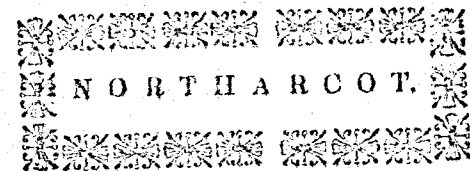


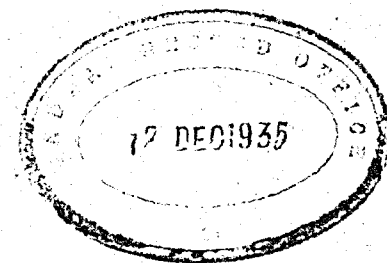
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No 2.

In F. U. No 1375 of 1847



REPORT

ON THE



INDIAN PENAL CODE.

A.R.M. 1431

CALCUTTA :

W. RIDSDALE, MILITARY ORPHAN PRESS.

1846..

FROM THE INDIAN LAW COMMISSIONERS,

TO THE HONORABLE

THE PRESIDENT OF THE COUNCIL OF INDIA,
IN COUNCIL

DATED THE 23D JULY, 1846.

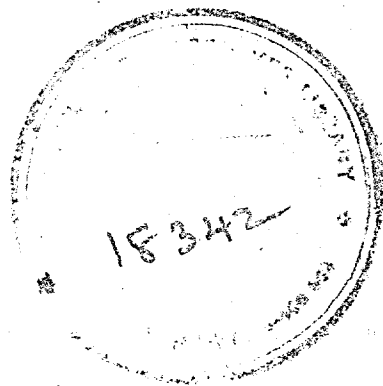
1. We have the honor to submit a Report on the Indian Penal Code, in pursuance of the instructions communicated to us in Mr. Secretary Bushby's letter, dated the 26th April 1845, as follows :—"The Governor General in Council is desirous that some step should be taken towards a revision of the Code* with a view to its adoption with such amendments as may be found necessary, or to its final disposal otherwise. For this purpose I have been instructed to refer to you for examination, all the opinions received from the several Presidencies as per enclosed list, and to direct your attention to the 'Act of Crimes and Punishments' contained in the Seventh Report of the Commissioners on the Criminal Law of England, with a view to comparison, and the detection of any omissions or other imperfections that may exist in the Code. With these materials, the Governor General in Council trusts that you will be enabled to frame such a report as may assist the Government of India in forming a judgment on the merits of the Code at no distant date."

Received 13th May 1845.

* The printed Draft of a Penal Code prepared by the Indian Law Commissioners, and submitted to the Government of India under date the 14th October 1837.

2. We have with great pains and care examined, compared and digested, the voluminous papers containing commentaries and strictures on the Penal Code transmitted to us with Mr. Bushby's letter, and having reviewed the Code generally with reference thereto, we have directed our more particular attention to the Chapters of the greatest importance, namely, those treating "of offences affecting the human body," Ch. xviii. and "of offences against property," and to those of a general nature Ch. xix. governing the whole, namely, the Chapter of "General Explanations," Ch. i. the Chapter of "General Exceptions," and the Chapter of "Abetment." Chs. iii. iv.

3. Having studied the definitions of crimes and the rules and penal provisions contained in those chapters, with the aid of the lucid and able expositions of the principles upon which they are framed which are afforded in the valuable notes appended to the Code, we turned to the instructive reports of the Commissioners on the English Criminal Law, and to the Digest of crimes and punishments contained in their Seventh



Report, and carefully compared the two systems, with reference occasionally to the Code Penal of France and Mr. Livingstone's Code for Louisiana, and with a constant regard to the Laws actually administered by the Company's Courts under the several Presidencies. Thus prepared, we proceeded to revise the Chapters, taking Clause by Clause, and considering particularly the criticisms, objections, or suggested amendments, which we had previously noted as worthy of remark.

4. Our work performed in this manner has necessarily occupied a great deal of time, and the observations we have thought it proper to offer have extended to a greater length than we anticipated.

5. The following Report is a Record of those observations, prefaced by a general notice of the papers referred to us for examination, and some observations suggested by criticisms of a general nature contained therein. We submit it as affording a sample* from which your Honor in Council will be able to form a pretty fair judgment of the value of the whole Code.

* The whole Code consists of 488 Clauses, of which 233 Clauses are comprised in the Chapters reviewed in this Report.

REPORT.

Her Majesty's Supreme Courts—Judges and Law Officers.

6. The papers transmitted with Mr. Bushby's letter comprised Reports from the following Judges of Her Majesty's Supreme Courts:—

Calcutta,	The Hon'ble Sir J. P. Grant, <i>Puisne Judge</i> .
	„ Sir H. W. Seton, <i>Puisne Judge</i> .
Madras,	„ Sir R. B. Comyn, <i>Chief Justice</i> .
	„ Sir E. J. Gambier, <i>Puisne Judge, now Chief Justice</i> .
Bombay,	„ Sir H. Compton, <i>Chief Justice</i> .
	„ Sir J. Awdry, <i>Puisne Judge, afterwards Chief Justice</i> .

a Report from the Advocate General at Madras, Mr. G. Norton, and one from the Company's Standing Counsel at Calcutta, Mr. J. Cochrane.

Also a Report from the Sudder Court for the North-Western Provinces under the Presidency of Fort William in Bengal, and separate Reports from two* of the Judges of the Sudder Court at Madras, and three† of the Judges of the Sudder Court at Bombay, accompanied by Reports from the Judges, Magistrates, &c., subordinate to the said Courts respectively, and a separate Report from Colonel Sleeman, Commissioner for the Suppression of Thuggee.

Hon'ble Company's Courts. Judges of the Sudder Courts and Subordinate Judges and Magistrates, &c.
* Mr. W. Hudleston and Mr. A. D. Campbell.
† Mr. Giberne, Mr. Pyne, and Mr. Greenhill.

7. Of the Judges of Her Majesty's Courts whose reports are above-mentioned, Sir J. P. Grant, Sir E. J. Gambier, and Sir H. Compton have not entered into a particular examination of the Code.

8. Sir J. P. Grant states that he considers it incompatible with his duties as a Judge to undertake the task of reviewing the Code and giving his opinion upon it, concluding with the following words, "I confess that I cannot set a limit to the number of years which it would be necessary for me to devote exclusively to the consideration and study of such a Code, and of all the large and intricate and appalling questions with which it must be of necessity surrounded, if I could think it consistent with my judicial duties, and the measure of my learning and capacity, to undertake so vast a task in so untried a path of speculative jurisprudence and legislation."

9. Sir E. J. Gambier says, "I have always entertained the strongest doubts of the propriety or expediency of promulgating any Code of Law which professes to be more than a compilation and a better arrangement of those enactments which have previously been in force, and which former experience has sanctioned and approved; and I have always thought that such a body of law should be modified by those additions and alterations alone of which the same experience has evinced the utility or the need. To do more than this, to put forth a body of law which is not even founded upon any previously existing system, and to clothe the enactments in language which is as new to those who are to dispense the law as to those who are to live under it, appears to me a mode of proceeding irreconcilable with the maxims of practical wisdom, and one calculated to introduce a degree of confusion and difficulty which has never yet been found in administering the criminal justice of any civilized country."

"Such (he adds) being my general opinion on the Code in question, I do not enter into the consideration of the different parts of it."

10. Sir H. Compton professes not to attempt a criticism of the work of the Law Commissioners, or of its arrangement, or particular provisions, but to state the grounds upon which *a priori* he is of opinion that the Code they have prepared should not be adopted. In the first part of his elaborate paper he endeavors to shew, that in preparing the Penal Code in the manner in which it has been prepared, as a general system of Criminal Law for India to be substituted for all the systems which now prevail, the Law Commissioners have done what was not

19. He next adverts to the language of the Code, and more especially to the definitions of crimes contained in it. He observes that Criminal Legislation demands plain language and definite precepts, but how far this is supplied by the Code with all the assistance derived from its illustrations, he thinks questionable. He remarks that the object seems to have been to exclude judicial discretion, but that however desirable it may be to limit judicial discretion, it is in vain to attempt wholly to exclude it by definitions however illustrated.

20. He says generally that "the Code itself furnishes abundant reasons why it should not be put into operation, until the whole system is completed." This he adds, "will afford the means of extending civil rights and remedies, and may be found to modify or supersede many of the present provisions of it."

21. His observations upon the details of the Code are submitted in a separate paper.

22. Of these observations and the criticisms in his report, he says they "are made with freedom, but not in a hostile spirit, not without a just sense of the great difficulty of the undertaking, of the pains bestowed upon the execution of it, and above all of the masterly manner in which the principles connected with it are discussed and developed in the notes."

23. Sir R. Comyn remarks, that "his own experience has been almost exclusively confined to the administration of Criminal Law at the Presidency of Fort Saint George under the English system," and observing of that system that "it is built up on notions not unfrequently inapplicable to the Native Society of India, and too often clogged by technical subtleties, which, if intended to protect the innocent, occasionally assist in the escape of the guilty," he says that "he certainly should be very far from advocating the extension of it beyond the limits of the several Presidencies, whilst he thinks it highly desirable that, if the Mofussil is to be governed by regulations emanating from British Authority, these should be assimilated throughout the territory as far as the nature of things may permit," therefore "in reviewing the proposed Code, he has endeavored to allow himself to be as little influenced by the prejudices of education and professional habits as could reasonably be expected, and to consider himself called upon to remark upon an entirely new compendium of Law by which the persons and property of those who reside in India, under the British dominion, may be best protected."

24. He observes that he has found himself embarrassed in advert-
ing to the various provisions of the Code by his ignorance of the manner in which it is proposed to carry them into effect, and expresses an opinion that under the system of criminal pleading now in force at the Presidencies, it would be difficult, if not impossible, to frame the accusations so as to meet many of them, adding that the very introduction of new Terms and new Definitions would be a great impediment.

25. Before advert-
ing to the particular heads of enactment, he "points out two or three imperfections which as a system of Criminal Law seem to pervade the whole." His remarks refer, 1st, to the system of "Illustrations;" 2dly, to the provisions by which "the commission or non-commission of an offence is made to depend upon what may be passing in the mind of the party offending at the time of committing the act laid to his charge; 3dly, to the provisions "treating acts which are really outrages on society as merely offences to individuals." After commenting on the above heads, he says "these are the chief general observations which have occurred to me on an attentive perusal of the text and the accompanying notes—many objections which had suggested themselves to me in the former have been entirely or in great measure removed by the satisfactory reasoning of the latter." In reviewing the details he finds occasion for a few brief observations only, upon particular Chapters and Clauses. With regard to the two important Chapters treating of "offences affecting the human body" and of "offences against property," he says of the former that it contains only one provision which appears to him objectionable in substance, of the latter that "it strikes him as a very successful digest of Law for the protection of property."

26. Sir J. Awdry says he conceives that he is not consulted on the expediency or practicability of codification in general, or as regards the Penal Law of India in particular, but that assuming the necessity of framing a penal Code as the only means of providing for the wants of a population which has no system of jurisprudence applicable to all, he is merely consulted as to the execution.

27. The first impression, he says, which was made upon him, by the perusal of an early draft of the Code without the preface or notes, was, how simple and practical the whole scheme seemed to be, how little (with certain grave exceptions) departing from the substantial principles of the Law of England. "This impression," he proceeds to say, "has

"been confirmed by the perusal of the complete work, and to it has been added a sense of the general comprehension of its plan and of the sound reason of large classes of its enactments." Again he remarks, "the enactments are generally so conformable to the sound and universal principles of this branch of Law, which is or ought to be less artificial than the civil, that I should see no great inconvenience and no injustice in its introduction." Contrarily to Sir R. Comyn, he observes that "the procedure of the English Law seems fully adequate to the general working of the Code," and that he could "easily leave to the jury almost any charge it contains."

28. The above he observes, is "almost the highest praise of which he conceives the draft of such a work capable, as long as it is not matured by those amendments and interpretations which in the course of time will supply its defects, correct its errors, and authenticate the sense of every line. The present involves a bold, and to a certain extent, a successful attempt to mitigate the unavoidable evils of the sudden introduction of a mass of enacted Law."

29. On the whole he says, he "views this work as an admirable attempt to comprise in a single statute, the definition of Crimes and their punishments, but no more; and considers that those who because they can point out numerous, and important defects in it, think they shew that it is not entitled to that praise, only betray their own ignorance of the extreme difficulty of sound legislation."

30. Mr. Norton, the Advocate General at Madras, in a long report, offers objections to the Code "which not only extend throughout almost all its details, but also to the legislative principles upon which it is founded." In the conclusion of his report he says, "my objection to the Code is to it as a *whole*. I conceive it framed on erroneous principles. I deem it constitutionally defective, and that it requires reconstruction throughout, and to be elaborated upon a different plan and upon far more extensive data."

31. Mr. Cochrane, the Company's Standing Counsel at Calcutta, confines his observations to the Chapters under the heads of "Punishments," "General Exceptions," "Abetment," "Offences relating to the Army and Navy," and "Offences against Public Tranquillity," in all which he finds provisions that appear to him highly objectionable.

32. The Sudder Court for the North Western Provinces of the Presidency of Fort William, while they express a doubt whether the plan

followed in the preparation of the Code is the best that could have been adopted, yet "willingly recognize its comprehensiveness, and the general success (as far as can be predicated of any production not submitted to the test of practice) with which it has been executed." Referring to the opinions given by officers subordinate to the Court submitted with their own report, they observe that one only disapproves of the Code absolutely, and that the majority "approve of it with qualifications." A general approbation of the Code, we remark, is expressed by a considerable number.

