of the law will operate more severely than we could wish; and so it is easy to put cases in which every penal clause in the code would operate more severely than we could wish. This is an evil inseparable from all legislation. General rules must be framed; and it is absolutely impossible to frame general rules which shall suit all particular cases. It is sufficient if the rule be, on the whole, more beneficial than any other general rule which can be suggested. Those particular cases in which a rule generally beneficial may operate too harshly must be left to the merciful consideration of the executive government. We are satisfied that the punishment of fine would, under the arrangement which we propose, be found to be a most efficacious punishment in a large class of cases. We are satisfied that if offenders are allowed to choose between imprisonment and fine, fine will lose almost its whole efficacy, and will never be inflicted on those who dread it most.

Closely connected with these questions respecting the punishment of fine is another question of the highest importance, which indeed belongs rather to the law of civil rights and to the law of procedure than to the penal law, but respecting which we are desirous to place on record the opinion which we have formed, after much reflection and discussion.

In a very large proportion of criminal cases there is good ground for a civil as well as for a penal proceeding. The

English law, most erroneously in our opinion, allows no civil claim for reparation in cases where injury has been caused by an offence amounting to felony. Thus a person is entitled to reparation for what he has lost by petty fraud, but to none if he has been cheated by means of a forged bill of exchange. He is entitled to reparation if his coat has been torn, but to none if his house has been maliciously burned down. He is entitled to reparation for a slap on the face, but to none for having his nose maliciously slit, or his ears cut off. A woman is entitled to reparation for a breach of promise of marriage, but to none for a rape. To us it appears that of two sufferers, he who has suffered the greater harm has, *cæteris paribus*, the stronger claim to compensation; and that of two offences, that which produces the greater harm ought, *cæteris paribus*, to be visited with the heavier punishment. Hence it follows that in general the strongest claims to compensations will be the claims of persons who have been injured by highly penal acts; and that to refuse reparation to all sufferers who have been injured by highly penal acts is to refuse reparation to that very class of sufferers who have the strongest claim to it.

We are decidedly of opinion that every person who is injured by an offence ought to be legally entitled to a compensation for the injury. That the offence is a very serious one, far from being a reason for thinking that he ought to have no compensation, is *primâ facie* a reason for thinking that the compensation ought to be very large.

Entertaining this opinion, we are desirous that the law of criminal procedure should be framed in such a manner as to facilitate the obtaining of reparation by the sufferer. We are inclined to think that an arrangement might be adopted under which one trial would do the work of two. We conceive that, in every case in which fine is part of the punishment of an offence, it ought to be competent to the tribunal which has tried the offender, acting under proper checks, to award the whole or part of the fine to the sufferer, provided that the sufferer signifies his willingness to receive what is so awarded in full satisfaction of his civil claim for reparation. If the criminal-court shall not make such an award,

or if the sufferer shall not be satisfied with such an award, he must be left to his civil action. But if, in such an action, he recovers damages, the fine ought, in our opinion, to be employed, as far as the fine will go, in satisfying those damages.

The plan we propose would not be open to the strong and, indeed, unanswerable objections which Mr. Livingston has urged against the plan of blending a civil and criminal trial together. Yet we think it likely that our plan would in a great majority of cases render a civil proceeding unnecessary. We are happy to be able to quote the high authority of Mr. Livingston in favor of the doctrine that every fine imposed for an offence ought to be expended, as far as it will go, in paying any damages which may be due in consequence of injury caused by that offence.

This course seems to be the only course consistent with justice to either party. It is most unjust to the man who has been disabled by a wound, or ruined by a forgery, that the government should take, under the name of fine, so large a portion of the offender's property as to leave nothing to the sufferer. In general, the greater the injury the greater ought to be the fine. On the other hand, the greater the injury the greater ought to be the compensation. If, therefore, the government keeps whatever it can raise in the way of fine, it follows that the sufferer who has the greatest claim to compensation will be least likely to obtain it. By empowering the courts to grant damages out of the fine, and by making the fine after it has reached the treasury of the government answerable for the damages which the sufferer may recover in a civil court, we avoid this injustice.

Nor is this arrangement required only by justice to the sufferer. It is also required by justice to the offender. However atrocious his crime may have been, he ought not to be subjected to any punishment beyond what the public interest demands. And we depart from this principle if, when a single payment would effect all that is required both in the way of punishment and in the way of reparation, we impose two distinct payments, the one by way of punishment, and the other by way of reparation.

The principles on which a court proceeds in imposing a fine are quite different from those on which it proceeds in assessing damages. A fine is meant to be painful to the person paying it. But civil damages are not meant to cause pain to the person who pays them. They are meant solely to compensate the plaintiff for evil suffered. They cause pain undoubtedly to the person who has to pay them. But this pain is merely incidental; nor ought the amount of damages at all to depend on the degree of depravity which the wrong-doer has shown, except in so far as that depravity may have increased the evil endured by the sufferer. If A, by mere inadvertence, drives the pole of his carriage against Z's valuable horse, and thus kills the horse, A has committed an action infinitely less reprehensible than if he kills the horse by laying poison secretly in its food. The former act would probably not fall at all under the cognizance of the criminal courts. The latter act would be severely punished. But the payment to which Z has a civil claim is in both cases exactly the same, the value of the horse, and a compensation for any expense and inconvenience which the loss of the horse may have occasioned. That A has committed no offence is no reason for giving Z less than his full damages; that A has committed a most wicked and malignant offence is no reason for giving Z more than his full damages. If a mere inadvertence cause a great loss, the damages ought to be high. If the most atrocious crime cause a small loss, the damages ought to be low. They are fixed on a principle quite different from that according to which penal laws are framed and administered.

Here, then, are two payments required from one person on account of one transaction. The object of the one payment is to give him pain, and the amount of that payment must be supposed to be sufficient to give him as much pain as it is desirable to inflict on him in that form. The object of the other payment is not at all to give pain to the payer, but solely to save another person from loss. It does, indeed, incidentally give pain to the payer; but it is not imposed for that end, nor is it proportioned to the degree in which it may

be fit that the payer should suffer pain. Surely, under such circumstances justice to the payer requires that the former payment should, as far as it will go, serve both purposes, and that if in the very act of enduring punishment he can make reparation, he should be permitted to do so.

We have now said all that we at present think it necessary to say respecting the punishments provided in the code. It may be fit that we should explain why some others are omitted.

We have thought it unnecessary to place incapacitation for office, or dismissal from office, in the list of punishments. It will always be in the power of the government to dismiss from office and to exclude from office even persons against whom there is no legal evidence of guilt. It will always be in the power of the government, by an act of grace, to admit to office even those who may have been dismissed. We therefore propose that the power of inflicting this penalty shall be left in form, as it must be left in reality, to the government.

We also considered whether it would be advisable to place in the list of punishments the degrading public exhibition of an offender on a pillory, after the English fashion, or on an ass, in the manner usual in this country. We are decidedly of opinion that it is not advisable to inflict that species of punishment.

Of all punishments this is evidently the most unequal. It may be more severe than any punishment in the code. It may be no punishment at all. If inflicted on a man who has quick sensibility, it is generally more terrible than death itself. If inflicted on a hardened and impudent delinquent, who has often stood at the bar, and who has no character to lose, it is a punishment less serious than an hour of the treadmill. It derives all its terrors from the higher and better parts of the character of the sufferer; its severity is therefore in inverse proportion to the necessity for severity. An offender who, though he has been drawn into crime by temptation, has not yet wholly given himself up to wickedness and discarded all regard for reputation, is an offender with whom it is generally desirable to deal gently. He may still be reclaimed. He may still become a valuable member of society.

On the other hand, the criminal for whom disgrace has no terrors, who dreads nothing but physical suffering, restraint and privation, and who laughs at infamy, is the very criminal against whom the whole rigor of the law ought to be put forth. To employ a punishment which is more bitter than the bitterness of death to the man who has still some remains of virtuous and honorable feeling, and which is mere matter of jest to the utterly abandoned villain, appears to us most unreasonable.

If it were possible to devise a punishment which should give pain proportioned to the degree in which the offender was shameless, hard-hearted, and abandoned to vice, such a punishment would be the most effectual means of protecting society. On the other hand, of all punishments the most absurd is that which produces pain proportioned to the degree in which the offender retains the sentiments of an honest man.

This argument proceeds on the supposition that the public exposure of the criminal has no other terrors than those which it derives from his sensibility to shame. The English pillory, indeed, had terrors of a very different kind. The offender was, even in our own time, given up with scarcely any protection to the utmost ferocity of the mob. Such a mode of punishment is, indeed, free from one objection which we have urged against simple exposure; for it is an object of terror to the most hardened criminal. But it is open to other objections so obvious, that it is unnecessary to bring them to the notice of his Lordship in Council. That the amount of punishment should be determined, not by the law or by the tribunals, but by a throng of people accidentally congregated, among whom the most ignorant and brutal would always on such an occasion be the most forward, would be a disgrace to an age and country pretending to civilization. We take it for granted that the punishment which we are considering, if inflicted in any part of India subject to the British government, would consist in degrading exposure, and nothing more. That punishment, we repeat, while it would be a mere subject of mockery to shameless and abandoned delinquents, would, when inflicted on men who have filled respectable

stations and borne respectable characters, be so cruel that it would become justly more odious to the public than the very offences which it was intended to repress.

We have not thought it desirable to place flogging in the list of punishments. If inflicted for atrocious crimes with a severity proportioned to the magnitude of those crimes, that punishment is open to the very serious objections which may be urged against all cruel punishments, and which are so well known that it is unnecessary for us to recapitulate them. When inflicted on men of mature age, particularly if they be of decent stations in life, it is a punishment of which the severity consists, to a great extent, in the disgrace which it causes; and to that extent the arguments which we have used against public exposure apply to flogging.

It has been represented to us by some functionaries in Bengal that the best mode of stimulating the lower officers of police to the active discharge of their duties is by flogging, and that since the abolition of that punishment in this presidency the magistrates of the lower provinces have found great difficulty in managing that class of persons.

This difficulty has not been experienced in any other part of India. We therefore cannot, without much stronger evidence than is now before us, believe that it is impracticable to make the police-officers of the lower provinces efficient without resorting to corporal punishment. The objections to the old system are obvious. To inflict on a public servant, who ought to respect himself and to be respected by others, an ignominious punishment, which leaves an indelible mark, and to suffer him still to remain a public servant, to place a stigma on him which renders him an object of contempt to the mass of the population, and to continue to intrust him with any portion, however small, of the powers of government, appears to us to be a course which nothing but the strongest necessity can justify.

The moderate flogging of young offenders for some petty offences is not open, at least in any serious degree, to the objections which we have stated. Flogging does not inflict on a boy that sort of ignominy which it causes to a grown man.

Up to a certain age, boys, even of the higher classes, are often corrected with stripes by their parents and guardians; and this circumstance takes away a considerable part of the disgrace of stripes inflicted on a boy by order of a magistrate. In countries where a bad system of prison discipline exists, the punishment of flogging has in such cases one great advantage over that of imprisonment. The young offender is not exposed even for a day to the contaminating influence of an ill-regulated jail. It is our hope and belief, however, that the reforms which are now under consideration will prevent the jails of India from exercising any such contaminating influence; and, if that should be the case, we are inclined to think that the effect of a few days passed in solitude, or in hard and monotonous labor, would be more salutary than that of stripes.

Being satisfied, therefore, that the punishment of flogging can be proper only in a few cases, and not being satisfied that it is necessary in any, we are unwilling to advise the government to retrace its steps, and to re-establish throughout the British territories a practice which, by a policy unquestionably humane and by no means proved to have been injudicious, has recently been abolished through a large part of those territories.

The only remaining point connected with this chapter, to which we wish to call the attention of his Lordship in Council, is the provision contained in Clause 61. This provision is intended to prevent an offender whose guilt is fully established from eluding punishment, on the ground that the evidence does not enable the tribunals to pronounce with certainty under what penal provision his case falls.

Where the doubt is merely between an aggravated and mitigated form of the same offence, the difficulty will not be great. In such cases the offender ought always to be convicted of the minor offence. But the doubt may be between two offences, neither of which is a mitigated form of the other. The doubt, for example, may lie between murder and the aiding of murder. It may be certain, for example, that either A or B murdered Z, and that whichever was the mur-

derer was aided by the other in the commission of the murder; but which committed the murder, and which aided the commission, it may be impossible to ascertain. To suffer both to go unpunished, though it is certain that both are guilty of capital crimes, merely because it is doubtful under what clause each of them is punishable, would be most unreasonable. It appears to us that a conviction in the alternative has this recommendation, that it is altogether free from fiction, that it is exactly consonant to the truth of the facts. If the court find both A and B guilty of murder, or of aiding murder, the court affirms that which is not literally true; and on all occasions, but especially in judicial proceedings, there is a strong presumption in favor of literal truth. If the court finds that A has either murdered Z or aided B to murder Z, and that B has either murdered Z or aided A to murder Z, the court finds that which is the literal truth; nor will there, under the rule which we have laid down, be the smallest difficulty in prescribing the punishment.

It is chiefly in cases where property has been fraudulently appropriated that the necessity for such a provision as that which we are considering will be felt. It will often be certain that there has been a fraudulent appropriation of property; and the only doubt will be, whether this fraudulent appropriation was a theft or a criminal breach of trust. To allow the offender to escape unpunished on account of such a doubt would be absurd. To subject him to the punishment of theft, which is the higher of the two crimes between which the doubt lies, would be grossly unjust. The punishment to which he ought to be liable is evidently that of criminal breach of trust. But that a court should convict an offender of a criminal breach of trust, when the opinion of the court perhaps is, that it is an even chance, or more than an even chance, that no trust was ever reposed in him, seems to us an objectionable mode of proceeding. We will not, in this stage of our labors, venture to lay it down as an unbending rule that the tribunals ought never to employ phrases which, though literally false, are conventionally true. Yet we are fully satisfied that the presumption is always strongly in fa-

vor of that form of expression which accurately sets forth the real state of the facts. In the case which we have supposed, the real state of the facts is, that the offender has certainly committed either theft or criminal breach of trust, and that the court does not know which. This ought, therefore, in our opinion, to be the form of the judgment.

The details of the law on this subject must, of course, be reserved for the code of procedure. But the provision which directs the manner in which the punishment is to be calculated appears properly to belong to the penal code.

NOTE (B).

ON THE CHAPTER OF GENERAL EXCEPTIONS.

This chapter has been framed in order to obviate the necessity of repeating in every penal clause a considerable number of limitations.

Some limitations relate only to a single provision, or to a very small class of provisions. Thus the exception in favor of true imputations on character (Clause 470) is an exception which belongs wholly to the law of defamation, and does not affect any other part of the code. The exception in favor of the conjugal rights of the husband (Clause 359) is an exception which belongs wholly to the law of rape, and does not affect any other part of the code. Every such exception evidently ought to be appended to the rule which it is intended to modify.

But there are other exceptions which are common to all the penal clauses of the code, or to a great variety of clauses dispersed over many chapters. Such are the exceptions in favor of infants, lunatics, idiots, persons under the influence of delirium; the exceptions in favor of acts done by the direction of the law, of acts done in the exercise of the right of self-defence, of acts done by the consent of the party harmed by them. It would obviously be inconvenient to repeat these exceptions several times in every page. We have, therefore,

placed them in a separate chapter, and we have provided that every definition of an offence, every penal provision, and every illustration of a definition or penal provision, shall be construed subject to the provisions contained in that chapter. Most of those explanations appear to us to require no explanation or defence. But the meaning and the ground of the rules laid down in Clause 69 and in the three following clauses may not be obvious at first sight. On these, therefore, we wish to make a few observations.

We conceive the general rule to be, that nothing ought to be an offence by reason of any harm which it may cause to a person of ripe age who, undeceived, has given a free and intelligent consent to suffer that harm or to take the risk of that harm. The restrictions by which the rule is limited affect only cases where human life is concerned. Both the general rule and the restrictions may, we think, be easily vindicated.

If Z, a grown man, in possession of all his faculties, directs that his valuable furniture shall be burned, that his pictures shall be cut to rags, that his fine house shall be pulled down, that the best horses in his stable shall be shot, that his plate shall be thrown into the sea, those who obey his orders, however capricious those orders may be, however deeply Z may afterwards regret that he gave them, ought not, as it seems to us, to be punished for injuring his property. Again, if Z chooses to sell his teeth to a dentist, and permits the dentist to pull them out, the dentist ought not to be punished for injuring Z's person. So if Z embraces the Mahometan religion, and consents to undergo the painful rite which is the initiation into that religion, those who perform the rite ought not to be punished for injuring Z's person.

The reason on which the general rule which we have mentioned rests is this, that it is impossible to restrain men of mature age and sound understanding from destroying their own property, their own health, their own comfort, without restraining them from an infinite number of salutary or innocent actions. It is by no means true that men always judge rightly of their own interest. But it is true that, in the vast

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, can judge for them. It is difficult to conceive any law which should be effectual to prevent men from wasting their substance on the most chimerical speculations, and yet which should not prevent the construction of such works as the Duke of Bridgewater's canals. It is difficult to conceive any law which should prevent a man from capriciously destroying his property, and yet which should not prevent a philosopher, in a course of chemical experiments, from dissolving a diamond, or an artist from taking ancient pictures to pieces, as Sir Joshua Reynolds did, in order to learn the secret of the coloring. It is difficult to conceive any law which should prevent a man from capriciously injuring his own health, and yet which should not prevent an artisan from employing himself in callings which are useful and, indeed, necessary to society, but which tend to impair the constitutions of those who follow them, or a public-spirited physician from inoculating himself with the virus of a dangerous disease. It is chiefly, we conceive, for this reason that almost all governments have thought it sufficient to restrain men from harming others, and have left them at liberty to harm themselves.

But though in general we would not punish an act on account of any harm which it might cause to a person who had consented to suffer that harm, we think that there are exceptions to this rule, and that the case in which death is intentionally inflicted is an exception.

It appears to us that the reasons which render it highly inexpedient to inflict punishment in ordinary cases of harm done by consent of the person harmed do not exist here. The thing prohibited is not, like the destruction of property, or like the mutilation of the person, a thing which is sometimes pernicious, sometimes innocent, sometimes highly useful. It is always, and under all circumstances, a thing which a wise law-giver would desire to prevent, if it were only for the

purpose of making human life more sacred to the multitude. We cannot prohibit men from destroying the most valuable effects, or from disfiguring the person of one who has given his unextorted and intelligent consent to such destruction or such disfiguration, without prohibiting at the same time gainful speculations, innocent luxuries, manly exercises, healing operations. But by prohibiting a man from intentionally causing the death of another, we prohibit nothing which we think it desirable to tolerate.

It seems to us clear, therefore, that no consent ought to be a justification of the intentional causing of death. Whether such intentional causing of death ought or ought not to be punished as murder is a distinct question, and will be considered elsewhere.

The next point which we have here to consider is how far consent ought to be a justification of the causing of death, when that causing of death is, in our nomenclature, voluntary, yet not intentional; that is to say, when the person who caused the death did not mean to cause it, but knew that he was likely to cause it.

In general we have made no distinction between cases in which a man causes an effect designedly, and cases in which he causes it with a knowledge that he is likely to cause it. If, for example, he sets fire to a house in a town at night, with no other object than that of facilitating a theft, but being perfectly aware that he is likely to cause people to be burned in their beds, and thus causes the loss of life, we punish him as a murderer. But there is, as it appears to us, a class of cases in which it is absolutely necessary to make a distinction. It is often the wisest thing that a man can do to expose his life to great hazard. It is often the greatest service that can be rendered to him to do what may very probably cause his death. He may labor under a cruel and wasting malady which is certain to shorten his life, and which renders his life, while it lasts, useless to others, and a torment to himself. Suppose that under these circumstances he, undeceived, gives his free and intelligent consent to take the risk of an operation which in a large proportion of cases has

proved fatal, but which is the only method by which his disease can possibly be cured, and which, if it succeeds, will restore him to health and vigor. We do not conceive that it would be expedient to punish the surgeon who should perform the operation, though by performing it he might cause death, not intending to cause death, but knowing himself to be likely to cause it. Again; if a person attacked by a wild beast should call out to his friends to fire, though with imminent hazard to himself, and they were to obey the call, we do not conceive that it would be expedient to punish them, though they might by firing cause his death, and though when they fired they knew themselves to be likely to cause his death.