33. Colonel Sleeman, Commissioner for the Suppression of Thuggee, whose opinion was specially called for by Government on account of his great practical experience, says "I have read the Code over several times very carefully, and can honestly say that at every reading it has grown more and more upon my esteem. I am persuaded that it might be put immediately in force with great advantage to the people of India; and that it would soon become all that could be desired under the fostering care of the Legislative Council and Law Commission, in the manner pointed out in the 25 para. of the letter of the Law Commission to the Governor General of India." Colonel Sleeman suggests certain alterations and additions as likely to be useful. We may note in particular, that he proposes to add Clauses for the punishment of Seduction and Adultery, and making it penal to sell or buy human beings, in order to put an end to Slavery in India.

34. Of the Judges of the Sudder Court at Bombay and of the Officers subordinate to that Court whose opinions are recorded, not one disapproves of the Code absolutely; some express unqualified approbation of it; others express approbation with certain reserves and qualifications; and one or two, apparently approving in general, suggest additions and modifications by which they think it may be amended.

35. Of the two Judges of the Madras Sudder Court whose opinions are recorded,* one expresses unqualified disapprobation generally. The† other disapproves of the Code for the most part, but dissents from the adverse comments of his Colleague in many places, and expresses approbation of particular portions. Of the subordinate Officers, a generally unfavorable opinion of the work is expressed by about a fourth part, and a generally favorable opinion by about one half; of the rest some may be taken as approving on the whole, but objecting to particular portions, and suggesting modifications, others as disapproving on the whole, but expressing approbation of particular portions, and a few as offering particular objections, but not giving a decided opinion on the whole.

* Mr. W. Hudleston.
† Mr. A. D. Campbell.

36. We would draw attention especially to the able report of Mr. J. F. Thomas, a Judicial Officer of great experience (now Chief Secretary to the Government of Madras) referred to by the Judges of the Madras Sudder Court, as containing many important and judicious observations and suggestions.

37. We shall be found in the sequel to give due consideration to the valuable comments of Mr. Thomas, in reviewing the particular provisions to which they apply. We shall now merely note the general opinion expressed by Mr. Thomas.

“Looking upon the Code as a whole, and as a substitute for the existing Regulations, I consider it chiefly valuable as a compendium of the latest, and most enlightened views of penal jurisprudence, applied with much judgment to the wants, and circumstances of India. The extensive use of pecuniary penalties, with the important object of rendering them the means of indemnifying parties injured; the Chapter on Abetment, and the introduction of the discriminating principle of the French Code in cases of Perjury, are a few of the instances of great and highly valuable improvements to which I allude. There is also a comprehensiveness in the definitions of Offences which will, I think, do much to remedy an evil of the present system under which crimes may either be committed with impunity, or, are only brought within the jurisdiction of the Courts, under some uncertain provisions of the Mahomedan Law, (Section VII. Regulation X. 1816) unknown to the Officers presiding in the Courts, and which ordinarily annex the arbitrary penalty of Ookoobut, leaving it therefore discretionary with the Courts to adjudge any, or little, or no punishment. This evil cannot exist under the new Code; whilst the comprehensiveness of the definitions will also render the constant interference of the legislature, and frequent additions to the penal Laws, unnecessary.”

“The entire abrogation of the Mahomedan Law, relieving the Criminal Jurisprudence of the country from a barbarous incumbrance, will also be found a most important improvement, and I consider the Code on the whole, well calculated to form the basis of a greatly improved system. It is, I am of opinion, capable of being at once made Law in the Provinces, and substituted, with but little modification, for the present Regulations of the Government.”

38. Having thus briefly indicated the general tenor of the reports upon the Penal Code which have been referred to us for examination,

we shall now notice particularly some of the objections that have been made to the plan of the work, and to the leading principles of the Code.

39. We conceive that we are not required on this occasion to discuss the reasonings which are to be found in several of these reports on the expediency of codification in general, or as regards the Penal Law of India in particular, but that, with Sir J. Awdry, “assuming the necessity of a Penal Code as the only means of providing for the wants of a population which has no one system of jurisprudence applicable to all,” and, with Sir H. Seton, deeming that “the best justification of it is to be found in the necessity of some system, and the absence of any satisfactory one,” we are to consider, whether the Code which has been proposed is fitted in its principles and its substantive provisions for the purpose which it was designed to serve, and is capable, with or without modification, of being brought into practical operation as a general system—whether it may be advisable for the legislature to adopt it, not as a body of Law already perfect, which its authors never pretended it to be,* but as a systematically digested Statute of Crimes and Punishments based upon sound principles, and defined with a precision before unknown, sufficiently complete to be acted upon, and which when brought into operation may be reasonably expected to work immediately an important improvement in the administration of Criminal Justice, by methodizing it, and rendering it more easy, certain, and equal; looking to its being gradually matured and advanced towards perfection in the manner contemplated by the Commissioners, by which the legislature will be enabled easily to supply the defects, correct the errors, and reconcile the inconsistencies, discovered by experience.

40. In the prefatory letter to the Governor General in Council, the Law Commissioners declare that the system of Penal Law contained in the Code is “not a digest of any existing system,” and that no existing system had furnished “even the ground-work” for it. In another place in the same letter, after repeating that they had not thought it desirable, for reasons stated, “to take as the ground-work of the Code any of the systems of Law now in force in any part of India,” they say they had however “compared the Code with all those systems and taken suggestions from all, though they had not adopted a single provision merely because it formed a part of any of these systems,” adding “we have also compared our work with the most celebrated systems of Western

* NOTE.—They say, “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.” “We have done as much as could reasonably be expected, if we have furnished the Government with that which may by suggestions from experienced and judicious persons be improved into a good Code.”

"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 that eminent jurist, the late Mr. Livingstone."

41. Upon the ground of the above declaration the Commissioners are severely censured in several of the reports. The course taken by them is denounced as "irreconcilable with the dictates of practical wisdom," and as leading almost inevitably to erroneous conclusions. The Code is spoken of slightly as "an invention" "based upon theoretical, not practical principles," and this is said to be "a demerit fatal to the whole work." But while the Commissioners are so much blamed for rejecting all the systems of Law at present in force in India, or, to speak more correctly, for not following any of them implicitly in laying the ground-work of their Code, those who find fault with them in this respect are not at all agreed as to what they ought to have done.

42. The Commissioners came to the determination to frame a new Code upon a plan of their own, because they found, as they thought, not "even the rudiments of a good Code" in any of the three systems contained in the Regulations of Bengal, Madras, and Bombay, and because they deemed the artificial and complicated system of the English Criminal Law which prevails within the local jurisdiction of Her Majesty's Courts to be unsuitable.

43. Now with respect to the former, we find that Mr. Norton, the Advocate General at Madras, one of those who condemn the Commissioners for the course they have taken, is obliged to observe that "the reasons assigned for rejecting the penal Laws prevailing in the provinces of India as a ground-work for a systematic general Code of Criminal Law for India are forcible and obvious. These Laws are inconsistent with each other, they are sometimes inconsistent with plain justice, they are inadequate, and they are vague in point of expression." But he takes a different view respecting the English Criminal Law, which in opposition to the Commissioners, he recommends "as supplying a safe and firm ground-work and ample materials for constructing a Penal Code for this country, subject to such modifications with respect to the condition, habits, and usages of the people, as the statute organizing the Indian Commission points out;" while on the contrary, as has been already shewn, Sir R. Comyn, the Chief Justice at the same Presidency, emphatically declares that the English system is one which

he should be very far from advocating the extension of. There are some again who would have a body of Criminal Law for this country composed by a combination of the Regulations of Government with the principles of English Law administered by the Supreme Courts; while others eschewing English Law, would harmonize the Laws contained in the Regulations of the several Presidencies, and thereby construct a general system.

44. From the tenor of some of the animadversions upon the plan pursued by the Commissioners, it might be supposed that they had proceeded entirely upon theoretical views of their own, rejecting all the aids to be obtained from the Laws actually in force in India, whereas although they followed none implicitly, they took suggestions from all, so that Sir J. Awdry remarks how little (with certain grave exceptions) the Code departs from the substantial principles of the Law of England, and Mr. Norton, on the other hand, finds fault with it as paying too much deference in some parts to the body of Law contained in the Regulations for the guidance of the Company's Courts. The truth is, that the Commissioners not only took suggestions from the Laws actually in force in India, but borrowed also from the legislation of the most civilized Countries of Europe, thus availing themselves of the practical wisdom embodied in many various Codes, while at the same time they sought instruction in the works of learned jurists, calling in the lights of science, or the "philosophy of jurisprudence," to use the phrase quoted by Mr. Norton, to help them in judging of the aptitude of the provisions contained in these Codes, and in devising new provisions where none of them supplied rules which they approved. Such new provisions and the principles upon which they are founded, are in general fully expounded and defended in the notes to the Code, and the reasonableness of the principles and the fitness of the provisions are to be considered impartially, without permitting the judgment to be influenced by prejudices against them as innovations and untried theories.

45. After all, the novelty which is so much animadverted upon is more imaginary than real, and is to be found more in form than in substance. On this point we find Sir J. Awdry remarking that although some beneficial principles are as far as he is aware newly developed in the Code, the amount of really new matter contained in it is not so great as to give the Commissioners a claim to originality, while he "thinks them entitled to the far greater praise of having seldom much disregarded the experience and recorded moral sense of the world."

46. The system of definitions and illustrations of definitions which has been adopted in this Code, is much criticised, and censured. The following are the explanations which the Commissioners have given of this leading feature of their plan. "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 in every system of Law which aims at accuracy. A legislator may, if he think 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 Lawgiver 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 definitions 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 shew 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 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."

"We have, in framing our definitions, thought principally of making them precise, and have not shrunk from rugged and 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 shew what its effect 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 must know more certainly than any Judge can know what the Law is which they mean to make."

47. The Commissioners on the Criminal Law of England "did not think it expedient to illustrate the abstract rules and propositions in the digest framed by them, by particular cases or examples, excepting in the few instances where such illustrations were found already moulded into rules, and therefore forming part of the existing Law." It appears to us," they said, "that if an example falls clearly within the terms of the rule, it is useless as an illustration, because the rule is explicit without it; if on the other hand, the example borders upon the verge of the rule, or does not fall clearly within its terms, it either renders the rule doubtful, or the example itself constitutes the Law. An illustration cannot, as is already observed, be of any use as a Law, except to remove some doubt which would otherwise occur as to the proper application of the Law to the case proposed, or to that and others of a similar kind. But this very necessity proves the Law to be imperfect, and shews the framer of the Law to have been aware of an imperfection which ought to have been remedied by using terms which either plainly excluded or included the proposed predicament. Laws must frequently be ambiguous in their application, because it is impossible to foresee all the various combinations of circumstances to which it may be necessary to apply them; but it would argue great negligence not to use terms which should clearly comprehend a case, not only within the knowledge of the law-maker, but even suggested by him."

4th Report, p. XVI

48. The India Law Commissioners observe that "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." They thought that this difficulty might be best overcome by the use of illustrations. The English Commissioners apparently feeling the same difficulty, had recourse to the expedient of adding to the definitions expository clauses, where the definitions themselves are not sufficiently explicit, or where technical expressions are necessarily used, to "interpret them into popular language and give them a precise meaning." After giving their reasons, as above, for not resorting to illustrations, "in order to guard against any misapprehension of their meaning," they say, "we do not assert that illustrations are not useful as leading to a knowledge and understanding of the Law, but that they ought not to form a part of the Law, so as to supersede or vary it, or to be of concurrent authority. There is, perhaps, no abstract rule or position in any science to the understanding of which the mind may not conveniently be led by the aid of familiar examples; they are indeed frequently the very steps by which the rule was first discovered, and its truth or propriety tested, and in either case must necessarily be included within it. It is, however, to be remarked, that none but plain and obvious examples are conducive even to the purposes of instruction; for predicaments to which the application of the proposed rule was doubtful, would serve to perplex rather than enlighten the mind." Here they appear to come pretty nearly to an agreement with the framers of the Indian Code, who in the passage above quoted in effect declare that they do not intend their illustrations "to form a part of the Law so as to supersede or vary it," "or to be of concurrent authority" so as to make anything Law which would not be Law without them, but simply to serve the same office as the expository Clauses in the digest of the English Commissioners, particularly those which are described in the following words,—“We have with a view to render the rules contained in the digest more generally intelligible, frequently applied the rules of Law to a detail of facts, where a more general and abstract enunciation of those rules would have been sufficient.”

49. On this part of the plan of the Indian Law Commissioners Sir J. Awdry observes,—“Their method of illustration by examples is excellent. It is the practice in other sciences, and the want of it has been felt in Law. Mr. Livingstone occasionally uses it, but in a manner confused between illustration and enactment. Here it occupies its proper place, distinct from the enactment. They truly say that precision could not always be made consistent with

“neatness and perspicuity. They have preferred, and rightly, precision. Their sentences are hardly more harsh, and are far less prolix and involved, than those of legislation in general. But still they often are and *must* be harsh, and at any rate the synthetical apprehension of them is difficult to minds not accustomed to accurate thinking—but an instance of the rule in action will lead the mind analytically to it. The examples ought however, in my opinion, only to be looked at like those in grammar, simply to lead the mind to apprehend the rule, not to define its limits in doubtful cases, or the example becomes part of the rule, and their statement that ‘the definitions and enacting Clauses contain the whole Law’ will be falsified. A fictitious example should only illustrate; real examples like real history may instruct.”