We propose, therefore, that it shall be no offence to do even what the doer knows to be likely to cause death if the sufferer, being of ripe age has, undeceived, given a free and intelligent consent to stand the risk, and if the doer did not intend to cause death, but, on the contrary, intended in good faith the benefit of the sufferer.

We have now explained the provisions contained in Clauses 69 and 70. The cases to which the two next clauses relate bear a close affinity to those which we have just considered.

A lunatic may be in a state which makes it proper that he should be put into a strait-waistcoat. A child may meet with an accident which may render the amputation of a limb necessary. But to put a strait-waistcoat on a man without his consent is, under our definition, to commit an assault. To amputate a limb is, by our definition, voluntarily to cause grievous hurt, and, as sharp instruments are used, is a very highly penal offence. We have therefore provided, by Clause 71, that the consent of the guardian of a sufferer who is an infant, or who is of unsound mind, shall, to a great extent, have the effect which the consent of the sufferer himself would have if the sufferer were of ripe age and sound mind.

That there should be some provision of this sort is evidently necessary. On the other hand, we feel that there is a considerable danger in allowing people to assume the office of judging for others in such cases. Every man always intends

in good faith his own benefit, and has a deeper interest in knowing what is for his own benefit than anybody else can have. That he gives a free and intelligent consent to suffer pain or loss, creates a strong presumption that it is good for him, on the whole, to suffer that pain or loss. But we cannot safely confide to him the interest of his neighbors in the same unreserved manner in which we confide to him his own, even when he sincerely intends to benefit his neighbors. Even parents have been known to deliver their children up to slavery in a foreign country, to inflict the most cruel mutilations on their male children, to sacrifice the chastity of their female children, and to do all this declaring, and perhaps with truth, that their object was something which they considered as advantageous to the children. We have, therefore, not thought it sufficient to require that on such occasions the guardian should act in good faith for the benefit of the ward. We have imposed several additional restrictions which, we conceive, carry their defence with them.

There yet remains a kindred class of cases which are by no means of rare occurrence. For example, a person falls down in an apoplectic fit. Bleeding alone can save him, and he is unable to signify his consent to be bled. The surgeon who bleeds him commits an act falling under the definition of an offence. The surgeon is not the patient's guardian, and has no authority from any such guardian; yet it is evident that the surgeon ought not to be punished. Again, a house is on fire. A person snatches up a child too young to understand the danger, and flings it from the house-top, with a faint hope that it may be caught in a blanket below, but with the knowledge that it is highly probable that it will be dashed to pieces. Here, though the child may be killed by the fall, though the person who threw it down knew that it would very probably be killed, and though he was not the child's parent or guardian, he ought not to be punished.

In these examples there is what may be called a temporary guardianship, justified by the exigency of the case and by the humanity of the motive. This temporary guardianship bears a considerable analogy to that temporary magistracy with

which the law invests every person who is present when a great crime is committed, or when the public peace is concerned. To acts done in the exercise of this temporary guardianship, we extend by Clause 72 a protection very similar to that which we have given to the acts of regular guardians.

Clause 73 is intended to provide for those cases which, though, from the imperfections of language, they fall within the letter of the penal law, are yet not within its spirit, and are all over the world considered by the public, and for the most part dealt with by the tribunals, as innocent. As our definitions are framed, it is theft to dip a pen in another man's ink, mischief to crumble one of his wafers, an assault to cover him with a cloud of dust by riding past him, hurt to incommode him by pressing against him in getting into a carriage. There are innumerable acts without performing which men cannot live together in society; acts which all men constantly do and suffer in turn, and which it is desirable that they should do and suffer in turn, yet which differ only in degree from crimes. That these acts ought not to be treated as crimes is evident, and we think it far better expressly to except them from the penal clauses of the code than to leave it to the judges to except them in practice; for if the code is silent on the subject, the judges can except these cases only by resorting to one of two practices which we consider as most pernicious, by making law, or by wresting the language of the law from its plain meaning.

We propose (clauses 74 to 84) to except from the operation of the penal clauses of the code large classes of acts done in good faith for the purpose of repelling unlawful aggressions. In this part of the chapter we have attempted to define, with as much exactness as the subject appears to us to admit, the limits of the right of private defence. 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.

We think it right, however, to say that there is no part of the code with which we feel less satisfied than this. We cannot accuse ourselves of any want of diligence or care. No portion of our work has cost us more anxious thought or has been more frequently rewritten. Yet we are compelled to own that we leave it still in a very imperfect state; and though we do not doubt that it may be far better executed than it has been by us, we are inclined to think that it must always be one of the least exact parts of every system of criminal law.

We have now made such observations as appear to us to be required on the general exceptions which we propose. It is proper that we should next explain why we have not proposed any exception in favor of some classes of acts which, as some persons may think, are entitled to indulgence.

We long considered whether it would be advisable to except from the operation of the penal clauses of the code acts committed in good faith from the desire of self-preservation; and we have determined not to except them.

We admit, indeed, that many acts falling under the definition of offences ought not to be punished when committed from the desire of self-preservation; and for this reason, that, as the penal code itself appeals solely to the fears of men, it

never can furnish them with motives for braving dangers greater than the dangers with which it threatens them. Its utmost severity will be inefficacious for the purpose of preventing the mass of mankind from yielding to a certain amount of temptation. It can, indeed, make those who have yielded to the temptation miserable afterwards. But misery which has no tendency to prevent crime is so much clear evil. It is vain to rely on the dread of a remote and contingent evil as sufficient to overcome the dread of instant death, or the sense of actual torture. An eminently virtuous man, indeed, will prefer death to crime; but it is not to our virtue that the penal law addresses itself; nor would the world stand in need of penal laws if men were virtuous. A man who refuses to commit a bad action, when he sees preparations made for killing or torturing him unless he complies, is a man who does not require the fear of punishment to restrain him. A man, on the other hand, who is withheld from committing crimes solely or chiefly by the fear of punishment, will never be withheld by that fear when a pistol is held to his forehead or a lighted torch applied to his fingers for the purpose of forcing him to commit a crime.

It would, we think, be mere useless cruelty to hang a man for voluntarily causing the death of others by jumping from a sinking ship into an overloaded boat. The suffering caused by the punishment is, considered by itself, an evil, and ought to be inflicted only for the sake of some preponderating good. But no preponderating good—indeed, no good whatever—would be obtained by hanging a man for such an act. We cannot expect that the next man who feels the ship in which he is left descending into the waves, and sees a crowded boat putting off from it, will submit to instant and certain death from fear of a remote and contingent death. There are men, indeed, who in such circumstances would sacrifice their own lives rather than risk the lives of others. But such men act from the influence of principles and feelings which no penal laws can produce, and which, if they were general, would render penal laws unnecessary. Again, a gang of dacoits, finding a house strongly secured, seize a smith, and

by torture and threats of death induce him to take his tools and to force the door for them; here, it appears to us, that to punish the smith as a house-breaker would be to inflict gratuitous pain. We cannot trust to the deterring effect of such punishment. The next smith who may find himself in the same situation will rather take his chance of being, at a distant time, arrested, convicted, and sentenced to imprisonment, than incur certain and immediate death.

In the cases which we have put, some persons may perhaps doubt whether there ought to be impunity; but those very persons would generally admit that the extreme danger was a mitigating circumstance to be considered in apportioning the punishment. It might, however, with no small plausibility be contended that if any punishment at all is inflicted in such cases, that punishment ought to be not merely death, but death with torture; for the dread of being put to death by torture might possibly be sufficient to prevent a man from saving his own life by a crime; but it is quite certain, as we have said, that the mere fear of capital punishment which is remote, and which may never be inflicted at all, will never prevent him from saving his life; and, *à fortiori*, the dread of a milder punishment will not prevent him from saving his life. Laws directed against offences to which men are prompted by cupidity ought always to take from offenders more than those offenders expect to gain by crime. It would obviously be absurd to provide that a thief or a swindler should be punished with a fine not exceeding half the sum which he had acquired by theft or swindling; in the same manner, laws directed against offences to which men are prompted by fear ought always to be framed in such a way as to be more terrible than the dangers which they require men to brave. It is on this ground, we apprehend, that a soldier who runs away in action is punished with a rigor altogether unproportioned to the moral depravity which his offence indicates. Such a soldier may be an honest and benevolent man, and irreproachable in all the relations of civil life; yet he is punished as severely as a deliberate assassin, and more severely than a robber or a kidnapper. Why is

this? Evidently because, as his offence arises from fear, it must be punished in such a manner that timid men may dread the punishment more than they dread the fire of the enemy.

If all cases in which acts falling under the definition of offences are done from the desire of self-preservation were as clear as the cases which we have put of the man who jumps from a sinking ship into a boat, and of the smith who is compelled by dacoits to force a door for them, we should, without hesitation, propose to exempt this class of acts from punishment. But it is to be observed that in both these cases the person in danger is supposed to have been brought into danger, without the smallest fault on his own part, by mere accident, or by the depravity of others. If a captain of a merchantman were to run his ship on shore in order to cheat the insurers, and then to sacrifice the lives of others in order to save himself from a danger created by his own villany; if a person who had joined himself to a gang of dacoits with no other intention than that of robbing, were at the command of his leader, accompanied with threats of instant death in case of disobedience, to commit murder, though unwillingly, the case would be widely different, and our former reasoning would cease to apply; for it is evident that punishment which is inefficacious to prevent a man from yielding to a certain temptation may often be efficacious to prevent him from exposing himself to that temptation. We cannot count on the fear which a man may entertain of being brought to the gallows at some distant time as sufficient to overcome the fear of instant death; but the fear of remote punishment may often overcome the motives which induce a man to league himself with lawless companions, in whose society no person who shrinks from any atrocity that they may command can be certain of his life. Nothing is more usual than for pirates, gang-robbers, and rioters to excuse their crimes by declaring that they were in dread of their associates, and durst not act otherwise. Nor is it by any means improbable that this may often be true. Nay, it is not improbable that crews of pirates and gangs of robbers may have committed

crimes which every one among them was unwilling to commit, under the influence of mutual fear; but we think it clear that this circumstance ought not to exempt them from the full severity of the law.

Again, nothing is more usual than for thieves to urge distress and hunger as excuses for their thefts. It is certain, indeed, that many thefts are committed from the pressure of distress so severe as to be more terrible than the punishment of theft, and than the disgrace which that punishment brings with it to the mass of mankind. It is equally certain that, when the distress from which a man can relieve himself by theft is more terrible than the evil consequences of theft, those consequences will not keep him from committing theft, yet it by no means follows that it is irrational to punish him for theft; for, though the fear of punishment is not likely to keep any man from theft when he is actually starving, it is very likely to keep him from being in a starving state. It is of no effect to counteract the irresistible motive which immediately prompts to theft; but it is of great effect to counteract the motives to that idleness and that profusion which end in bringing a man into a condition in which no law will keep him from committing theft. We can hardly conceive a law more injurious to society than one which should provide that as soon as a man who had neglected his work, or who had squandered his wages in stimulating drugs, or gambled them away, had been thirty-six hours without food, and felt the sharp impulse of hunger, he might, with impunity, steal food from his neighbors.

We should, therefore, think it in the highest degree pernicious to enact that no act done under the fear even of instant death should be an offence. It would *à fortiori* be absurd to enact that no act under the fear of any other evil should be an offence.

There are, as we have said, cases in which it would be useless cruelty to punish acts done under the fear of death, or even of evils less than death. But it appears to us impossible precisely to define these cases. We have, therefore, left them to the government, which, in the exercise of its clemency,

will doubtless be guided in a great measure by the advice of the courts.

We considered whether it would be desirable to make any distinction between offences committed against freemen and offences committed against slaves. We certainly entered on the consideration of this important question with a strong leaning to the opinion that no such distinction ought to be made. We thought it our duty, however, not to come to a decision without obtaining information and advice from those who were best qualified to give it. We have collected information on the subject from every part of India, and we have now in our office a large collection of documents containing much that is curious, and that in future stages of the work in which we are engaged will be useful. At present we have only to consider the subject with reference to the penal code.

These documents have satisfied us that there is at present no law whatever defining the extent of the power of a master over his slaves; that everything depends on the disposition of the particular functionary who happens to be in charge of a district, and that functionaries who are in charge of contiguous districts, or who have at different times been in charge of the same district, hold diametrically opposite opinions as to what their official duty requires. Nor is this discrepancy found only in the proceedings of subordinate courts. The Court of Nizamut Adawlut at Fort William lay down the law thus: "A master would not be punished, the court opine, for inflicting a slight correction on his legal slave, such as a tutor would be justified in inflicting on a scholar, or a father on a child." The Court of Nizamut Adawlut at Allahabad take a quite different view of the law: "Although," they say, "the Mahometan law permits the master to correct his slave with moderation, the code by which the magistrates and other criminal authorities are bound to regulate their proceedings does not recognize any such power, and as the regulations of the government draw no distinction between the slave and the freeman in criminal matters, but place them both on a level, it is the practice of the courts, following the principles of equal justice, to treat them both alike." The Court

of Foujdarry Adawlut at Madras state that it is not the practice of the courts to make any distinction whatever in cases which come before them; that a circular order of the Foujdarry Adawlut recognizes the right of a master to inflict corrections in certain cases, but that in practice no such distinction is made. We own that we entertain some doubts whether the practice be universally such as is supposed by the Foujdarry Adawlut. We perceive that two magistrates in the western division of the Madras Presidency differ from each other in opinion on this subject. The magistrate of Canara says, that "the right of the master to inflict punishment has been allowed, but only to a very small extent." The magistrate of Malabar states, that "the relation of a master and slave has never been recognized as justifying acts which would otherwise be punishable, or as constituting a ground for mitigation of punishment." The Court of Foujdarry Adawlut at Bombay has given no opinion on the point, and there is a great difference of opinion among the subordinate authorities in the Bombay Presidency. One gentleman conceives that the imposing of personal restraint is the only act otherwise punishable which the courts would allow a master to commit when a slave might be concerned. Another conceives that a master has a power of correction similar to that of a father. A third goes farther, and is of opinion that "all but cases of very aggravated nature would be considered as entitled to exemption from or mitigation of punishment on this account." On the other hand, several gentlemen are of opinion that the relation of master and slave would not be considered by the courts as a plea for any act which would be an offence if committed against a freeman.

It is clear, therefore, that we find the law in a state of utter uncertainty. It is equally clear that we cannot leave it in that state. We must either withdraw from a large class of slaves a protection to which the courts under the jurisdiction of which they live now think them entitled, or we must extend to a large class a protection greater than what they actually enjoy.

We have not the smallest hesitation in recommending to

his Lordship in Council that the law throughout all British India should be conformable to what, in the opinion of the Court of Nizamut Adawlut at Allahabad, is now actually the law in the Presidency of Fort William, and to what, in the opinion of the Court of Foujdarry Adawlut at Fort St. George, is now actually the practice in the Madras Presidency. That is to say, we recommend that no act falling under the definition of an offence should be exempted from punishment because it is committed by a master against his slave.

The distinction which, in the opinion of many respectable functionaries, the law now makes between acts committed against a freeman and acts committed against a slave is in itself an evil, and an evil so great that nothing but the strongest necessity, proved by the strongest evidence, could justify any government in maintaining it. We conceive that the circumstances which we have already stated are sufficient to show that no such necessity exists. By removing all doubt on the subject, we shall not deprive the master of a power the right to which has never been questioned, but of a power which is and has for some time been, to say the least, of disputable legality, and which has been held by a very precarious tenure.

To leave the question undecided is impossible. To decide the question by putting any class of slaves in a worse situation than that in which they now are is a course which we cannot think of recommending, and which we are certain that the government will not adopt. The inference seems to be that the question ought to be decided by declaring that whatever is an offence when committed against a freeman shall be also an offence when committed against a slave.

It may perhaps be thought that, by framing the law in this manner, we do, in fact, virtually abolish slavery in British India; and undoubtedly, if the law as we have framed it should be really carried into full effect, it will at once deprive slavery of those evils which are its essence, and will insure the speedy and natural extinction of the whole system. The essence of slavery, the circumstance which makes slavery the

worst of all social evils, is not, in our opinion, this, that the master has a legal right to certain services from the slave; but this, that the master has a legal right to enforce the performance of those services without having recourse to the tribunals. He is a judge in his own cause. He is armed with the powers of a magistrate for the protection of his own private interest against the person who owes him service. Every other judge quits the bench as soon as his own cause is called on. The judicial authority of the master begins and ends with cases in which he has a direct stake. The moment that a master is really deprived of this authority, the moment that his right to service really becomes, like his right to money which he has lent, a mere civil right, which he can enforce only by a civil action, the peculiarly odious and malignant evils of slavery disappear at once. The name of slavery may be retained, but the thing is no longer the same. It is evidently impossible that any master can really obtain efficient service from unwilling laborers by means of prosecution before the civil tribunals. Nor is there any instance of any country in which the relation of master and servant is maintained by means of such actions. In some states of society the laborer works because the master inflicts instant correction whenever there is any disobedience or slackness. In a different state of society, the people labor for a master because the master makes it worth their while. Practically, we believe it will be found that there is no third way. A laborer who has neither the motive of the freeman nor that of the slave, who is actuated neither by the hope of wages nor by the dread of stripes, will not work at all. The master may indeed, if he chooses, go before the tribunals and obtain a decree. But scarcely any master would think it worth while to do so, and scarcely any laborer would be spurred to constant and vigorous exertion by the dread of such a legal proceeding. In fact, we are not even able to form to ourselves the idea of a society in which the working-classes should have no other motives to industry than the dread of prosecution. We understand how the planter of Mauritius formerly induced his negroes to work. He applied the lash if they loi-

tered. We understand how our grooms and bearers are induced to work at Calcutta. They are gainers by working, and by obtaining a good character; they are losers by being turned away. But in what other way servants can be induced to work we do not understand.

It appears to us, therefore, that if we can really prevent the master from exacting service by the use of any violence or restraint, or by the infliction of any bodily hurt, one of two effects will inevitably follow: either the master will obtain no service at all, or he will find himself under the necessity of obtaining it by making it a source of advantage to the laborer as well as to himself. A laborer who knows that if he idles, his master will not dare to strike him; that if he absconds, his master will not dare to confine him; that his master can enforce a claim to service only by taking more trouble, losing more time and spending more money than the service is worth, will not work for fear. It follows that if the master wishes the laborer to work at all, the master must have recourse to different motives, to the motives of a freeman, to the hope of reward, to the sense of reciprocal benefit. Names are of no consequence. It matters nothing whether the laborer be or be not called a slave. All that is of real moment is that he should work from the motives and feelings of the freeman.

This effect, we are satisfied, would follow if outrages offered to slaves were really punished exactly as outrages offered to freemen are punished. But we are far, indeed, from thinking that, by merely framing the law as we have framed it, we shall produce this effect. It is quite certain that slaves are, at present, often oppressed by their masters in districts where the magistrates and judges conceive that the law now is what we propose that it shall henceforth be. It is, therefore, evident that they may continue to be oppressed by their masters when the law has been made perfectly clear. To an ignorant laborer, accustomed from his birth to obey a superior for daily food, to submit without resistance to the cruelty and tyranny of that superior, perhaps to be transferred, like a horse or a sheep, from one superior to another, neither the law

which we now propose, nor any other law, will of itself give freedom. It is of little use to direct the judge to punish unless we can teach the sufferer to complain.

We have thought it right to state this, lest we should mislead his Lordship in Council into an opinion that the law, framed as we propose to frame it, will really remove all the evils of slavery, and that nothing more will remain to be done. So far are we from thinking that the law, as we propose to frame it, will of itself effect a great practical change, that we greatly doubt whether even a law abolishing slavery would of itself effect any great practical change. Our belief is that, even if slavery were expressly abolished, it might, and would, in some parts of India, still continue to exist in practice. We trust, therefore, that his Lordship in Council will not consider the measure which we now recommend as of itself sufficient to accomplish the benevolent ends of the British Legislature, and to relieve the Indian Government from its obligation to watch over the interests of the slave population.

NOTE (C).