50. We understand the authors of the Code to have intended their illustrations to serve precisely the same purpose as examples in grammar, and as of examples in grammar or in any science it is not to be supposed that they ever “supersede or vary” the rule they are intended to illustrate, the same is in fairness to be presumed of the illustrations deliberately put forth to exemplify the intended action of the enactments contained in the Code. They shew as far as they go what the authors of the Code meant by the enactments. And it would be as unreasonable for a Judge to refuse to decide according to the illustration annexed to any enactment, in a case exactly parallel, as it would be in a student, in attempting to apply a rule of grammar, to refuse to follow the example set for the very purpose of guiding him in its application. Yet the example is not said to limit the rule. No more should the illustration be said to limit the enactment. Should it happen, accidentally, that the example is inapt, and such as, if followed, would “supersede or vary” the rule, in such a case, a most unlikely one, the student would exercise his reason, and finding the rule and example irreconcilable would properly follow the rule, concluding the example to have crept in by error. So also a Judge finding an illustration plainly at variance with the terms of the enactment, of the application of which it is exhibited as an example, would be at liberty to neglect it, and to apply the Law according to his own judgment of its meaning. He would not be justified however in neglecting the illustration if he found it reconcilable with the terms of the enactment, although it did not agree with his own understanding of their import, any more than the Judge sitting in an English Court in a case depending upon the construction of a statute* would be justified in neglecting an established precedent among the decided cases in the English Law books, though it did not square with his own notions.

* In a case depending upon the Common Law, Precedents are of more authority—they may be said to be the Law.

51. No more is the illustration a part of the enactment, than the example is a part of the rule in grammar, or a decided case upon the construction of a statute is a part of the statute, but each has a certain authority as a guide, and may not be unreasonably disregarded. For the purpose intended it seems to be a matter of indifference whether the examples be fictitious or real. The examples in grammar which Sir J. Awdry refers to as purely illustrative, are generally real examples. In geometry the cases taken for the purpose of demonstration are fictitious, invented for the occasion.

52. We have in the above remarks spoken of the examples in grammar as Sir J. Awdry has spoken of them, merely as illustrations, like examples in other sciences, but there is a material difference which it is proper to notice. The examples in grammar may indeed be *used* as illustrations. But they are the particular cases from which the rules in grammar are obtained by induction. They are the real authorities. The rules are merely what this or that grammarian has collected from them. In this view they resemble the decided cases in the Law books upon which rules of Common Law are founded.

53. It is of importance to ascertain what the authors of the Code really aimed at in framing it in the manner we have been considering, for it seems to have been greatly misunderstood, and some have been disposed to regard the work as a failure because it is palpably incapable of effecting completely what they imagine to have been designed.

54. Sir H. Compton observes that "the object of the Law Commissioners seems to have been by definitions and by illustrations of definitions to give to the new plan that simplicity, clearness, and certainty, which should render construction and analogical interpretation unnecessary," and so "to expel from the penal jurisdiction of India what has been called by Bentham *Judge made Law*;" and without any attempt to test those definitions and illustrations, he labours, otherwise, to prove that the supposed object is impracticable, or as he expresses it, in words which he says were applied to the definitions and illustrations in the Code of Louisiana, that "the very attempt is founded on a radical misconception of the duty of Law-makers and the degrees of clearness attainable by them," concluding his observations to this effect with the remark, that "it will be consolatory to the Law Commissioners to find that if they have failed, they have failed in common with legislators, ancient and modern, of the most enlightened nations."

55. Again Sir H. Seton, who criticizes the Code generally in the most candid spirit, observes that "the object seems to have been to

"exclude judicial discretion. But however desirable it may be (and to none more than to Judges) to limit judicial discretion, it is in vain to attempt wholly to exclude it by definitions, however illustrated." "The terms 'fraudulently,' 'unjustly,' &c. so frequently resorted to in the Code, obviously because no other definitions were practicable, are so many admissions of the fact, and must ever render the Code with all its precautions mainly dependant for its practical operation upon the discretion of those by whom it is administered." The same view of the design of the Commissioners is taken by others, whose animadversions are less moderate.

56. But in truth the Commissioners aimed at nothing more than what Sir H. Seton admits to be desirable, to *limit* judicial discretion. They never entertained the fond idea that they could exclude it. Observing that the illustrations are meant to take the place of decided cases in the English Law Books, with this difference that "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," they say "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 of cases 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." Here the exercise of judicial discretion is supposed; limited in some degree but not excluded; rendered unnecessary in cases to which the illustrations will apply, as it is unnecessary, in Courts governed by English Law, in cases to which applicable precedents are to be found in the English Law books, but still necessary in all other cases.

57. It is observed that there are at present eight Chief Courts subject to the Indian Legislature, every one at liberty to put its own construction on the Law; and as it is not to be expected that they will always adopt the same construction, there will be in the course of a few years a large collection of opposite decisions all of equal authority. This is an evil against which it is proper to provide, but it is not proposed to do so by excluding judicial interpretation. The suggestion is to narrow the field for the exercise of judicial discretion by frequent revisions of the Code, and making every successive edition of it solve all the impor-

tant questions as to its construction which have arisen since the appearance of the last edition. Intermediately the Courts are intended to apply the written Law as well as they can on the grounds of reason, with this reserve, that the accused party shall have the advantage of a doubt, if that doubt be entertained after mature consideration by the highest judicial authority.

58. Sir J. Awdry supposes the Commissioners to assume that the office of interpretation essentially belongs to the Legislature, and argues against this doctrine as unphilosophical, inexpedient, and unconstitutional. But the Commissioners merely say that this doctrine was maintained by the Roman jurists, and that the contrary opinion was censured by them with great force of reason. They then explain how their illustrations differ from the imperial rescripts, in that they are not made *ex post facto*, and cannot therefore be made to serve any particular turn. They say expressly "we do not think it desirable that the Indian Legislature should, like the Roman Emperors, decide doubtful points of Law which have been mooted in cases pending before the tribunals."

59. This explanation seems to anticipate the objections urged by Sir J. Awdry, and manifests that there was no intention "to repeal that rule of the British constitution which places interpretation and legislation in different hands, by which it ordinarily belongs to the Judges (subject to correction) *jus dicere*, to pronounce what the Law is, to the Legislature *jus dare*, to ordain what it shall be." Indeed Sir J. Awdry after arguing generally against the assumption by the Legislature "of the totally distinct office of interpretation," acknowledges that the Commissioners do not in fact assign that office to the Indian Legislature, though he says "they claim it in principle." Even this assertion however is not warranted, pointed as it is to interpretation to be exercised in "reconsidering decided cases." At the utmost the Commissioners claim a right in the Legislature to pass declaratory Laws, such as Sir J. Awdry himself alludes to as exercised by Parliament, and of which he observes "such a power if it exist, is different from the ordinary power of interpretation."

60. In order to the proposed revisions of the Code the Commissioners suggest that the doubts or differences of opinion that may arise in the Courts as to the construction of its enactments should be reported to Government to be considered in the Legislative Department. "In some cases," the Commissioners observe, "it will be found that the Law is sufficiently clear, and that any misconstruction which may have taken place is to be attributed to weakness, carelessness, wrongheadedness,

"or corruptions, on the part of an individual. 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 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 shew 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."

61. The Commissioners remark that an addition of a very few pages to the Code in each successive edition, "will stand in the place of several volumes of reports, and will be of far more value than such reports, in as much 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."

62. This remark obviously applies to the additional illustrations as well as to the alterations supposed to be made in "the definitions and enacting Clauses," which, in the original edition of the Code, are, they say, to be regarded as "containing the whole Law," and seems to ascribe equal authority to both. Noticing this Sir J. Awdry observes that "the new illustration will, when introduced with the same authority as the rest of the enactment, merely be an unusual form of enactment, limiting, extending, or otherwise qualifying the provision. The doctrine that the provision itself contains the whole Law will certainly be falsified by giving, as the Commissioners propose, to this illustration legislative authority. It will *therefore* not strain the Law, where it is required to make language which is as precise as the subject admits of, sufficiently intelligible, simply because it is a modifying part of that Law. The method is new. I do not know where it is (contrary to the view of the Commissioners) an avowed part of the Law, and not retrospective, that it is inexpedient, nor when these are no longer fictitious cases (as to which I have before expressed an opinion) but the results of experience, can I say that in enacting that such and such cases shall or shall not be deemed to be included may not be effec-

“ tual, at the same time that it is easier than amending the body of the
 “ Clause, as well as more authoritative than the judicial decision that
 “ they are comprehended or not in its obscure terms.”

63. Though it is not in terms so declared, it does indeed appear that the new illustrations in the successive editions of the Code are intended to be a part of the Law, and consequently absolutely binding upon those who have to administer it, and so to differ in character from the illustrations in the original edition. The hypothesis is that some definition or enactment has been misunderstood, and a wrong construction given of it. The illustration is authoritatively to extend, or limit, or otherwise qualify the construction. It is in effect a declaratory Law. Whereas the illustrations in the original Code are as has been observed merely examples, but examples clothed with an authority entitling them to the highest respect, though not absolutely binding. The difference however is of so little consequence practically that we are not sure that it would not be better to treat the illustrations in the original Code, as well as in the successive editions of it, as parts of the Law, of concurrent authority with the definitions and enactments.

64. With respect to the objection which has been made to the Code on the ground of the multitude of new offences created by it, we think that this will be best discussed in considering the particular provisions to which it applies. It will be found that exception is taken on this ground to some of the provisions in the chapter “ of offences against property,” upon which we have submitted our observations in the proper places.

65. Many persons have found fault with the composition of the Code as being in many places framed in a style very difficult to be understood, some indeed have pronounced parts of it to be unintelligible, and several have declared their opinion that it is incapable of being translated, and therefore useless for the general purpose for which it was intended. We have carefully considered the Clauses in the chapters we have reviewed which have been pointed out as affording grounds for this censure, and upon each we have given our opinion. The criticisms on this head are anticipated, and we think are sufficiently answered by the observations of the authors of the Code which we have already quoted. With respect to the “ ruggedness of phraseology” which some have been offended with, in addition to what the authors of the Code have said for themselves, we submit the following concurrent remarks of the English Criminal Law Commissioners upon their own work:—“ Elegance of diction must be regarded as a matter of inferior importance in the

“ declaration of abstract propositions and rules, and we have not hesi-
 “ tated to use plain and even homely language in our Articles where a
 “ neater construction of the sentences and more refined expressions
 “ would have not contained so effectually the meaning of the Law.”
 We would recommend attention generally to the observations of the English Criminal Law Commissioners on the manner in which the definitions and rules of the Criminal Law ought to be expressed, which are to be found in the 4th and 7th Reports.

4th Report p. 12 & Seq.
 7th Report p. 6 & Seq.

66. Sir J. Awdry as we have shewn has declared his opinion that “ the sentences in the Code are hardly more harsh, and are far less “ prolix and involved than those of legislation in general.”

67. We apprehend that the opinions which some have expressed of the obscurity, almost unintelligibility, of particular Clauses, have been formed without such study as a Judge would be bound to bestow upon them, and we are strongly inclined to think that there is scarcely any one of those who, as we conceive, have somewhat rashly delivered such opinions, that being called upon as a Judge to construe the Clauses in question would feel himself at a loss to determine their meaning. *

68. Mr. A. D. Campbell is one who has pronounced the Code to be “ absolutely untranslatable,” but the instance he adduces is not very convincing. “ It will be no easy task,” he says, “ to convey in any of “ the Native dialects the meaning even of No. 24, which merely declares “ that ‘ to do a thing’ denotes omissions as well as acts ; for in every “ language ‘ to do’ must stand opposed to its omission.” We can only say that if there were no greater difficulty than this to be overcome the task of translation would in our estimation be an easy work. We do not however think that it will be an easy work ; on the contrary we are of opinion with the authors of the Code that “ the difficulty of procuring “ good translations will be great ;” but we concur with them also in believing that the means at the disposal of the Government of India “ are sufficient to overcome every difficulty” of this nature. Indeed when we consider what has been done in India by comparatively private means in the way of translating the scriptures, we are at a loss to understand how there can be a doubt on the subject. We may advert also to what has been actually accomplished in the translation of the Regulations of the several Presidencies and the Legislative Acts of the Government of India, in which we will venture to say are to be found as great difficulties as any that are to be met with in the Code. We would instance in the Acts, the Preamble to 5 and 6 Victoria, Chapter 39, recited in Act XX. of 1844, the Statute recited in Act IX. of 1842, and Section 1 of

He writes 42.

*Relatory address to the Governor General in Council, p. 11.

Act XXX. of 1839. In the Code of the Regulations for the Presidency of Fort William, not to multiply examples, we would point to the Preamble of Regulation I. of 1821, and to the important Regulation VII. of 1822.

69. The object we conceive should be "by the combined labour of enlightened Europeans and Natives" to make as good a translation as possible into one Native language, known more or less all over India, that is to say the Oordoo, to be used as an approved model in making versions into all the other languages into which it is usual to translate the Laws enacted by the Government of India. This we believe was the course taken lately in translating the new Articles of War.

70. We proceed to review the Chapters we have mentioned, in the order in which they stand in the Code.

CHAPTER I.

GENERAL EXPLANATIONS.

71. Mr. Norton says, "This Chapter appears to me to exemplify vagueness and uncertainty in language," and "to contain many incorrect positions, and some that are arbitrary and inconsistent."