ON THE CHAPTER OF OFFENCES AGAINST THE STATE.

His Lordship in Council will perceive that, in this chapter, we have provided only for offences against the Government of India, and that we have made no mention of offences against the General Government of the British empire. We have done so because it appears to us doubtful to what extent his Lordship in Council is competent to legislate respecting such offences. The act of Parliament which defines the legislative power of the Council of India especially prohibits that body from making any law "which shall in any way affect any prerogative of the Crown or the authority of Parliament, or any part of the unwritten laws, or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend, in any degree, the allegiance of any person to the Crown of

the United Kingdom, or the sovereignty or dominion of the said Crown over any part of the said territories."

It might be argued that these words relate only to laws affecting the rights of the Crown and of Parliament, and not to laws affecting the penal sanctions of those rights, and that, therefore, though the Governor-General in Council has no power to absolve the King's subjects from their allegiance, he has power to fix the punishment to which they shall be liable for violating their allegiance. It seems to us, however, that there is the closest connection in this case between the right and the penal sanction; that a power to alter the sanction amounts to a power to abolish the right; and that Parliament, which withheld from the Indian Legislature one of those powers, cannot be supposed to have intended to grant the other.

If the Governor-general in Council has the legal power to fix the punishment of a subject who should, in the territories of the East India Company, conspire the death of the King, or levy war against the King, then the Governor-general in Council has the legal power to fix that punishment at a fine of one anna; and it is plain that a law which should fix such a fine as the only punishment of regicide and rebellion, would be a law virtually absolving all subjects within the territories of the East India Company from their allegiance.

This part of the penal law, therefore, we have not ventured to touch. We leave it to the Imperial Legislature. But we trust that we may be permitted to suggest to his Lordship in Council that the early attention of the Home authorities should be called to this subject.

There is no doubt that the criminal statute law of England is not binding generally on a native of India in the Mofussil. Whether the statute law relating to treason be binding on such a native is a question with respect to which we do not venture to give a decided opinion. It seems to us exceedingly doubtful whether that part of the statute law be binding on such a native. It is quite certain that no court has ever enforced it against such a native; and that, in the opinion of many respectable and intelligent judicial officers in the service

of the Company, it could not legally be enforced against such a native. Nor are the Company's judicial officers, by whom alone such a native can legally be tried, likely to be accurately acquainted with the statute law of England on the subject of treason, or with the mass of constructions and precedents by which that law has been overlaid. If such a native be not punishable under the English statute law of treason, it is difficult to say under what law he could be punished for that crime. The regulations contain nothing on the subject. The Council of India, we conceive, is not competent to legislate respecting it. The Mahometan law might possibly be so violently strained as to reach it in Bengal and in the Madras Presidency; and in the Bombay Presidency it might possibly be brought within that clause which arms the courts with an enormous discretion in cases in which they conceive that morality and social order require protection. But there are, in our opinion, strong reasons against retaining either the Mahometan penal law, or the sweeping clause of the Bombay Regulations, to which we have referred.

It may be added that the provision of the Bombay Regulations, to which we have referred, applies only to persons who profess a religion with which a system of penal law is inseparably connected. Unless, therefore, the English statute law on the subject of treason applies to natives in the Mofussil, a point respecting which we entertain great doubt, a native Christian who should, at Surat, assist the levying of war, not against the Company's Government, but against the British Crown, would be liable to no punishment whatever.

This anomalous state of things may be, in some degree, explained by the singular manner in which the British empire grew up in India. The East India Company was, during a long course of years, in theory at least, under two masters. It was subject to the King of England; it was subject also to the great Mogul. It derived its corporate existence from the British Parliament. It held its territorial possessions by a grant from the Durbar of Delhi. The situation of the native subjects of the Company bore some analogy to that of the inhabitants of Mindelheim, while that fief of the empire was

held by the Duke of Marlborough. The inhabitants of Mindelheim were subjects of the Duke of Marlborough, but they owed no allegiance to the English Crown, though their sovereign was subject to that crown. It was in this way that the British empire in India originated. It was long considered as a wise policy to disguise the real power of the English under the forms of vassalage, and to leave to the Mogul and his Viceroys the empty honors of a sovereignty which was really held by the Company. This policy was abandoned slowly and by imperceptible degrees. The recognition of the supremacy of the King of Delhi appeared on the seal of the British government down to a late period, and on its coin down to a still later period. A great change has, indeed, taken place since the grant of the Dewannee of the lower provinces to the Company, but it has taken place so gradually, that, though it would be absurd to deny that the natives of British India are now subjects of his Majesty, it would be impossible to point out the particular time when they became so.

To these circumstances we attribute most of the anomalies which are to be found in the legal relation subsisting between the natives of British India and the general government of the empire. It seems highly desirable that the Imperial Legislature should do what cannot be done by the Local Legislature, and should pass a law of high-treason for the territories of the East India Company. As far, indeed, as respects the royal person, the present state of the law, though in theory unseemly, is not likely to cause any practical evil. It is highly improbable that any English king will visit his Indian dominions, or that any plot, having for its object the death of an English king, will ever extend its ramifications to India. But it is by no means improbable that persons residing in the territories of the East India Company may be parties to the levying of war against the British Crown, without violating any local regulation. If any insurrection were to take place in any of the British dominions in the Eastern Seas—in Ceylon, for example, or in Mauritius—it is by no means improbable that persons residing within the Company's territo-

ries might furnish information and stores to the rebels. And if this were done by a person not subject to the jurisdiction of the courts established by Royal Charter, we are satisfied that there would be the most serious difficulty in bringing the criminal to legal punishment.

We have, his Lordship in Council will perceive, made the abetting of hostilities against the government, in certain cases, a separate offence, instead of leaving it to the operation of the general law laid down in the chapter on abetment. We have done so for two reasons. In the first place, war may be waged against the government by persons in whom it is no offence to wage such war, by foreign princes and their subjects. Our general rules on the subject of abetment would apply to the case of a person residing in the British territories, who should abet a subject of the British government in waging war against that government; but they would not reach the case of a person who, while residing in the British territories, should abet the waging of war by any foreign prince against the British government. In the second place, we agree with the great body of legislators in thinking that, though in general a person who has been a party to a criminal design which has not been carried into effect, ought not to be punished so severely as if that design had been carried into effect, yet an exception to this rule must be made with respect to high offences against the State; for State crimes, and especially the most heinous and formidable State crimes, have this peculiarity, that if they are successfully committed, the criminal is almost always secure from punishment. The murderer is in greater danger after his victim is despatched than before. The thief is in greater danger after the purse is taken than before. But the rebel is out of danger as soon as he has subverted the government. As the penal law is impotent against a successful rebel, it is consequently necessary that it should be made strong and sharp against the first beginnings of rebellion, against treasonable designs which have been carried no farther than plots and preparations. We have, therefore, not thought it expedient to leave such plots and preparations to the ordina-

ry law of abetment. That law is framed on principles which, though they appear to us to be quite sound, as respects the great majority of offences, would be inapplicable here. Under that general law, a conspiracy for the subversion of the government would not be punished at all if the conspirators were detected before they had done more than discuss plans, adopt resolutions, and interchange promises of fidelity. A conspiracy for the subversion of the government, which should be carried as far as the gunpowder treason or the assassination plot against William the Third, would be punished very much less severely than the counterfeiting of a rupee, or the presenting of a forged check. We have, therefore, thought it absolutely necessary to make separate provision for the previous abetting of great State offences. The subsequent abetting of such offences may, we think, without inconvenience, be left to be dealt with according to the general law.

NOTE (D).

ON THE CHAPTER OF OFFENCES RELATING TO THE ARMY AND NAVY.

A FEW words will explain the necessity of having some provisions of the nature of those which are contained in this chapter.

It is obvious that a person who, not being himself subject to military law, exhorts or assists those who are subject to military law to commit gross breaches of discipline, is a proper subject of punishment. But the general law respecting the abetting of offences will not reach such a person; nor, framed as it is, would it be desirable that it should reach him. It would not reach him, because the military delinquency which he has abetted is not punishable by this code, and therefore is not, in our legal nomenclature, an offence. Nor is it desirable that the punishment of a person not military, who has abetted a breach of military discipline, should be fixed according to the principles on which we have pro-

ceeded in framing the law of abetment. We have provided that the punishment of the abettor of an offence shall be equal or proportional to the punishment of the person who commits that offence; and this seems to us a sound principle when applied only to the punishments provided by this code. But the military penal law is, and must necessarily be, far more severe than that under which the body of the people live. The severity of the military penal law can be justified only by reasons drawn from the peculiar habits and duties of soldiers, and from the peculiar relation in which they stand to the government. The extension of such severity to persons not members of the military profession appears to us altogether unwarrantable. If a person, not military, who abets a breach of military discipline, should be made liable to a punishment regulated, according to our general rules, by the punishment to which such a breach of discipline renders a soldier liable, the whole symmetry of the penal law would be destroyed. He who should induce a soldier to disobey any order of a commanding officer would be liable to be punished more severely than a dacoit, a professional thug, an incendiary, a ravisher, or a kidnapper. We have attempted in this chapter to provide, in a manner more consistent with the general character of the code, for the punishment of persons who, not being military, abet military crimes.

NOTE (E).

ON THE CHAPTER OF THE ABUSE OF THE POWERS OF PUBLIC SERVANTS.

This chapter is intended to reach offences which are committed by public servants, and which are of such a description that they can be committed by public servants alone.

We have found considerable difficulty in drawing the line between public servants and the great mass of the community. We hope that the description which we have given in Clause 14 will be found to comprehend all those whom it

is desirable to bring under this part of the law, and we trust that, when the code of procedure is completed, this description may be made both more accurate and more concise.

Those offences which are common between public servants and other members of the community we leave to the general provisions of the code. If a public servant embezzles public money, we leave him to the ordinary law of criminal breach of trust. If he falsely pretends to have disbursed money for the public, and by this deception induces the government to allow it in his accounts, we leave him to the ordinary law of cheating. If he produces forged vouchers to back his statement, we leave him to the ordinary law of forgery. We see no reason for punishing these offences more severely when the government suffers by them than when private people suffer. A government, indeed, which does not consider the sufferings of private individuals as its own, is not only selfish but short-sighted in its selfishness. The revenue is drawn from the wealth of individuals, and every act of dishonest spoliation which tends to render individuals insecure in the enjoyment of their wealth is really an injury to the revenue. On every account, therefore, we think it desirable that the property of the State should, in general, be protected by exactly the same laws which are considered as sufficient for the protection of the property of the subject.