72. Mr. Norton finds vagueness and uncertainty in what appears to us so explicit and definite, that, but for the instance he affords in his own case, we could not have supposed it possible to be misconceived by any instructed person endeavouring to understand it. Thus he says, he "cannot see clearly why (Clause 4) starving a man to death is considered no act, but an omission." Now in the Clause referred to, it is laid down that "wherever the causing of a certain *effect* by an *act* or by an *omission* is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence." In the "illustration" the *effect* supposed is death, partly caused by an *act*, beating, partly by an *omission*, not supplying food. The word "starving" used by Mr. Norton, does not occur. As far as we know, Mr. Norton is singular in his inability to see the distinction between "act" and "omission" so illustrated, and we do not apprehend that there will be any difficulty generally in discerning it. Again it is declared in Clause 9 of this Chapter that the words "Government of India" denote the Executive Government of India, unless it be otherwise expressed. Upon this Mr. Norton remarks—"I do not know what is meant by the Executive Government as the explanation of the Government of India." Now of course Mr. Norton well knows that the constitution of the Government of India for Legislative purposes is different from its constitution for all other purposes; that for legislative purposes it consists of the Governor General and a Council of four Ordinary Members, and for all other purposes, of the Governor General and a Council of three Ordinary Members, the fourth Ordinary Member not being entitled to sit and vote in Council except at meetings for making Laws and Regulations; and that it is enacted that "all Laws and Regulations shall be made at some meeting of the Council at which the said Governor General and at least three of the Ordinary Members of Council shall be assembled, and

3 and 4 Wm. IV. Cap. 85.
Sec. XL.

See XLVIII.

"that *all other functions* of the said Governor General in Council may be "exercised by the said Governor General and *one* or more Ordinary "Member or Members of Council." It is difficult to conceive that Mr. Norton knowing all this, can be in earnest in saying he does not know that the Governor General in Council exercising "all other functions," except the function of legislation, is what is meant by the Executive Government of India.

Clause 3.

73. Mr. Norton speaking of Clause 3, says, "I am unable to see "clearly what is meant by, or what is the reason of, the limitation of "a joint act to those specifically which are said to consist of offences by "causing a certain effect with a certain intention or with a knowledge of "certain circumstances." It might be replied, that Mr. Norton has not been very happy in expressing his own meaning. Perhaps he would have had a clearer view of the matter if, attending to the words of the Clause, he had considered whether any case is excluded which ought to be included. It does not appear so to us.

Clause 7.

74. In Clause 7, it is explained that the word "party" denotes collections of persons, as well as persons. Sir H. Seton questions "the "use of 'party' for person." "The word party in a legal sense," he observes, "signifies a person who is party in a cause or to a deed, &c. "It implies the existence of some other party. It is a person of a particular description." The intention however is not that the word "party" shall be used for "person" generally, but simply to explain that it may comprehend a body, such as the Government of India, the Bank of Bengal, &c. as well as an individual. It seems to be used in this Code only in some such particular sense as is indicated by Sir H. Seton, and as it is used in the Digest of the English Criminal Law Commissioners.

Clause 12.

75. Upon Clause 12, which explains the word "Judge," it has been asked whether a *Magistrate* or *Criminal Judge* investigating a case in which the party accused must be committed, if there is evidence against him, for trial by a Judge of superior jurisdiction, or a Judge trying a case in which the sentence rests with the Sudder Court, is comprehended in its terms. It is clear that every person "officially designated as a Judge" is included. The illustration (*b*) shews that a *Magistrate* sitting on a charge on which he has power to sentence to fine or imprisonment with or without appeal, is a Judge. A *Magistrate* conducting a preliminary investigation to ascertain whether there is ground to put an accused party on his trial by a Judge, it would seem, is not to be considered a Judge under this Clause.

76. Mr. Norton says he does not know if Arbitrators are included as Judges. Arbitrators "empowered by Law to give a definitive judgment," as for example under Regulation XVI. of 1793 of the Bengal Code, and the corresponding Regulation XXII. of 1802 of the Madras Code, we apprehend, are included.

77. Under Clause 14, Mr. Norton supposes that the first class of Clause 14. public servants therein described, viz. "every Covenanted Servant of "the East India Company," may be taken to include Covenanters with Government by Charter party. This is a mistake, which, considering the positive sense that the term "Covenanted Servant" bears in the Company's Territories, we deem to be most unlikely.

78. Mr. Norton notices the comprehensiveness of some of the other descriptions of public servants, and observes on the whole, that he "can hardly tell what existing person may not be included under "the term 'public servant.'" Supposing the several descriptions he specifies to be as comprehensive as he takes them to be, yet it does not appear to us that they are faulty in this respect, with reference to the provisions in the two Chapters relating to public servants in the application of which recourse will be had to them. We think they will be found sufficiently distinct and definite for the purpose they are to serve. We have no apprehension that there will be any difficulty in determining who are positively excluded as not falling under any of the descriptions in Clause 14. Chapters VII. and VIII.

79. It is questioned by one Officer whether Juwabnevisses, Gomastahs, and other Servants of that class, come under any of the descriptions in this Clause so as to be subject to the provisions of Clause 138. It seems to us that as servants whose duty it is "to make" or "keep documents" they fall under the 5th, 10th, or 11th description, according to the Department in which they may be employed.

80. With reference to Clauses 15 and 16 Mr. Norton says—"It Clauses 15 and 16. "appears to me an incorrect position to include (as may be) highway robbery among 'frauds' as by 'causing wrongful gain to one party by "means of wrongful loss to another party.'" "Wrongful gain" and "wrongful loss" are explained in Clause 15; and in Clause 16 it is said—"Whoever does any thing with the intention of causing wrongful gain "to one party, by means of wrongful loss to another party, is said to do "that thing fraudulently." In the definition of theft in Clause 363, a chief ingredient is the intention "to take fraudulently any thing which "is property." It is said in Clause 375, that theft is "robbery" if.

attended with certain aggravations. Hence arises Mr. Norton's remark, that by the definition in Clause 16, highway robberies may be included among frauds. The remark we think does not affect the correctness of the definition of the term "fraudulently." The propriety of using this term in the definition of theft and robbery will be considered in the proper place.

81. With reference to these and other Clauses in which the term "property" is used without a definition of it, an Officer observes that in discussing the Code with Natives the meaning of the term was questioned; and he suggests that it is a point on which disputes are likely to arise.

82. In the book of definitions annexed to Mr. Livingstone's Code, it is said that the term "property conveys a compound idea composed of "that which is its subject, and of the right to be exercised over it." We believe that the term "property" is every where used in this Code so as to be applicable exclusively to "that which is its subject," and we imagine that the expression so used was thought by the framers of the Code to be sufficiently intelligible by itself, and as clear as it could be made by the help of any set of words in the form of a definition. And so far as we have considered the provisions relating to "property" and the illustrations thereof, it does not appear to us that there is need for any explanation of the term. In this view we are confirmed by finding that there is no question raised about it, in the papers referred to us, by any one but the individual whose observation we have noticed.

Clauses 17 and 18.

83. Referring to Clauses 17 and 18, Mr. Norton says, "it appears "both arbitrary and inconsistent to attribute possession to cestuiqui trusts, "and to guardians, of those things which are put into a wife's or servant's "possession in trust for the husband or master, or into an idiot's possession," as for instance, without "the consent or knowledge of the husband, "master, or guardian." And Mr. Greenhill suggests that words should be added in Clause 18, specifying that the possession of the idiot, &c. is "with the knowledge of the guardian." The objection would have weight, we think, if such constructive possession could be charged against the party so possessing, as a criminal possession, in order to bring him within the definition of any offence, and to render him liable to a penal prosecution. But we are not aware that the Clauses in question are capable of being so perverted under any of the provisions of the Code; and they appear to be necessary with a view to precision in criminal charges affecting other parties in respect of property so situated, in which it may be material to declare in whom the possession rested at a certain time, as, for example, in charges of theft under Clause 363.

See Note N. p. 76 and 77.

84. Upon Clause 19 which explains that "property is not said to "be in the possession of any party other than a person," and upon the illustration which shews that property is not to be considered as in the possession of the Government of India, the Bank of Bengal, &c., but of the persons in trust for those parties, Sir H. Seton observes that "the sole "object of this explanation seems to be to convert theft from a body of "persons into criminal breach of trust, see Clause 363. If so," he asks "whether it does not fall under the rule as to General Exceptions, Note "B. page 15, viz. that it ought to be appended to the rule which it is "intended to modify." He asks again "why should not property in the "possession of a body of persons be protected from theft? It is so by "the Law of England." To these remarks and questions it may be answered that property belonging to a body of persons is protected from theft committed by any but the person who has possession of the property in trust for the owners. Such a person making away with the property committed to his keeping by a body of persons is not guilty of theft, but of a criminal breach of trust. See Illustration (x) under Clause 363. Any other person stealing such property will be guilty of theft, but of theft from the person who, according to the illustration under Clause 19, is considered to have possession in trust for the body to which the property belongs.

Clause 19.

85. Upon Clause 21 explaining the signification of the word "documents," Sir H. Seton puts the following questions: Clause 21.

"Why should the term 'document' which in a popular sense has "a more extensive meaning, be limited to writing, which with the explanation given, would exactly convey what is meant?"

"Why should a Gazette, a Proclamation, &c., cease to be documents? "they are usually classed among documentary evidence by the English "Law?"

"Whether the explanation has not reference solely to the Chapter "relating to offences relating to documents and ought not therefore "to have been inserted in it?"

86. Mr. Norton also says it appears an arbitrary definition of a document to confine it to hand-writing.

87. Mr. Greenhill observes that a printed or lithographed paper bearing the *seal* or *stamped signature* of a person unable to write would not be a document under the explanation given in this Clause. He alludes to this, he says, as seals are used in India without hand-writing.

88. The term "writing" which Sir H. Seton suggests to be used instead of "document" as conveying exactly what is meant, is defined in the Digest of the English Criminal Law Commissioners "to signify *any material* on which any words or figures, at length or abridged, are *written, printed, or otherwise expressed*, or any map or plan is described." In Mr. Livingstone's book of definitions it is explained that "wherever the contrary does not appear from the context the word *writing* means not only words traced with a pen, or *stamped*, but *printed, or engraved*, or made legible by *any other device*." It is obvious that these explanations of the term "writing" make it more comprehensive than the word "document" as it is defined by the Indian Law Commissioners, and they seem to be open to the objection that they give a meaning to the term more extensive than that which the word "writing" conveys in a popular sense, as the explanation of "document" in the Clause under consideration, on the other hand, as Sir H. Seton remarks, comes short of the popular sense of its meaning. Another difference between the definition of "writing" in the Digest of the English Criminal Law Commissioners and that of "document" in this Clause is that the former applies to the *material* on which words are written, &c. whereas the latter applies to the matter written, &c. Mr. Livingstone's definition of "writing" also applies to the words written, &c. Both the definitions referred to would embrace the seal used instead of a signature, or the stamped signature, alluded to by Mr. Greenhill, which the definition in this Clause appears to exclude, but which we incline to think ought to be included. We are not aware indeed of any reason why the definition of "document" in this Code should not be as wide as that of "writing" in the Digest of the English Criminal Law. It is dangerous, however, so much to extend the terms of a definition lest what depends upon it in the sequel should be deranged. Perhaps Sir H. Seton's suggestion of placing the definition in the Chapter "of offences relating to Documents" for which it seems to have been framed might be adopted on the principle stated in the 2d para. of Note B in regard to Special Exceptions, altering it so as to include a paper bearing a seal intended to serve instead of the signature of a name, or the stamped signature of a name intended to serve instead of the same written with a pen.

Clause 22.

89. With reference to Clause 22 which explains what is meant by the words "valuable security," Sir H. Seton asks "would not a cancelled instrument be 'a valuable security' under this Clause?" We think not; for an instrument available for the purpose for which it was made is clearly what the Clause intended; a cancelled instrument therefore, though by the cancelling of it a legal right may be "extinguished," in as much as the instrument upon which such right depended is thereby voided, does not fall within its scope.

90. In Clause 26 it is explained that "a person is said to cause *an effect 'voluntarily'* when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew to be likely to cause it." The latter part of this definition, which goes beyond the intention, to the obvious consequences of an action, is highly approved by Sir J. Awdry, but is disapproved by others. We shall consider the point in reviewing the Chapter of General Exceptions. Clause 26.

91. Colonel Sleeman objects to that part of Clause 28 which makes the term "illegal" applicable to every thing "which furnishes ground for a Civil Action." These appear wide words, but we think it would be difficult to restrict them without the risk of excluding something that ought to be included. Generally we apprehend it will be found unobjectionable to designate as illegal any thing done or omitted to be done by a man for which he is liable to a Civil Action. Clause 28.

92. Upon the explanation of "intelligent consent" in Clause 31 Sir H. Seton questions whether the word 'consent' does not necessarily import the capacity of the party giving it, implying that the definition is unnecessary. Mr. Norton observes that it is arbitrary and inconsistent to attribute to "intelligent consent" that consent "which may have been given under deception," implying that there ought to be a definition, but that the one which is given is too wide. Sir H. Seton we conceive would construe the word "consent," which he appears to consider sufficient by itself, to include consent given under deception, supposing the party to be capable of consenting at all, or able "to understand the nature and consequences of that to which he gives his consent." Even supposing with Sir H. Seton that the definition is superfluous, which we do not think, it can do no harm. We do not think it would be proper to consider "a consent given under deception" as not an "intelligent consent." Clause 31.

93. It has been suggested that it would be dangerous to put consent given under the influence of "passion" out of the pale of "intelligent consent," as in the definition, and we are rather inclined to that view.

94. It would seem that the definition of "a person of Asiatic blood" contained in Clause 32 has no relation to any provisions of the Code but those contained in Clauses 43 and 44 in the Chapter of Punishments, and it appears to us that on a principle analogous to that stated in the 2d para. of Note B. on the Chapter of General Exceptions, it should be introduced as an explanation immediately after those Clauses, in connection with which we shall examine it. Clause 32.