We are not without apprehension that we may be thought to have treated the transgressions of public servants too favorably, to have passed by without notice some malpractices which deserve punishment, and where we have provided punishments, to have seldom made those punishments sufficiently severe.

It is true that we have altogether omitted to provide any punishment for some kinds of misconduct on the part of public servants. It is true, also, that the punishments which we propose in this chapter are not generally proportioned either to the evil which the abuse of power produces, or to the depravity of a man who, having been intrusted with power for the public benefit, employs that power to gratify his own cupidity or revenge.

But it is to be remembered that there is a marked distinction between the penal clauses contained in this chapter and the other penal clauses of the code. In general a penal clause sets forth the whole punishment which can be inflicted on an offender by any public authority. The penalty of theft, of breach of trust, of cheating, of extortion, of assault, of defamation, has been fixed on the supposition that it is the whole penalty which the criminal is to suffer, and that no power in the State can make any addition to it. But the penalty of an offence committed by a public functionary in the exercise of his public functions has been fixed on the supposition that it will often be only a part, and a small part, of the penalty which he will suffer. It is in the power of the government to punish him for many acts which the law has not made punishable. It is in the power of the government to add to any sentence pronounced by the courts another sentence which will often be even more terrible. To a man whose subsistence is derived from official emoluments, whose habits are formed to official business, and whose whole ambition is fixed on official promotion, degradation to a lower post is a punishment; dismissal from the public service is a punishment sufficient even for a serious offence. The mere knowledge that his character has suffered in the opinion of those superiors on whom his advancement depends probably gives him as much pain as a heavy fine.

This is to a great degree the case in every country, and assuredly not less in India than in any other country. Indeed, those servants of the Company by whom all the higher offices in the Indian government are filled entertain a feeling about their situations very different from that which is found among political men in England. It is natural that they should entertain such a feeling. They are set apart at an early age as persons destined to hold offices in India. Their education is conducted at home with that view. They are transferred when just entering on manhood to the country which they are to govern. They pass the best years of their lives in acquiring knowledge which is most important to men who are to fill high situations in India, but which in any other walk

of life would bring little profit and little distinction; in mastering languages which, when they quit this country, are useless to them; in studying a vast and complicated system of revenue which is altogether peculiar to the East; in becoming intimately acquainted with the interests, the resources, and the projects of potentates whose very existence is unknown even to educated men in Europe. To such a man, dismissal from the service of the Indian government is generally a very great calamity. His life has been thrown away. It has been passed in acquiring information and experience which, in any pursuit to which he may now betake himself, will be of little or no service to him. There are, therefore, few covenanted servants of the Company who, even if they were men destitute of all honorable feeling, would not look on dismissal from the service as a most severe punishment. But the covenanted servants of the Company are English gentlemen; that is to say, they are persons to whom the ruin of their fortunes is less terrible than the ruin of their characters. There are few of them, we believe, to whom an intimation that their integrity was suspected by the government would not give more pain than a sentence of six months' imprisonment for an offence not of a disgraceful kind, and to many of them death itself would appear less dreadful than ignominious expulsion from the body of which they are members.

Thus dismissal from the public service is a punishment exceedingly dreaded by public functionaries, and most dreaded in this country by the highest class of public functionaries. Nor is this all. It is not merely a severe punishment, but it is also a punishment which is far more likely to be inflicted than many punishments which are less severe. Those who are legally competent to inflict it are bound by no rules, except those which their own discretion may impose on them. For what kind and degree of delinquency they shall inflict it, by what evidence that delinquency shall be established, by what tribunals the inquiry shall be conducted; nay, whether there shall be any delinquency, any evidence, any tribunal, is absolutely in their breasts. They may inflict this punishment, and may be justified in inflicting it, for transgressions

which are not susceptible of precise definition, and which have not been substantiated by decisive proof. They may be justified in inflicting it, because many petty circumstances, each of which separately would be too trivial for notice, have, when taken together, satisfied them that a functionary is unfit for any public employment. They may be justified in inflicting it, because they strongly suspect him of guilt which they cannot bring home to him by evidence to which a Zillah judge would pay any attention. Most of what we have said of the punishment of dismissal from office applies, though not in the same degree, to the slighter punishments of censure, suspension, and removal from a higher to a lower post.

We have shown that public functionaries are liable not only to the punishments provided by this code, but also to other peculiar punishments of great severity. It seems, therefore, to follow that, if those who possess the power of inflicting these peculiar punishments can be trusted, some malpractices of public functionaries may be safely left unnoticed in this code, and that other malpractices need not be visited with legal punishment so rigorous as their enormity might seem to merit. The executive government, in our opinion, deserves to be trusted. At all events, it must be trusted; for it is quite certain that no laws will prevent corruption and oppression on the part of the servants of the Indian government, if that government is inclined to screen the offenders. The government, to say nothing of the vast influence which it can indirectly exert, appoints, promotes, and removes judges at its discretion. It can remit any sentence pronounced by the courts. It can, therefore, if it be not honestly disposed to correct official abuses, render any penal clauses directed against such abuses almost wholly inoperative. And if it be honestly disposed, as we firmly believe that it is, to correct official abuses, it will use for that purpose its power of rewarding and punishing its servants.

It will be seen that we propose, under Clause 138, to punish with imprisonment for a term not exceeding three years, or with fine, or both, the corruption of public functionaries. The punishment of fine will, we think, be found very effi-

cacious in cases of this description, if the judges exercise the power given them as they ought to do, and compel the delinquent to deliver up the whole of his ill-gotten wealth.

The mere taking of presents by a public functionary, when it cannot be proved that such presents were corruptly taken, we have made penal only in one particular case, to which we shall hereafter call the attention of his Lordship in Council. We have not made the taking of presents by public functionaries generally penal; because, though we think that it is a practice which ought to be carefully watched and often severely punished, we are not satisfied that it is possible to frame any law on the subject which would not be rendered inoperative either by its extreme severity or by its extreme laxity. Absolutely to prohibit all public functionaries from taking presents would be to prohibit a son from contributing to the support of a father, a father from giving a portion with a daughter, a brother from extricating a brother from pecuniary difficulties. No government would wish to prevent persons intimately connected by blood, by marriage, or by friendship from rendering services to each other; and no tribunals would enforce a law which should make the rendering of such services a crime. Where no such close connection exists, the receiving of large presents by a public functionary is generally a very suspicious proceeding. But a lime, a wreath of flowers, a slice of betel-nut, a drop of otto of roses poured on his handkerchief, are presents which it would, in this country, be held churlish to refuse, and which cannot possibly corrupt the most mercenary of mankind. Other presents of more value than these may, on account of their peculiar nature, be accepted, without affording any ground for suspicion. Luxuries socially consumed according to the usages of hospitality are presents of this description. It would be unreasonable to treat a man in office as a criminal for drinking many rupees-worth of champagne in a year at the table of an acquaintance; though if he were to suffer one of his subordinates to accept even a single rupee in specie, he might deserve exemplary punishment.

It appears to us, therefore, that the taking of presents

where a corrupt motive cannot be proved, ought not in general to be a crime cognizable by the courts. Whether in any particular case it ought to be punished or not will depend on innumerable circumstances, which it is impossible accurately to define—on the amount of the present, on the nature of the present, on the relation in which the giver and receiver stand to each other. Suppose that a wealthy English agent, who is interested in a young civil servant of the Company, were to pay the debts of that civil servant; or, suppose that a resident were to furnish money to enable his invalid assistant to proceed to the Cape. In these transactions there might be nothing which the most scrupulous could disapprove; but the case would be widely different if a wealthy native Zemindar were to pay the debts of a collector of his district, or if any of the officers at the residency were to receive money from the minister of a foreign power. In such a case, though it might be impossible to prove a corrupt motive, we think that the government would be inexcusable if it suffered the delinquent to remain in the public service.

We have hitherto put only extreme cases; cases in which it is clear that the taking of presents ought not to be punished, or cases in which it is clear that the taking of presents ought to be severely punished. But between the extremes lie an immense variety of cases, some of which call for severe punishment, some for milder punishment, some for censure, some for gentle admonition, while some ought to be tolerated. We have said that if a collector were to accept a large present of money from a wealthy native Zemindar, he would deserve to be turned out of the service. But if the collector were to accept such a present from an English indigo planter, the case would be different. The indigo planter might be his uncle, his brother, his father-in-law, his brother-in-law. In that case there might be no impropriety in the transaction. Again, if a native in the public service were to accept a present from a Zemindar who was connected with him by blood, marriage, or friendship, there might be no impropriety in the transaction.

By the Act of Parliament to which the malpractices of the

first British conquerors of India gave occasion, the servants of the Company were forbidden to receive presents from Asiatics, but were left at liberty to receive presents from Europeans. The legislators of that time appear to have proceeded on the supposition that the servants of the Company would all be Englishmen, and that no Englishman would ever have any such connection with any native as would render the receiving of presents from that native unobjectionable.

Natives are now declared by law to be competent to hold any post in the Company's service. It would evidently be improper to interdict an Asiatic in the service of the Company from receiving pecuniary assistance from his Asiatic father, or from receiving a portion with an Asiatic bride. It seems to us, therefore, that the rule laid down by Parliament, though it will still be in many cases an excellent rule of evidence, ought not, under the altered circumstances of India, to continue to be a rule of law.

Again, it ought to be remembered that the European and native races are not at present divided from each other by so strong a line of separation as at the time when the British Parliament laid down the rule which we are considering. The interval is still wide; but it by no means appears to us, as it appeared to the legislators of the last generation, to be impassable. It is evident, therefore, that the rule formerly laid down by Parliament is constantly becoming less and less applicable to the state of India. On these grounds we have thought it advisable to leave this matter to the executive government, which will doubtless promulgate, from time to time, such rules as it may deem proper, and will enforce submission to those rules by visiting its disobedient servants with censure, with degradation, or with dismissal from the public service, according to the circumstances of every case.