CHAPTER III.

GENERAL EXCEPTIONS.

95. In Clause 26, as already noticed, it is explained that "a person is said to cause an effect 'voluntarily' when he causes it by means whereby he *intended* to cause it, or by means which at the time of employing those means he *knew to be likely* to cause it." In Clause 69 in this Chapter it is declared that "nothing which is *not intended* to cause death and which is not *known by the doer to be likely* to cause death, is an offence by reason of any harm which it may cause," &c. if the sufferer has consented to suffer that harm, &c. In Clause 70, it is declared that "nothing which is *not intended* to cause death is an offence by reason of any harm which it may cause," &c. if the sufferer has consented to suffer that harm, &c. In Clause 294 in the Chapter of Offences affecting the human body, it is set forth that whoever does any act "with the *intention* of thereby causing, or with the *knowledge that he is likely thereby* to cause the death of any person, and does by such act cause the death of any person, is said to commit the offence of 'voluntary culpable homicide.'"

96. Sir J. Awdry observes with reference to the above explanation and the definitions corresponding with it, that "the general purpose of avoiding fiction and adhering to strict truth is excellent. For this reason I think the Commissioners have done well in subjoining to 'intending,' the phrase 'or knowing that he was likely to produce such an effect,' instead of leaving it to the legal presumption that a man must be taken to intend the obvious consequences of his wilful acts."

97. Mr. Norton on the other hand deems that the Commissioners have erred. He says "It appears to me impossible to read as far as this Chapter* without suspecting that the Commissioners have some peculiar object in distinguishing on so many occasions between the doing an act 'with an intention' to effect a certain result, and the doing it with a '*knowledge that it is likely*' to produce that result. Now there appears to me an error in principle in legislating on any such distinction, and I mention it the more pointedly at this opportunity, because I think the present Chapter will afford more than one instance of the uncertainty, and even of the absurdity, which may arise from the applications of such a distinguishing doctrine. The principle of English Law is that a man's intentions and designs are to be judged of

"by the quality of the act done, and that he shall be *presumed* to have intended that which his act was naturally likely, or calculated to effect. But, if the Commissioners' distinction above noted is really intended, and is to prevail, in estimating the substantive quality of an act, it will follow that a man is to be supposed capable of designing a thing by means not at all likely, and which he knows not to be likely, to effect it, or, on the other hand, he is to be supposed capable of doing a thing which he knows to be likely to cause a certain effect, and at the same time not to intend that result."

98. Mr. A. D. Campbell makes the following remarks. "At Clause 26 it is declared, that a person is said to cause an effect 'voluntarily' either 'when he causes it by means whereby he *intended* to cause it; or, *by means which* at the time of employing these means he *knew to be likely* to cause it;' I greatly doubt the propriety of the latter part of this definition, especially with reference to the distinction subsequently drawn by the Commissioners themselves in Note B. page 17, between acts which they there distinguish as '*voluntary, yet not intentional*,' that is to say, when the person who caused death did not mean to cause it, but *knew* that he was *likely* to cause it. They add, what appears to me no less important than most appalling—'*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 the knowledge that he is likely to cause it*.'"

"They then go on, in illustration of the cases of consent excepted from this very extraordinary rule, in which on the contrary, they distinguish the intent from the knowledge possessed of the likely result, to instance a fatal operation by a Surgeon, and a shot fired at a wild beast, attacking a man, which kills the latter; as exhibiting *no intent* whatever to cause death, yet the possession of *knowledge* that the act *was likely* to cause it. Now the only knowledge possessed, in both these instances, seems to me to have been the very reverse of that which is here erroneously stated by the Law Commissioners, and to have coincided precisely with the intent itself. The knowledge possessed was, that the act of man was, in these instances, the sole means left to *prevent*, not to *cause*, death; and the intent was the very same, not to *cause* but to *prevent* death. The *likelihood* decidedly was the *prevention* of death by the act of man, and the fatal alternative was *not* as the Law Commission erroneously state, any *likelihood* but the mere *improbable* result of the failure of his best endeavors to prevent that death, which by the act of God, was, otherwise, quite, inevitable."

* Chapter XVIII.

" But because the Law Commission, in these two instances, intending to give illustrations of the distinction between 'intent' and 'knowledge of likelihood' chance unfortunately to have here quoted two cases, in which they happen on the contrary to coincide, instead of differing from each other, there is no reason whatever thence to question the correctness of the most important distinction here drawn by the Law Commissioners themselves between crimes produced by 'intent,' as contradistinguished from such as are caused 'without intent,' yet are accompanied by a knowledge on the part of the causer of the result '*likely*' to be produced, and there seems, on their own admission of such distinction, the very strongest reason for doubting the propriety of their having made no such distinction 'in general.' My decided impression is that, throughout the Code, the glimmering here given by the Law Commission of this highly important distinction is altogether lost sight of, and that these two phrases, which, though they may occasionally express the same, may also, as here admitted by the Law Commission, often express very different, if not opposite, things, have been nearly universally used in the Code, in the most dangerous manner, as really convertible terms."

Note B, Page 17.

99. It appears to be necessary only to quote the words of the Commissioners in the passage referred to by Mr. Campbell, in order to shew that there was no such confusion as he imagines in their views on this subject.

They say, " 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 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."

100. The Commissioners saw clearly the difference between "intent" and "knowledge of likelihood," and meant to express it distinctly, in order to avoid the necessity of fiction in laying a charge, as for example by imputing "intent" constructively where the circumstances imply only "a knowledge of likelihood," advisedly intending, as they did, that there should be no distinction in general, in respect of penal consequences, between cases in which a man causes an effect which is an offence designedly, and cases in which he causes it by doing what "he knows is likely to cause it." Advisedly intending this in general they worded the enactment so that the charge may be always expressed according to the truth. The exception which the Commissioners thought it necessary to make for the reasons stated in the passage we have cited, of cases in which a person does to another with his consent what he knows is likely to cause his death, intending not to cause his death, but to relieve him from suffering, is contained in Clause 70. It appears to us to be quite justified by the reasons stated.

101. We cannot agree with Mr. Norton that because in laying a charge against a man it is to be distinctly expressed according to the truth, as it is to be gathered from the circumstances, whether he intended the effect the causing of which is the offence imputed to him, or did the act from which such effect resulted not intending to cause such effect, but knowing it to be likely that such effect would result from his act, "it will follow that a man is to be supposed capable of designing a thing by means not at all likely and which he knows not to be likely to effect it."

102. The alternative deduction that "a man is to be supposed capable of doing a thing which he knows to be likely to cause a certain effect and at the same time not to intend that result," we do not dispute; on the contrary we hold it to be true; and therefore we think that the distinction in question is reasonable and proper.

103. The above definition of the term "voluntarily" in this Code agrees pretty nearly with the definition of the word "wilfully" in the Digest prepared by the Commissioners on the Criminal Law of England. In Article 2, Section 3, Chapter 1, it is laid down that "A hurt, damage, or other evil consequence of an act, shall be deemed to have been caused *wilfully* where the doer of the act *intended* such consequence to result, or *knew or believed that it was likely* to result from his act, or, where knowing or apprehending that such consequence would *probably* result from his act, he wilfully incurred the risk of causing it."

104. It will be observed that this definition differs from that of the Indian Law Commissioners only in having a third branch or member besides the two contained in the latter, namely, the knowledge or apprehension that the effect or consequence in question would *probably* result from the act done.

105. It seems to us that the objections of Mr. Norton and Mr. Campbell, and of others to the same effect, are fully answered by the observations of the English Criminal Law Commissioners in explanation and defence of the above definition. We submit a few extracts. Upon the subject of "Wilful injuries" they say, "We now advert to a large class of cases where, although the injurious consequence which occurs be not that directly *intended* and to which the offender has adapted his means, he yet clearly possesses the *mens rea*, and where we think the act may properly be regarded as wilful. This class includes all who, knowing or believing that the acts which they do are *likely* to occasion an injurious result, or that hurt or damage will probably result, wilfully incur the risk of causing the injurious consequences by doing those acts."

"We have framed our definitions of crimes with reference to the general principles above referred to; in so doing we have included within the predicament of *wilful* offenders, not only such as directly intend to inflict a particular injury, but also all such as wilfully and knowingly incur the hazard of causing it."

p. 23. 106. In further explanation they say, "The proper test of guilt in such cases is that of knowledge and consciousness on the part of the

"malefactor that hurt or damage is likely to result or will probably result, from what he does; his criminality consists in the wilfully incurring the risk of causing loss or suffering to others. The case of a party so misconducting himself, and so regardless of the interests of others seems to be undistinguishable in point of legal guilt and penal consequences from that of a criminal who acts with the most direct intention to execute an illegal purpose, and it seems to us that he may properly be described as the voluntary author of the mischief produced. The principle of exemption from criminal responsibility in respect of a hurtful consequence is that of *bonâ fide* ignorance of the connexion existing between the mere mechanical act and its consequence. That principle ceases to operate where the connexion is known to be either certain or probable. If the doer of an act know or believe that a noxious consequence will result from that act, he is just as culpable both in Law and Morals as if he had acted with the most direct intention to hurt. Let it however be supposed that the consequence is not* certain, but that it is a likely or probable consequence, and that the likelihood or probability is known to the doer of the act. Here again it is clear that the principle of exemption above mentioned is unavailable to exempt the offender from liability in respect of the consequence. All he can urge is, that he was not sure that the hurtful consequence would follow; but he had no right to incur the risk and danger of producing the mischief, and having done so is justly responsible for it; he cannot reasonably complain that the Law did not give him notice of the penalty annexed to the offence, or that he did not wilfully offend, for the Law may justly, after due notification, doom such an offender to the penalties inflicted on those who accomplish their purposes by more certain or direct means; the safety of society is inconsistent with any distinction in this respect, and the offender in truth acted wilfully, in wilfully incurring the risk and danger of causing the injurious result."

107. The following is offered as an illustration—"Let it be supposed that A was wilfully to mutilate the person of B, not intending to kill him, but only to injure him from a motive of revenge. Suppose also that he did this, knowing that death, though not a certain result, was yet likely to result from what he did, and that in fact death did result, it cannot be presumed, that the legal penalty ought to be just the same as if A had directly intended to kill."

* "In speaking of certainty, moral certainty is to be understood; there is in truth no perfectly certain connexion between an act and its consequences; an accidental circumstance may save an intended victim from the stab of the most expert assassin."

p. 25. 108. The English Commissioners remark upon their definition of the term "wilful," (and the remark is equally applicable to the definition of the term "voluntary" in the Indian Code) that "although an act be "wilful, its criminality must depend on the definition of the particular "crime which may make the wilful doing of the act criminal either absolutely or subject to qualifications or exceptions." Applying this remark they say—"A party may put life itself in peril and yet "be wholly innocent, whilst another who incurred merely the "same degree of peril would be highly criminal. A Surgeon may "most innocently put the life of a patient in great peril in order "to avoid a still greater danger; a party may innocently shoot at a "tiger about to inflict deadly injury on some other person, although at "the risk of shooting him whom he wished to save; a person who incurred precisely the same degree of risk and peril of life, but who incurred it either with a positive evil intention, or wantonly without justification "or excuse would act criminally."

109. It is to be observed that the two cases here stated by way of illustration are the same as are given for the same purpose in the Note of the Indian Law Commissioners, quoted above.

110. Sir R. Comyn notices as an objection to a variety of Clauses, "that the commission or non-commission of an offence is made too "much to depend upon what may be passing in the mind of the party "offending at the time of his committing the act laid to his charge."

111. Amongst other exceptions in this Chapter, he remarks that by Clause 62 "the party's *belief in good faith* that he is commanded "by law to do an act exempts him from criminal liability; and in Clause "63 the exemption arises from a man's exercising a power given him by "law; and *acting to the best of his judgment exerted in good faith*. "So a child above seven and under twelve cannot be guilty of an offence "unless he shall have attained sufficient maturity of understanding to "judge of the nature and consequences of his conduct on that occasion." Again by Clause 68 a party will not be within the Code who commits an "offence under intoxication from a substance, of the *intoxicating quality* "of which he may be ignorant. In all these cases a most perplexing "question must be left to the Court, relative to the state of mind of the "party charged with the offence. In the first case, did he *in good faith* believe he was commanded by Law? In the second case, did he "exert the best of his judgment in good faith? In the third, had the "child attained sufficient maturity, &c. ? In the fourth, did the party "know the intoxicating nature of the means of his intoxication?"

112. "In these and other instances," he observes, "the mistake "seems to be in making the question of crime or no crime, depend upon the "want of good faith, &c. so as to throw upon the prosecutor the burthen "of averring and proving the absence of good faith or misconception." After making these remarks, Sir R. Comyn himself anticipates the answer to them by suggesting that, "the Code of procedure may perhaps remove "part of this difficulty by simply requiring averment and proof of the "supposed criminal act, and leaving the party accused to satisfy the "Court that he acted from such motives or impressions as according to "the penal Code, may negative his being guilty at all."

113. Similar objections are made by Mr. Norton and others, who appear to forget that the exceptions in this Chapter, in cases which come to trial, are to be alleged in defence, and proved by sufficient evidence. The detailed rules which may be necessary for governing the procedure of the Courts in trying such defences belong to the Code of procedure. It is to be presumed that they will be so framed that it will not serve a person accused of having done something which is an offence by this Code, merely to allege that he did it "in good faith, believing "himself to be commanded by Law to do it" according to Clause 62, or that he did it "in the exercise, to the best of his judgment exerted in "good faith, of a power given to him by Law" according to Clause 63, in either case no doubt he will be required to prove that his conduct was such as to lead fairly to the inference that he acted in good faith as alleged. It is true that he cannot prove directly what was in his mind, but he may be able to prove facts by which this may be sufficiently manifested.

114. Sir R. Comyn objects that "to permit a person who has "committed an injury to set up his *private intentions* as defence or "excuse, and to allege that he did the injury from *virtuous motives* or "from a wrongful impression of the Law or the fact, would frequently "produce a defect in justice, and allow offenders to escape." We do not find that it is permitted to any person to set up his private intentions, or to allege virtuous motives, simply, as defence or excuse under a criminal charge. We hold with the English Criminal Law Commissioners, that "to allow any man to substitute for Law his own notions of right would "be in effect to subvert the Law. To investigate the real motive in "each case would be impracticable, and even if that could be "done a man's private opinion could not possibly be allowed to "weigh against the authority of the Law." But no such thing is allowed by the two Clauses above mentioned in which good faith is recognized to a certain extent as a ground of defence. Under both there

must be a *bonâ fide* intention *to advance the Law*, manifested by the circumstances attending the act which is the subject of charge; and the party accused cannot allege generally that he had a good motive, but must allege specially that he believed in good faith that he was bound by Law to do as he did, or that being empowered by Law to act in the matter, he had acted to the best of his judgment exerted in good faith. To satisfy the Court of his good faith, he must shew at least that he acted advisedly, and that he had reasonable ground *primâ facie* for believing that he ought to do what he did.

115. Clause 62 has been generally construed, as it is construed by Sir R. Comyn, to mean that a person who has done a thing that is generally an offence shall be excused if he can prove to the satisfaction of the Court that he acted "from a wrongful impression of the Law or of the fact," causing him in good faith to believe that he was commanded by Law so to act. Ignorance or mistake of *facts* is an excuse under the Law of England; but this Clause, in the extensive construction given to it, is considered to violate the maxim common to both English and Roman Law, "*ignorantia juris neminem excusat*," and great objection is made to it on that ground.

116. We feel satisfied that if the authors of the Code had intended to infringe a principle so generally established they would not have done so *sub silentio*, but would have drawn attention to it particularly in the Note upon the Chapter. But while in that Note they carefully explain and vindicate some of the exceptions proposed, "the meaning and ground of which" they think "may not be obvious at first sight," they pass over the Clause in question as one of those "which appear to require no explanation or defence." Although the words admit of a greater latitude of construction, we are assured that no more was meant than to excuse a person who has done what by Law is an offence, under a misconception of facts leading him to believe in good faith that he was commanded by Law to do it. This restriction being understood, the objections that have been made to the Clause are obviated. To make it perfectly clear, we would suggest that the following proviso be subjoined to the Clause—"Provided that this exception shall not extend to any person who by reason of a misconception of Law, and not by reason of a misconception of fact, believes himself to be commanded by Law to do any thing."

117. Clause 64 declares in conformity with the spirit of Article 3, Section 2, Chapter 1, of the Digest of the English Criminal Law, that nothing is an offence which is done by a child under seven years of age.

In Clause 65, the same is declared in respect of "a child above seven years of age and under twelve who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion." It would seem from this that *maturity of understanding is to be presumed* in the case of such a child unless the negative be proved on the defence. By the English Law, in the case of a child from seven to fourteen years of age, *incapacity to commit a crime is to be presumed* until the contrary be proved. After fourteen years *capacity* is to be presumed until the contrary be proved. With reference to the precocity of children in the East, the rule of the Indian Code which fixes the age of twelve as the period after which the plea of immaturity of understanding shall not be allowed, appears to be proper.

Digest, Chapter 1, Sec. 2, Art. 4.

Art. 5.

118. By Clause 67 "nothing is an offence which a person does in consequence of being mad or delirious at the time of doing it;" and by Clause 68 "nothing is an offence which a person does in consequence of being, at the time of doing it, in a state of intoxication, provided that either the substance which intoxicated him was administered to him without his knowledge or against his will, or that he was ignorant that it possessed any intoxicating quality." Mr. A. D. Campbell observes that delirium may be produced voluntarily by narcotic drugs; he proposes therefore to omit "delirious" in Clause 67, and to alter Clause 68 by omitting the words after "state" and substituting "of involuntary delirium or involuntary intoxication."

119. We apprehend that the word "delirious" is meant to distinguish the condition of a person labouring under a *transient* alienation of mind through the influence of some *unseen* cause, from that of one who is afflicted with *permanent* insanity, that is to say who is "mad," and that the delirium alluded to by Mr. Campbell arising *evidently* from the use of narcotic drugs, &c. is included under the term "intoxication" in Clause 68. This arrangement appears to be etymologically correct, and at the same time in accordance with the popular sense of the terms.

120. The authors of the Code have clearly explained the meaning and the ground of the rules laid down in Clause 69 and in the three following Clauses. The general rule is, that "nothing ought to be an offence by reason of any harm (in respect of either person or property) which it may cause to any 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." The general rule is contained in Clause 69, but this excludes acts either intended to cause

Note B. p. 15.

known to be likely to cause death. The three following provide for cases where human life is concerned. Clause 70 the causing of any harm even to death, when the person who it, did not mean to cause death, but knew that he was likely to death, by an act done in good faith for the benefit of the party arising, with his consent, express or implied, as for example by a dangerous surgical operation. We have already noticed this Clause, and expressed our opinion that it is fully vindicated by the reasons assigned by the Commissioners. Further, Clause 72 justifies, under certain restrictions, death or other harm resulting from acts done likewise in good faith for the benefit of a person, *without* his consent, when he is incapable of signifying or giving consent, as, for example, trepanning a person insensible from a fall. Again, Clause 71 justifies under similar restrictions the acts of guardians done in good faith for the benefit of their wards, notwithstanding any harm even to death arising therefrom.

121. Sir J. Awdry approves of the principles upon which these provisions are founded. He says, "a sound line seems to be drawn as to trusting individuals with their own persons and properties, and in certain cases with those of others. I agree no less to the exception founded on the sanctity of human life." Sir R. Comyn on the other hand objects to Clause 69 as an instance in which the Code treats offences which are really outrages on society as merely offences to individuals. He says, "Clause 69 appears to proceed upon the maxim, *volenti non fit injuria*, and it might be an answer to a civil action by an injured person that the injury was inflicted by his own consent. But the public are surely interested in the preservation of the limbs as well as the lives of the Queen's subjects; and if such a state of society can be imagined as that in which one man may allow another to inflict upon him any bodily injury short of death, it would well become the legislator to step in and save persons from the consequences of their own free and intelligent consent. In a country thoroughly civilized, a law such as is indicated by Clause 69 would in all probability be a disletter; but in India, where so much self-infliction and voluntary torture are resorted to, it seems necessary to protect men from themselves rather than offer impunity to those who are assisting in their suffering. These objections we think are of little weight against the views of the Commissioners.

122. Mr. Norton says, "Clauses 69 to 73 are severely adapted to cases the very recital of which in the ill-calculated to excite ridicule, and yet they exonerate within such exceptive Clauses, which I imagine no

"so to be." He suggests that, "they may be found to authorize violations of the peace in fighting, surgical operations of the most dangerous quality by the most unqualified and ignorant quacks, selling for purposes of prostitution, killing to prevent 'mischief' under some circumstances, and any violence short of killing to prevent 'mischief' of any sort." The last two instances are obviously not in point with reference to the Clauses here in question. The first instance we imagine refers to the illustration (c) under Clause 69; but the exception of acts known to be likely to cause death would exclude dangerous fighting even with the consent required by the text, such as pugilistic prize fighting; and in a similar contest arising out of a sudden quarrel between two parties involving a breach of the peace, consent could hardly be implied. Whether an affray should be made an offence, independently of consequences, is a question to be considered in another place.

123. The second instance appears to refer to the illustrations of Clauses 70 and 72, in which operations performed by surgeons are given as examples. Under the former of these Clauses we apprehend that "an unqualified and ignorant quack" could hardly be excused, for it is not to be conceived that such a one could obtain the free and intelligent consent of any person to his performing upon him an operation dangerous to life, but by misrepresentation; and such a one could hardly satisfy a Court of Justice that he had undertaken the operation in good faith under Clause 72, for good faith must surely be construed here to mean, a conscientious belief that he had skill to perform the operation and by it to benefit the party, while the supposition is that he was unskilled and ignorant. With respect to the instance of selling for prostitution, whether such a proceeding should be declared a substantive offence, is a question which will be considered in its proper place. If it be made penal it will be necessary to provide that the exception in Clause 71 shall not extend to it.

124. With reference to the Articles providing that the exceptions in Clauses 71 and 72 shall not extend to rape, &c. Mr. W. Hudleston and Mr. A. D. Campbell make strong observations upon the allusion to such acts "as within a rule respecting acts done in good faith for the benefit of a child or lunatic." The explanation of the Commissioners is that, "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, (they say) not thought it sufficient to

"require that on such occasions the guardians should act in good faith for the benefit of their ward." The case given as an illustration (*f*), is a person abetting a rape on his daughter, intending in good faith her pecuniary benefit.

125. We regret that in the present state of moral feeling among large classes of the people of India we cannot regard this as a case out of all probability. We fear that parents in poor circumstances are too often to be found ready "to sacrifice the chastity of their female children" under circumstances very likely to involve a rape, in a belief that they will be benefitted by the connection thus formed with persons able to provide for them. It seems to be proper therefore to guard the exception from abuse in this respect.

126. There is a difference between Clause 69 and Clause 70, in that the latter speaks of "any person" "who has given a free and intelligent consent," whereas in the former it is "any person above 12 years of age" who has given such consent. We have seen that in describing these Clauses generally, the phrase used by the Commissioners is "a person of ripe age," which phrase is also used in describing Clause 70 particularly—"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," &c. By Clause 31 "the words intelligent consent, denote a consent given by a person who is not from *youth*, &c. unable to understand the nature and consequences of that to which he gives his consent." In the case supposed in the illustration to Clause 70, if the child is under 12 years of age, and has a guardian, a surgeon ought not, we conceive, to act without the consent of the guardian according to Clause 71. If the child has not a guardian, but is, although under 12 years of age, capable of giving an intelligent consent, the surgeon would be justified under Clause 70 in acting upon that consent, and under Clause 72 even without that consent.

127. We may here notice a remark of Mr. A. D. Campbell—"With reference to the very early age at which females reach the age of puberty in India, it appears to me a mistake throughout the Code to confound a person under 12 years of age with incapacitated infancy." From the observations we have just made it will be apparent that this remark is not strictly correct. We shall revert to the point when we come to consider the Clause 298 regarding "culpable homicide by consent," as applied to a case of Sutte where the widow is under 12, which Mr. Campbell had particularly in view.

128. Clause 73 has been objected to as superfluous. Sir H. Seton asks, whether the subject is not one which "might be left to the discretion of those by whom the Law is to be administered? and whether this Clause affords any other security?" The answer is to be found in the Note of the Commissioners—"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." After specifying instances, they say, "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 most pernicious, by making Law, or by wresting the language of the Law from its plain meaning." p. 18.

129. Some of the objections to this Clause seem to arise from misconception. Thus Sir R. Comyn observes upon it that "the criminality of doing 'harm' depends upon whether the person harmed be of ordinary sense or temper, and likely to complain of such harm," and his comment is that "it seems straining the Criminal Law to suppose the consumption of the time of the Court in ascertaining the sense and temper of the party." Now all this is a mistake. There could be no question of the sense and temper of the person harmed under Clause 73. The only question there could be, is, how would men of ordinary sense and temper regard the harm of which he complained? was it so slight that no person of ordinary sense or temper would complain of it?

130. We come now to the provisions regarding the right of private defence, of which the Commissioners speak with great diffidence as the part of the Code the least satisfactory to themselves, at the same time observing that they are "inclined to think it must always be one of the least exact parts of every system of Criminal Law." They propose 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. Of the definitions they have given of the limits of private defence, they observe as follows: "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

Clauses 74 to 84.

"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."

131. Sir J. Awdry says, "I agree with the admission of the Commissioners that the line drawn as to the right of private defence is not satisfactory, as well as that it is probably the least satisfactory part of most Codes. I cannot suggest a better line. The difficulty is inherent. A nicely graduated scale of urgency is impossible, because it depends on a combination of so many circumstances wherein those which are higher in their kind may exist in a lower degree, and because the rule is to be applied by unlearned men, under circumstances likely to deprive them of self-possession. I do not see that the Commissioners have erred from the line of moral right and wrong, and this is the true guide—men cannot in general act in such cases from the knowledge of their rights, but from the impulse of the moment acting on dispositions ready or not ready to place others' safety in fair competition with their own—upon this footing therefore, not on that of strict knowledge of the law, must their responsibilities stand, though of course it is desirable to simplify the law, so as to obtain the largest possible amount of knowledge."

132. Mr. Norton on the other hand says, "As to those 'General Exceptions' which exclude from criminality certain acts done in *private defence*, a host of cases, as it appears to me, might be suggested falling within the text which neither ought, nor perhaps were intended, to be included, and as many more acts disallowed, which are justifiable! Such terms as right of defending body or property against 'mischief' or 'criminal trespass' are not indeed easy to be appreciated, and the whole Clause 75 is, with reference to the vast variety of cases which may possibly be pointed at, to me absolutely unintelligible. I know not how to make Clause 76 square with the restrictions of Clause 75." He adds, "It would be too tedious a task to point out the doubts, and

"difficulties, and incongruities, which arise to my mind in the perusal of the various vague and general expressions throughout this Chapter."