We have thought it desirable to make one exception. We propose that a judge who accepts any valuable thing by way of gift from one whom he knows to be a plaintiff or a defendant in any cause pending in his court shall be severely punished. This rule is not to extend to the taking of food in

the interchange of ordinary civilities. It appears to us that the objections which we have made to a general law prohibiting the receipt of presents by public functionaries do not apply to this clause. The rule is clear and definite. The practice against which it is directed is not a practice which ought sometimes to be encouraged, and sometimes to be tolerated. It ought always, and under all circumstances, to be discouraged. It therefore appears to unite all the characteristics which mark out a practice as a fit object of penal legislation.

The only other penal provision of this chapter to which we think it necessary to call the attention of his Lordship in Council is that which is contained in Clause 149.

We are of opinion that the preceding clauses, and the power which the government possesses of suspending, degrading, and dismissing public functionaries, will be found sufficient to prevent gross abuses. But there will remain a crowd of petty offences with which it is very difficult to deal, offences which separately are too slight to be brought before the criminal tribunals, which will sometimes be committed by good public servants, and which therefore it would be inexpedient to punish by removal from office, yet which will be very often committed if they can be committed with impunity, and which, if often committed, would impair the efficiency of all departments of the administration, and would produce infinite vexation to the body of the people.

By the existing laws of all the presidencies, a summary judicial power is given in certain cases to certain official superiors for the purpose of restraining their subordinates. We are inclined to believe that this is a wholesome power, and that it has, in the great majority of cases, been honestly employed for the protection of the public. We propose, therefore, to adopt the principle, and to make the system uniform through all the provinces of the empire, and through all the departments of the public service. We propose that a public functionary who is guilty of neglect of duty, who treats his superiors with disrespect, or who disobeys the lawful orders given by them for his guidance, shall be liable to a fine not exceeding the official pay which he receives in

three months. In default of payment he will be liable (see Clause 54) to seven days' imprisonment.

In the code of procedure we think that it will be proper to provide that the power of awarding this penalty shall be given, not to the ordinary tribunals, but to the official superiors of the offender. Thus, if a subordinate officer employed in the collection of revenue should incur this penalty, it will be imposed by the collector, and the appeal will probably be to the Board of Revenue. If an officer employed to execute the process of a Zillah court should neglect his duty, the fine will be imposed by the Zillah judge, and the appeal will probably be to the Sudder court. If the offence should be committed by a tide-waiter, the collector of customs for the port will probably impose the penalty, and the appeal will be to the Board of Customs. These instances we give merely as illustrations of what, at present, appears to us desirable. The details of this part of the law of procedure cannot be arranged without much consideration and inquiry.

One important question still remains to be considered. We are of opinion that we have provided sufficient punishment for the public servant who receives a bribe. But it may be doubted whether we have provided sufficient punishment for the person who offers it. The person who, without any demand, express or implied, on the part of a public servant, volunteers an offer of a bribe, and induces that public servant to accept it, will be punishable under the general rule contained in Clause 88 as an instigator. But the person who complies with a demand, however signified, on the part of a public servant, cannot be considered as guilty of instigating that public servant to receive a bribe. We do not propose that such a person shall be liable to any punishment, and, as this omission may possibly appear censurable to many persons, we are desirous to explain our reasons.

In all states of society the receiving of a bribe is a bad action, and may properly be made punishable. But whether the giving of a bribe ought or ought not to be punished, is a question which does not admit of a short and general answer. There are countries in which the giver of a bribe ought

to be more severely punished than the receiver. There are countries, on the other hand, in which the giving of a bribe may be what it is not desirable to visit with any punishment. In a country situated like England, the giver of a bribe is generally far more deserving of punishment than the receiver. The giver is generally the tempter; the receiver is the tempted. The giver is generally rich, powerful, well educated; the receiver, needy and ignorant. The giver is under no apprehension of suffering any injury if he refuses to give. It is not by fear, but by ambition, that he is generally induced to part with his money. Such a person is a proper subject of punishment. But there are countries where the case is widely different; where men give bribes to magistrates from exactly the same feeling which leads them to give their purses to robbers or to pay ransom to pirates; where men give bribes because no man can, without a bribe, obtain common justice. In such countries we think that the giving of bribes is not a proper subject of punishment. It would be as absurd, in such a state of society, to reproach the giver of a bribe with corrupting the virtue of public servants, as it would be to say that the traveller who delivers his money when a pistol is held to his breast corrupts the virtue of the highwayman.

We would by no means be understood to say that India, under the British government, is in a state answering to this last description. Still we fear it is undeniable that corruption does prevail to a great extent among the lower class of public functionaries; that the power which those functionaries possess renders them formidable to the body of the people; that in the great majority of cases the receiver of the bribe is really the tempter, and that the giver of the bribe is really acting in self-defence.

Under these circumstances, we are strongly of opinion that it would be unjust and cruel to punish the giving of a bribe in any case in which it could not be proved that the giver had really by his instigations corrupted the virtue of a public servant, who, unless temptation had been put in his way, would have acted uprightly.

NOTE (F).

ON THE CHAPTER OF CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.

We were at first disposed to have one chapter for contempts of the lawful authority of courts of justice, another for contempts of the lawful authority of officers of revenue, and a third for contempts of the lawful authority of officers of police. But we soon found that these three chapters would be almost the same, word for word. It appeared to us also that, in the existing state of the civil administration of India, the separation which we were at first inclined to make would produce nothing but perplexity. The functions of magistrate and collector are very frequently united in the same person; and that person is perpetually called upon, both as magistrate and collector, to perform acts which are judicial in their nature, to try offenders, and to decide litigated questions of civil right. While the division of labor between the different departments of the public service is so imperfect, it would be idle to make nice distinctions between those departments in the penal code.

In order to frame this chapter, we went carefully through the existing regulations of the three Presidencies, and extracted the numerous penal provisions which are intended to enforce obedience to the lawful authority of different classes of public servants. Having collected these provisions, and discarded a very few which we thought obviously unreasonable or superfluous, we proceeded to analyze the rest.

It is possible that our analysis may be imperfect; and it is highly probable that the punishments which we propose may require some modification. It will be seen that we propose the same punishment for all the offences which fall, in our analysis, under the same head. For example; one head is the omitting to obey the lawful summons of a public servant. For this offence we have only one punishment; and this punishment will be applicable alike to the witness who omits to

obey the lawful summons of the court of Sudder Dewanny Adawlut, to the witness who omits to obey the lawful summons of a Moonsiff, to the putwarree who in Bengal omits to obey the lawful summons of the collector, to the ryot who in the Madras Presidency omits to obey the lawful summons of the collector, to the trader who in the same presidency omits to attend a meeting lawfully convened for the distribution of the Vizabuddy. In the same manner we propose one punishment for the captain of a ship in the Hoogly who illegally refuses to admit a custom-house officer on board, for a landholder who refuses to admit a surveyor lawfully commissioned by the collector to measure land, for a distiller who refuses to admit the proper officer to examine his distillery. Again, we propose the same punishment for the person who resists the taking of goods in execution under a decree of a court of justice, for the person who resists the taking of property by way of distress for arrears of revenue, for the person who resists the seizure of salt by lawful authority, for the person who resists the seizure of a boat in default of toll by lawful authority, for the person who resists the seizure of smuggled goods by lawful authority.

We are sensible that there may be reasons which have escaped us for making distinctions in punishment between offences which in our classification fall under the same head. But it is impossible to find in any single person, or in any small body of persons, so extensive and minute a knowledge of every province of India, and of every department of the public service, as would be a security against errors of this description. We have no doubt that if his Lordship in Council directs the code to be published for general information, valuable suggestions will be received from servants of the Company in different parts of India, and that those suggestions will enable the government to modify the provisions which we propose, by introducing proper aggravations and mitigations.

The only provision which appears to us to require any further explanation is that which is contained in Clause 182.

We have, to the best of our ability, framed laws against

acts which ought to be repressed at all times and places, or at times and places which it is in our power to define. But there are acts which at one time and place are perfectly innocent, and which at another time or place are proper subjects of punishment; nor is it always possible for the legislator to say at what time or at what place such acts ought to be punishable.

Thus it may happen that a religious procession which is in itself perfectly legal, and which, while it passes through many quarters of a town, is perfectly harmless, cannot without great risk of tumult and outrage be suffered to turn down a particular street inhabited by persons who hold the ceremony in abhorrence, and whose passions are excited by being forced to witness it. Again, there are many Hindoo rites which in Hindoo temples and religious assemblies the law tolerates, but which could not with propriety be exhibited in a place which English gentlemen and ladies were in the habit of frequenting for purposes of exercise. Again, at a particular season hydrophobia may be common among the dogs at a particular place, and it may be highly advisable that all people at that place should keep their dogs strictly confined. Again, there may be a particular place in a town which the people are in the habit of using as a receptacle for filth. In general this practice may do no harm; but an unhealthy season may arrive when it may be dangerous to the health of the population, and under such circumstances it is evidently desirable that no person should be allowed to add to the nuisance. It is evident that it is utterly impossible for the legislature to mark out the route of all the religious processions in India, to specify all the public walks frequented by English ladies and gentlemen, to foresee in what months and in what places hydrophobia will be common among dogs, or when a particular dunghill may become dangerous to the health of a town. It is equally evident that it would be unjust to punish a person who cannot be proved to have acted with bad intentions for doing to-day what yesterday was a perfectly innocent act, or for doing in one street what it would be perfectly innocent to do in another street, without giving him some notice.

What we propose, therefore, is to empower the local authorities to forbid acts which these authorities consider as dangerous to the public tranquillity, health, safety, or convenience, and to make it an offence in a person to do anything which that person knows to be so forbidden, and which may endanger the public tranquillity, health, safety, or convenience. It will be observed that we do not give to the local authorities the power of arbitrarily making anything an offence; for unless the court before which the person who disobeys the order is tried shall be of opinion that he has done something tending to endanger the public tranquillity, health, safety, or convenience, he will be liable to no punishment. The effect of the order of the local authority will be merely to deprive the person who knowingly disobeys the order of the plea that he had no bad intentions. He will not be permitted to allege that if he has caused harm, or risk of harm, it was without his knowledge.