133. Mr. W. Hudleston, one of the Judges of the Sudder Court at Madras, "thinks that the general principle of these rules respecting the right of private defence contrasts disadvantageously with the plain practical good sense of the Law of England on this subject." He views the several Clauses as open to the objection that they would tend "to deter from exertion for the protection of person and property." It appears to him also that "the conditions enumerated are such as cannot be supposed to enter into the contemplation of the party assaulted." And he "regards the whole as a piece of legislation that savors of the closet, and could not have emanated from practical knowledge and experience."

134. Mr. A. D. Campbell, another Judge of the Sudder Court at Madras, and several other Judges of that Presidency, concur with Mr. Hudleston in thinking that the subsequent qualifications of the right declared to be inherent in every person by Clause 74, are "calculated to paralyze those exertions in defence of their persons and property which the Government has sought to encourage among the natives of this country."

135. Mr. Giberne, a Judge of the Sudder Court at Bombay, makes observations to the same effect.

136. It will be seen from the quotation given above, that the Commissioners were fully alive to the danger of discouraging self-exertion on the part of the people by restrictions on the exercise of the right of self-defence, and apprehended that they might be thought to have gone too far the other way, and to have allowed too great a latitude to it. And so we find Officers of the Upper Provinces of the Bengal Presidency making this very objection. Thus Mr. Heyland anticipates that under colour of exercising the right of defence against mischief or criminal trespass, there will be endless affrays and breaches of the peace. "The evil that is thus likely to arise," he observes, "is but too evident, and there is doubtless a wide difference between this species of aggression and that by a band of Dacoits, and however little disposed the natives of this country may be to oppose the latter, they are by no means backward in opposing their neighbours in an act of trespass, or on any slight provocation, and are only too ready to make use of their swords and clubs on those occasions." Again, Mr. G. W. Bacon observes, that "nothing is more common than the defence that the deceased was sup-

"posed to be a thief, when murdered in cool blood; and when really suspected, the first thing done towards his apprehension is usually the infliction of a sword cut. Whatever may be the case in Bengal, the natives of these Provinces (North-Western Provinces) are ready enough to slay, right or wrong, and require no further encouragement."

137. Before proceeding to notice the particular criticisms which we find in the papers referred to us upon the provisions of the Code on this subject, we shall shortly state for the purpose of comparison the rules set out in the Digest of the English Criminal Law Commissioners, which it is the more necessary to advert to, since "the plain practical good sense of the Law of England" is supposed to rebuke the theoretical contrivance which is attributed to the framers of the Code, in this, as in other parts of it.

Chapter XV. Sec. 2.

Art. 20.

138. First then with respect to *Homicide*, it is laid down in the Digest that it is justifiable, 1stly, for the prevention of any felony, that is to say (Chapter I, Section I.) any offence punishable with death or transportation, against the *person, habitation, or property*, of the person killing; or of *any other person*; 2ndly, for the defence of one's own *person* against *violence*, under reasonable *apprehension* of *immediate death* from the assailant; 3rdly, in repelling force by force in defence of one's own *person*, *using no more violence than is necessary*; 4thly, in defence of *moveable property*, repelling force by force, and *using no more violence than is necessary*; or under *fear of death* from the assailant; 5thly, in defence of *house or land*, resisting a person endeavoring by force to enter, *using no more violence than is necessary*; or under *fear of death*; 6thly, in *removing* from house or land a person who has *no right to be there*, *using no more violence than is necessary*; or, under *fear of death*. And such justification extends to every person aiding or assisting another in the defence of his person or property.

Art. 22.

Art. 23.

Art. 24.

Art. 25.

Art. 26.

Sec. 5, Art. 51.

Clause 74.

139. By the Code every person has the right to defend *his own body*, and *the body of every other person* against *every assault*; and *his own property*, and *the property of every other person* against *theft, robbery, mischief, or criminal trespass*.

Clause 76.

140. Homicide, or "the voluntary causing of death," is justifiable in defence of *the body*, as above, against an assault likely to cause *death* (1) or *grievous hurt* (2); or with intent to commit rape (3), or an *unnatural offence* (4); or for the purpose of *kidnapping* (5), or of *confining wrongfully* (6); and in defence of *property*, against *robbery* (1), *house-breaking by night* (2), *mischief by fire* on any building, tent or vessel,

Clause 79.

used as a *human dwelling* (3); and against *theft, mischief, or house trespass, under circumstances causing apprehension of death or grievous hurt*. (4).

141. In cases not of any of the descriptions above enumerated, the right of self-defence extends to the causing of any harm other than death, in repelling assaults upon the person, or offences against property, subject to the general condition of inflicting *no more harm than it is necessary to inflict for the purpose of defence*.

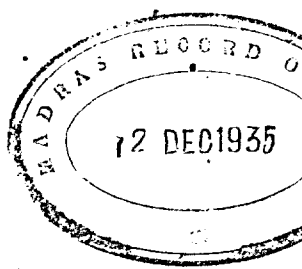
Clause 77.

Clause 75.

142. The Digest does not expressly declare that every person has the right to defend his person and property, and for this end to repel force by force, and that where homicide may not under the circumstances be justifiable, any lesser degree of bodily harm may be justifiable, if no more violence was used than was necessary for the purpose of defence, but this appears to be implied in Article 44, Section 5, of Chapter XV. in which it is laid down that "where violence is permitted to be used, in the defence of person or property, any excess beyond that which is necessary and unavoidable is within the meaning of the last preceding Article," which defines the offence of "Battery."

143. Comparing thus the provisions of the Code with the rules contained in the Digest of the English Criminal Law framed by Her Majesty's Commissioners, it is not easy to discover the contrast alluded to by Mr. Hudleston, and one is at a loss to conceive what Mr. Norton meant in his observation that "such terms as right of defending body or property against mischief, or criminal trespass, are not easily appreciated." The Code does not speak of defending the *body* against mischief or criminal trespass, but it does speak of defending *property* against such offences by resisting even to the death, if necessary; and so does the Law of England.

144. Coming now to the criticisms upon particular provisions, we shall notice first some observations of Mr. J. F. Thomas upon the declaration contained in Clause 75, that "the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence." Mr. Thomas says, "This I consider too indefinite, and it is not aided by the illustration (b)—that A, a powerful man well armed, defends his property by killing an unarmed boy. The illustration shews, not merely that A inflicted 'more harm,' it may be but little, or by some degrees, than was necessary, but such as was obviously, and wantonly unnecessary, and the definition itself should I think be confined to this class of cases."



"At present there is too much uncertainty in the Law. Judges must differ greatly when they have to determine the point, that no more harm than necessary was done. I would make the line broader, and stronger; and would suggest that the Clause should run in these or similar terms—'The right of private defence, in no case extends to the inflicting of harm manifestly and clearly unnecessary to inflict for the purpose of defence.' The illustration in the Code will then stand."

145. Mr. Giberne apprehends that this provision "will occasion much doubt and difficulty, the opinion of the defender being acted upon at the moment of danger with all his feelings enlisted in favor of extreme measures, whereas the Judge quietly contemplating in his Court the probable and distant danger, will naturally hold a very different opinion, and the consequence will be, that people will be discouraged from defending themselves and property from fear of the consequences."

146. We have shewn that words substantially of the same import with those in question are used for the same purpose in the Digest of the English Law Commissioners, and we may take it upon the authority of the Commissioners that they are strictly in accordance with the present Law. We are not aware that it has been found in practice that they present any greater difficulty than is inherent in the nature of the case. The necessity for the degree of force used is a matter to be judged of "from the manner of the attack, the means used in the attack, or some other manifestation of the criminal purpose." We doubt whether a stricter definition could be made without risking the consequence apprehended by Mr. Giberne from the present one.

147. Mr. Norton to explain his remark that he "knows not how to make Clause 76 square with the restrictions of Clause 75," observes that "taking the text of the two together, part of it may be read thus: 'a female may defend herself against an assault, provided she ascertains that the assault is with a view to rape, and provided she acts under the restrictions of Clause 75, one of which is that she must not inflict more harm than is necessary.' We really cannot perceive any difficulty in this case, and we think that Mr. Norton would hardly be able to shew that the female would be in a more unfavorable position for defending herself in a Court of Justice, which it is to be remembered is the point in all the exceptions, under the Clause in question, than under the English Law, as it is set forth in Article 20, coupled with Article 21, Section 2, Chapter XV. of the Digest, which contain the provisions that apply to the case supposed. Under either law, the

female being accused, let us say, of homicide, would confess the fact, but would justify it on the ground that she slew the man to save herself from violation, being unable to do so by any other means. Under either law she would have to give proof of circumstances evidencing the intent of the man, and the necessity of her act to prevent him from accomplishing his purpose.

148. We take it that Article 20, above-mentioned, which justifies homicide for the prevention of any *felony*, includes all the cases in Clause 76 of the Code, except the sixth, an assault with the intention of wrongfully confining any person, and this last we apprehend is covered by Article 23.

149. Referring to the case last mentioned under Clause 76, in connection with the first Article of Clause 75, Mr. Norton observes, that "a man may defend himself against an assault provided he ascertains that the assault is with the intention of confining, and is aware that the apprehended confinement is an offence punishable by more than a year's imprisonment, and provided also, that the assailant does not turn out to be a public servant authorized under circumstances to confine some person though not the party assailed." This case is stated invidiously. Simply stated the proposed law is, that if a public servant, known to be one who is by his office competent to make arrests shall attempt to confine a person, it may be wrongfully, that person will not be justified in resisting the attempt by force, but he will be justified in resisting by force any person not being a public servant, or not being legally competent, who shall attempt to confine him, and if from the circumstances there be reasonable cause to apprehend that the confinement is intended to be protracted, he will be justified in resisting even to death, if necessary.

Clause 75.

Clause 76.

150. We think, however, that there is reason in the exception that has been taken to the provision which justifies homicide in resisting an attempt at wrongful confinement likely to be continued for three days, that is to say, such a confinement as is punishable under Clause 33-1 with imprisonment for a term exceeding 1 year. Although it may be right to allow resistance even to death against an attempt to carry a person off to be kept a prisoner in a hill fastness, for example, where his captivity would be likely to continue for years, we cannot think it would be right to justify such an extremity to prevent a confinement which there was reason to apprehend might extend to three days, or a little more, even if it were quite certain that it could not be prevented by other means.

151. With reference to the second Article of Clause 76 and the fourth Article of Clause 79, Mr. Pyne, a Judge of the Sudder Court at Bombay, observes as follows: "Were 'grievous hurt' limited to the first seven definitions of that offence, the right of private defence against an assault by which it might reasonably be apprehended that such grievous hurt would take place, might be taken as a justification for homicide, but, under the eighth designation of the offence, it is I think allowing too great latitude to the right of private defence to suffer a person to resist to the death from a fear of receiving an injury which may render him unable to follow his ordinary pursuits for twenty days; the nature of the assault against which a person in self-defence acts, must be taken into consideration, in extenuation or aggravation of the homicide, and the intention of the aggressor will always be much more clearly developed by the instrument made use of, and other circumstances, when permanent bodily injury is contemplated, than where the fear of the assaulted may magnify the assault, into the apprehension of grievous hurt. It appears to me that scarcely any assault can be committed, wherein the assailed may not justify an act of homicide under the eighth definition of the offence." We shall revert to this observation in considering the definition of grievous hurt.

152. Upon the 3d Article of Clause 79, Mr. T. Blane observes that "the restriction that the building, &c. should be used as a human dwelling appears unnecessary and injurious. If I may kill a man while attempting to rob my property from a godown or tent not used as a dwelling, surely I ought to be allowed to do so if he attempts to destroy the same property by fire. I might recover my property if robbed, but not if destroyed by fire. By this rule the attempt to set fire to a stable full of valuable horses, a warehouse, or even a public arsenal, could not be resisted by killing the offender."

153. Mr. Blane appears to have overlooked that the definition of robbery in Clause 375 makes the causing or attempting to cause death, hurt, or unlawful restraint to any person, or fear of death, &c. a necessary ingredient of the offence. But we are on the whole inclined to concur in the opinion that the restriction to a human dwelling in the case of mischief by fire in defining the right of defence in Clause 79 is inadvisable. There is no such reserve with respect to house-breaking by night, which may be committed in a place for the custody of property as well as in a human dwelling.

154. Mr. J. F. Thomas upon the same Article suggests that a distinction should be drawn between frail huts constructed of boughs, &c.

and permanent dwellings. This is a point which will fall to be considered in examining the Chapter on offences against property.

155. Upon Clause 81 Mr. T. Blane observes that the expression in the second para. "till the offender has effected his retreat" is very indefinite. The whole Clause, with exception of the 1st para., he thinks is too much restricted. He remarks that the natives of this country seldom recover from the panic caused by an attack, or think of resistance, till a robbery has been completed, they cannot indeed assemble in sufficient numbers soon enough; if therefore a village has been attacked and robbed by a gang who have effected their retreat with the property to a neighbouring jungle, the villagers ought not to be precluded from attempting its recovery and the seizure of the robbers, even at the risk of killing any of them. Again he observes, that under this Clause, if a man has broken into a house and carried off property only just outside the wall or door, the owner may not slay him in attempting to recover the property.

156. Mr. G. Casamajor offers remarks to the same effect. He and Mr. A. Elphinstone suggest that the privilege of this Clause should operate till the offender is taken and delivered to an Officer of Justice.