Thus, if in a town where no order for the chaining up of dogs has been made, A suffers his dog to run about loose, A will be liable to no punishment for any mischief which the animal may do, unless it can be shown that A knew the animal to be dangerous. But if an order for confining dogs has been issued, and if A knew of that order, it will be no defence for him to allege, and even to prove, that he believed his dog to be perfectly harmless. If the court think that A's disobedience has caused harm, or risk of harm, A will be liable to punishment. On the other hand, if the court think that there was no danger, and that the local order was a foolish one, A will not be liable to punishment.

We see some objections to the way in which we have framed this part of the law; but we are unable to frame it better. On the one hand, it is, as we have shown, absolutely necessary to have some local rules which shall not require the sanction of the legislature. On the other hand, we are sensible that there is the greatest reason to apprehend much petty tyranny and vexation from such rules; and this although the framers of those rules may be very excellent and able men. There is scarcely any disposition in a ruler more

prejudicial to the happiness of the people than a meddling disposition. Yet experience shows us that it is a disposition which is often found in company with the best intentions, with great activity and energy, and with a sincere regard for the interest of the community. A public servant of more than ordinary zeal and industry, unless he have very much more than ordinary judgment, is the very man who is likely to harass the people under his care with needless restrictions. We have, therefore, thought it necessary to provide that no person should be punished merely for disobeying a local order, unless it be made to appear that the disobedience has been attended with evil, or risk of evil. Thus no person will be punished for disobeying an idle and vexatious order.

The mode of promulgating these orders belongs to the code of procedure, which will, of course, contain such provisions as may be required for the purpose of enabling the government to exercise a constant and efficient control over its local officers.

NOTE (G).

ON THE CHAPTER OF OFFENCES RELATING TO PUBLIC JUSTICE.

Many offences which interfere with the administration of justice are sufficiently provided for in other chapters, particularly in the chapter relating to contempts of the lawful authority of public servants. There still remain, however, some offences of that description for which the present chapter is intended to provide.

The rules which we propose touching the offence of attempting to impose on a court of justice by false evidence differ from those of the English law, and of the codes which we have had an opportunity of consulting.

It appears to us, in the first place, that the offence which we have designated as the fabricating of false evidence is not punished with adequate severity under any of the systems to which we refer. This may perhaps be because the offence, in its aggravated forms, is not one of very frequent occurrence

in Western countries. It is notorious, however, that in this country the practice is exceedingly common, and for obvious reasons. The mere assertion of a witness commands far less respect in India than in Europe, or in the United States of America. In countries in which the standard of morality is high, direct evidence is generally considered as the best evidence. In England assuredly it is so considered, and its value, as compared with the value of circumstantial evidence, is perhaps overrated by the great majority of the population. But in India we have reason to believe that the case is different. A judge, after he has heard a transaction related in the same manner by several persons who declare themselves to be eye-witnesses of it, and of whom he knows no harm, often feels a considerable doubt whether the whole, from beginning to end, be not a fiction, and is glad to meet with some circumstance, however slight, which supports the story, and which is not likely to have been devised for the purpose of supporting the story.

Hence, in England, a person who wishes to impose on a court of justice knows that he is likely to succeed best by perjury, or subornation of perjury. But in India, where a judge is generally on his guard against direct false evidence, a more artful mode of imposition is frequently employed. A lie is often conveyed to a court, not by means of witnesses, but by means of circumstances, precisely because circumstances are less likely to lie than witnesses. These two modes of imposing on the tribunals appear to us to be equally wicked and equally mischievous. It will, indeed, be harder to bring home to an offender the fabricating of false evidence than the giving of false evidence. But wherever the former offence is brought home, we would punish it as severely as the latter. If A puts a purse in Z's bag, with the intention of causing Z to be convicted as a thief, we would deal with A as if he had sworn that he saw Z take a purse. If A conceals in Z's house a paper written in imitation of Z's hand, and purporting to be a plan of a treasonable conspiracy, we would deal with A as if he had sworn that he was present at a meeting of conspirators at which Z presided.

The exception in Clause 190 is in strict conformity with this principle. We propose to treat the giving of false evidence and the fabricating of false evidence in exactly the same way. We have no punishment for false evidence given by a person when on his trial for an offence, though we conceive that such a person ought to be interrogated. The grounds on which this part of the law is founded will shortly be submitted to government in our report on the law of evidence. As we do not propose to punish a prisoner for lying at the bar in order to escape punishment, so we do not propose to punish him for fabricating evidence with the view of escaping punishment, unless he also contemplated some injury to others as likely to be produced by the evidence so fabricated. If A stabs Z, and afterwards on his trial denies that he stabbed Z, we do not propose to punish A as a giver of false evidence. And on the same principle, if A, after having stabbed Z, in order to escape detection, disposes Z's body in such a manner as is likely to lead a jury to think the death accidental, we do not propose to punish A as the fabricator of false evidence.

It appears to us that the offence of attempting to impose on a court of justice by false evidence is an offence of which there are numerous grades, some of which may be easily defined. The authors of the French code have not overlooked these circumstances, though they have not, in our opinion, marked the gradations very successfully. The English law makes no distinction whatever between the man who has attempted to take away his neighbor's life by false swearing, and the man who has strained his conscience to give an undeserved good character to a boy accused of a petty theft. The former is punished far too leniently; the latter perhaps too severely.

The giving of false evidence must always be a grave offence. But few points in penal legislation seem to us clearer than that the law ought to make a distinction between that kind of false evidence which produces great evils, and that kind of false evidence which produces comparatively slight evils.

As the ordinary punishment of false evidence, we propose imprisonment for a term of not more than seven years, nor less than one year. If the false evidence is given or fabricated with intent to cause a person to be convicted of a grave offence not capital, we propose that the person who gives or fabricates such evidence may be punished with the punishment of the offence which he has attempted to fix on another. If the false evidence be given or fabricated with the intention of causing death, we propose to punish it in the same manner in which we propose to punish the worst attempts to murder. If such false evidence actually causes death, the person who has given or fabricated it falls under the definition of murder, and is liable to capital punishment. In this last point, the law, as we have framed it, agrees with the old law of England, which, though in our opinion just and reasonable, has become obsolete.

We think this the proper place to notice an offence which bears a close affinity to that of giving false evidence, and which we leave for the present unpunished, only on account of the defective state of the existing law of procedure—we mean the crime of deliberately and knowingly asserting falsehoods in pleading. Our opinions on this subject may startle persons accustomed to that boundless license which the English law allows to mendacity in suitors. On what principle that license is allowed we must confess ourselves unable to discover. A lends Z money; Z repays it. A brings an action against Z for the money, and affirms in his declaration that he lent the money, and has never been repaid. On the trial A's receipt is produced. It is not doubted. A himself cannot deny that he asserted a falsehood in his declaration. Ought A to enjoy impunity? Again: Z brings an action against A for a debt which is really due. A's plea is a positive averment that he owes Z nothing. The case comes to trial; and it is proved by overwhelming evidence that the debt is a just debt. A does not even attempt a defence. Ought A in this case to enjoy impunity? If, in either of the cases which we have stated, A were to suborn witnesses to support the lie which he has put on the pleadings, every one

of these witnesses, as well as A himself, would be liable to severe punishment. But false evidence in the vast majority of cases springs out of false pleading, and would be almost entirely banished from the courts if false pleading could be prevented.

It appears to us that all the marks which indicate that an act is a proper subject for legal punishment meet in the act of false pleading. That false pleading always does some harm is plain. Even when it is not followed up by false evidence, it always delays justice. That false pleading produces any compensating good to atone for this harm has never, as far as we know, been even alleged. That false pleading will be more common if it is unpunished than if it is punished, appears as certain as that rape, theft, embezzlement, would, if unpunished, be more common than they now are. It is evident, also, that there will be no more difficulty in trying a charge of false pleading than in trying a charge of false evidence. The fact that a statement has been made in pleading will generally be more clearly proved than the fact that a statement has been made in evidence. The falsehood of a statement made in pleading will be proved in exactly the same manner in which the falsehood of a statement made in evidence is proved. Whether the accused person knew that he was pleading falsely, the courts will determine on the same evidence on which they now determine whether a witness knew that he was giving false testimony.

We have as yet spoken only of the direct injury produced to honest litigants by false pleading. But this injury appears to us to be only a part, and perhaps not the greatest part, of the evil engendered by the practice. If there be any place where truth ought to be held in peculiar honor, from which falsehood ought to be driven with peculiar severity, in which exaggerations, which elsewhere would be applauded as the innocent sport of the fancy, or pardoned as the natural effect of excited passion, ought to be discouraged, that place is a court of justice. We object, therefore, to the use of legal fictions, even when the meaning of those fictions is generally understood, and we have done our best to exclude them from

this code. But that a person should come before a court, should tell that court premeditated and circumstantial lies for the purpose of preventing or postponing the settlement of a just demand, and that by so doing he should incur no punishment whatever, seems to us to be a state of things to which nothing but habit could reconcile wise and honest men. Public opinion is vitiated by the vicious state of the law. Men who, in any other circumstances, would shrink from falsehood, have no scruple about setting up false pleas against just demands. There is one place, and only one, where deliberate untruths, told with the intent to injure, are not considered as discreditable, and that place is a court of justice. Thus the authority of the tribunals operates to lower the standard of morality, and to diminish the esteem in which veracity is held; and the very place which ought to be kept sacred from misrepresentations, such as would elsewhere be venial, becomes the only place where it is considered as idle scrupulosity to shrink from deliberate falsehood.

We consider a law for punishing false pleading as indispensably necessary to the expeditious and satisfactory administration of justice, and we trust that the passing of such a law will speedily follow the appearance of the code of procedure. We do not, as we have stated, at present propose such a law, because, while the system of pleading remains unaltered in the courts of this country, and particularly in the courts established by Royal Charter, it will be difficult, or, to speak more properly, impossible, to enforce such a law. We have, therefore, gone no farther than to provide a punishment for the frivolous and vexatious instituting of civil suits, a practice which, even while the existing systems of procedure remain unaltered, may, without any inconvenience, be made an offence. The law on the subject of false evidence will, as it appears to us, render unnecessary any law for punishing the frivolous and vexatious preferring of criminal charges.

No other part of this chapter appears to require comment.