157. The rule of the Law of England is that "as homicide committed in the prevention of forcible and atrocious crimes is justifiable only upon the plea of necessity, it cannot be justified unless the necessity continue to the time when the party is killed. Thus though the person upon whom a felonious attack is first made be not obliged to retreat, but may pursue the felon till he finds himself out of danger; yet if the felon be killed after he has been properly secured, and when the apprehension of danger has ceased, such killing will be murder; though perhaps, if the blood were still hot from the contest or pursuit, it might be held to be only manslaughter, on account of the high provocation."

Russell 1.—552.
Art. 21, Sec. 2, Chap. XV.
of Digest.

158. We think with Mr. Blane that the 2d para. of Clause 81 is not sufficiently definite. We are not sure of the meaning intended by the expression "till the offender has effected his retreat with the property." We know not certainly when he is to be considered as having effected his retreat; probably it is when he has once got clear off, having escaped immediate pursuit, or pursuit not having been made; but the meaning should be made certain by an explanation or illustration. We presume that the protection of parties pursuing robbers, &c. for the recovery of property which they have

succeeded in carrying off, or for bringing them to justice, was thought not to be within the scope of the provisions touching the right of private defence. We apprehend that under the rules which will be laid down in the Code of Procedure, parties will be protected on such occasions under Clauses 62 and 63.

Clause 82 (b)

Blackstone 4—27.

159. Sir R. Comyn, speaking of Clause 82, says here misconception "is innocence." It does not appear however that in the instance given the proposed law differs from the Law of England. Blackstone specifying ignorance or mistake of fact as one of the pleas or excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, gives as an illustration the case of a man, who intending to kill a thief or house-breaker in his own house, by mistake kills one of his own family; "this," he observes, "is no criminal action." "Misconception" is not *expressly* mentioned as an excuse in any of the antecedent Clauses; the reference we apprehend is to Clauses 62 and 63. The illustration appears to depend upon the latter. It is as follows: "A enters by night a house which he is legally entitled to enter. Z, in good faith taking A for a house-breaker, attacks A. Here Z, by attacking A under this misconception, commits no offence. But A has the same right of private defence against Z which he would have if Z were acting under no misconception."

160. Mr. H. C. Tucker observes that it appears inconsistent in Clause 82 to allow A to kill Z making an attempt upon his life under the influence of madness, which under Clause 67* is no offence. The right of private defence holds against any assault causing the apprehension of death, and it matters not what is the mental condition of the assailant. *This* is to be considered only with respect to *his* responsibility.

* Mr. Tucker writes 68.

161. Exception is taken by Mr. Hudleston, Mr. A. D. Campbell, Mr. T. Blane, and others to Clause 84. Mr. Blane observes, "a person's simple belief in good faith that circumstances are so and so, ought not to be sufficient—there ought also to be sufficiently strong and just grounds for his belief. An instance has been known of a person shooting his own servant who had come to his room at night mistaking him for a robber, but he ought not to be held blameless, he ought to have ascertained that he was a robber before he killed him." The party in such a case would have to satisfy the Court that he believed in good faith that the man was a robber, which must be taken we conceive to exclude a mere reckless conjecture or suspicion. Belief must have a foundation, and that must be shewn. The reference we have made above to the English law in respect to "misconception," is in point here.

162. We have now finished our review of the provisions in the Chapter of "General Exceptions" which appeared to call for remark. We proceed to notice some omissions, the reasons of which are given in the Note to the Chapter.

163. By Article 30, Section 2, Chapter XV. of the Digest of the English Criminal Law, it is laid down that "homicide is justifiable whensoever a man is involuntarily placed in such a situation, that he is under the necessity of exposing another person to certain death in order to save his own life." In a note to this Article in the 4th Report of the Commissioners it is said, "the illustration commonly applied in the text books to this rule is the case supposed by Lord Bacon, (Maxims of the Law, Reg. 5.) where two persons being wrecked and getting on the same plank which is insufficient to save them both, one thrusts the other from it, whereby he is drowned."

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v. Blackstone, 4.—186.

164. Again by Article 6, Section 2, Chapter I. of the Digest it is declared that, "Duress inducing just and well grounded fear of death, or of grievous bodily harm, shall be sufficient to excuse a person acting under such duress from penal consequences, except in case of treason and homicide."

165. There are no corresponding rules in the Indian Code. The Commissioners say, "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."

Note B. page 19.

166. They observe that, "it would 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." 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." They then say, "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 above, we should without hesitation propose to exempt this class of acts from punishment. But in both

Page 20.

"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." On the other hand they remark that, "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 could 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," they say, "that this circumstance ought not to exempt them from the full severity of the law," and the reasons they give for this opinion are that, "though 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, yet 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 is sure of his life."

In fine they say, "We should 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 a 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 those 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 Court."

167. We think that a distinction may be drawn between cases in which a man does a thing which is an offence by Law, spontaneously, to save his own life, and cases in which he does such a thing, from what is called Duress, that is from the compulsion of others to save his life threatened by them.

168. With respect to the former, we agree with the authors of the Code that it is impossible to define precisely those cases in which it may be proper to excuse the parties, and that it is expedient to leave them to the discretion of the Government.

169. With respect to the latter, it seems to us that the following would be a safe definition with the explanation annexed:

"Nothing is an offence, except under Clause 294, which is done by a person who is compelled to do it by threats, which may reasonably cause the apprehension that instant death to that person will otherwise be the consequence, the act being done in the presence of the person using the threat, and the threat being continued to the time of doing it, provided the party doing the act did not voluntarily place himself in the situation by which he became subject to such constraint."

Explanation. "A person who shall have voluntarily joined a gang of dacoits, or a crew of pirates, or the like, knowing their character will not be entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do any thing that is an offence by law."

"A person who shall have embarked ignorantly in a piratical vessel being compelled by the crew by threat of instant death to join in an act of piracy, will be entitled to the benefit of the exception."

"So also a person seized by a gang of dacoits and forced by threat of instant death to do a thing which is an offence by law, for example a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it."

170. By the English Law according to the Digest, Duress cannot be pleaded in excuse of treason or homicide; except, in cases of treason, the charge be for "levying war against the king," or "adhering to the king's enemies," or "supplying money, &c. to be used in furtherance of any treasonable design or purpose," when it may be pleaded under certain conditions. Art. 7.
Art. 8.

171. The Clause we have drawn relating to Duress likewise excludes the plea in case of homicide, and it is expressed so as in effect to adopt the conditions above alluded to, not only in the case of persons compelled to join in waging war against the Government, &c. but generally, as we think they ought to be of general application.

172. We observe that Duress is allowed as an excuse by the Code framed by Mr. Livingstone in case of the party having been threatened with loss of life or limb, or forced by actual violence, and the English Law allows it when the party was constrained by the fear of grievous bodily hurt as well as fear of death; we have thought it proper however to limit the excuse to cases in which the party acted under threat of instant death.

Chap. 1. Sec. 2, Art. 9.

173. It is laid down in the Digest of the English Criminal Law that, "a married woman charged with the commission of any criminal act shall, in case her husband shall be present at the time of the commission of such act, be presumed to have acted under his coercion, and shall be entitled to an acquittal, unless it appear that she did not so act. Provided that no such presumption shall be made in case of any charge of treason or homicide." By Mr. Livingstone's Code, "a married woman committing an offence by command or persuasion of her husband shall suffer no greater punishment than simple imprisonment for one half of the term to which she would have been sentenced if she had committed the offence without such command or persuasion."

Art. 10.

174. There is no provision in favor of the wife under such circumstances in the Code under review. The point is not adverted to in the Notes; we have therefore no explanation of the reasons upon which the framers of the Code determined not to allow the plea of coercion by the husband to avail in favor of the wife, either to the extent of excusing her, or in the way of extenuation. It seems to us, considering how much the women of India are under the power of their husbands, that such a plea may more properly be allowed in this country than in England.

CHAPTER IV

OF ABETMENT.

• 175. Mr. J. F. Thomas considers the Chapter of Abetment "a great and highly valuable improvement."

176. On the other hand, Mr. Norton says "This Chapter appears to me to confound and perplex the English Criminal Law of Principal and Accessories, which law I conceive to be very clear and rational."

177. Mr. W. Hudleston likewise says "I am of opinion that these rules are less worthy of adoption than the provisions of the Law of England."

178. The Law of England on this subject is set forth in the Digest prepared by Her Majesty's Commissioners under the head of "Criminal Agency and Participation." In the first Article it is declared that "parties to a crime are either principals in the first degree, or principals in the second degree, or accessories before the fact."

Chapter 1, Sec. 4, 7th Report, p. 115.

179. "A principal in the first degree," according to Blackstone, "is he that is the actor or absolute perpetrator of the crime," "in the second degree he who is present aiding and abetting the fact to be done." "An accessory is he who is not the chief actor in the offence or present at its performance, but is some way concerned therein either before or after the fact committed." The Digest explains that not only the absolute perpetrator of a criminal act is a principal in the first degree, but also he who causes it to be done, otherwise than by a guilty agent. An accessory is defined to be one who "not being present" at the doing of a criminal act "has procured or promoted the doing of it." And it is declared that "a party shall be deemed to procure or promote the doing of a criminal act" "who shall by commandment, counsel, advice, consent, aid, or otherwise, either directly or indirectly cause, incite, or encourage any other offender to do such act or cause it to be done."

Vol. 4, p. 34 and 35.

Art. 2, Chapter 1, Sec. 4.

Art. 10.

Art. 11.

• 180. It is declared in Article 14, that "Every party to a crime within the meaning of Article 1 shall be deemed to be guilty of that crime," and that every penal provision in respect thereof shall be applicable to all parties within the meaning of the same. The effect of which,

as explained in a Note, "is to make every one liable as the doer, who is either the actual doer, or who aids in the doing, or procures or promotes the doing of any criminal act."

Chapter 1. 181. There is no distinction of principals in the first degree and principals in the second degree in the Indian Code. In the 3d Clause of the Chapter of General Explanations, it is laid down once for all that "Wherever the causing of a certain effect with a certain intention, or with a knowledge of certain circumstances, is an offence, it is to be understood that if more persons than one jointly cause that effect, every one of them who has that intention, or that knowledge, commits that offence."

Clause 86. 182. The definitions of substantive offences, construed with reference to this general explanatory Clause, take in all who actually cause or assist in causing the effect which constitutes the offence, without distinction of leaders or followers, principals or subordinate agents. We apprehend that all are included whose acts are such as to bring them within the definition of principals in the first degree in Articles 3 and 4, Section 4, Chapter I. of the Digest of the English Law, and all who as being actually present and assisting come directly within the definition of principals in the second degree in Article 7, but not such as are constructively regarded as principals in the second degree under the circumstances set forth in Article 8, though not present and not having any hand in causing the effect. The latter come under the third head in the definition of previous abetment in the Indian Code, and are made Clause 97. liable to the same punishment as the actual perpetrators. The effect is the same as by the English Law, but without that forced construction by which the English Law is strained for the purpose.

Previous Abetment. 183. The provisions regarding "previous abetment," in the Indian Code, besides the offenders just mentioned, appear to apply to all who, as procuring and promoting the doing of criminal acts, in any of the ways set forth in the Article of the Digest quoted above, are liable to be dealt with by the English Law as accessories before the fact. Art. 11, Sec. 4, Chapter 1.

184. According to the definition in the Code previous abetment the procuring and promoting the doing of a thing by instigation, spiracy, or aid, or by concealment intended to facilitate the doing of a thing. The mode of abetment last mentioned is not in terms brought into the above Article in the Digest as rendering the offender liable to be dealt with as an accessory. The concealment of an intended offence by a party not consenting thereto is provided for as a misprision under

of offences tending to defeat justice. If the concealment was wilful with the intention of facilitating the commission of the offence, we apprehend that it would be construed into such approbation or assent as would make the offender an accessory before the fact.

Art. 27, Sec. 5, Chapter 5.
Russell 1, p. 29.

185. In the 8th Report of the Commissioners on the Criminal Law of England, lately published, this subject is again discussed. It is assumed to be impossible to make any distinction between accessories before the fact and principals, *as regards the degree of the offence*, and it is questioned whether there ought to be any distinction *in the mode of charging the offence*. "The main, and as it seems the only reason for charging the 'procurement or participation of the offence specially,' say the Commissioners, 'is the giving to the party charged more accurate and circumstantial information as to the mode of participation intended to be proved.'" It is admitted that if the distinction were of easy practical application, it would be desirable to adopt it for this reason. But it is argued that it would be attended with great practical inconvenience. Page 11.

186. After stating the difficulties, the Commissioners observe that there seem to be three modes of obviating them; "by admitting the 'general charge to be sufficient, but requiring the prosecutor on application by the accused and under the direction of the Court to supply the 'accused with the names of the principals in the first degree, and such particulars as would be necessary with a view to his defence; or secondly, by allowing the charge to be stated in both ways by means of different Counts; thirdly, by allowing the charge to be made in the alternative,' when it is doubtful whether the proof will show the party to have been an accessory before the fact or a principal in the second degree.

187. The authors of the Code, in framing the definitions of abetment, have made the distinction the propriety of which is here in question, and the provision in Clause 61, it seems to us will obviate the difficulties apprehended by the English Commissioners. This Clause directs that when a person is found guilty of an offence, but it is doubtful under which of certain penal provisions he is punishable, the offender shall be liable to whatever punishment is common to the penal provisions between which the doubt lies. The same result is aimed at by the suggestion which we find has been offered by Lord Denman, Lord Chief Justice of England, and other persons consulted by the Criminal Law Commissioners, namely, in the words of Lord Denman, that "when the train of circumstances makes it perfectly clear that the accused is either prin-

Appendix (A.) 8th Report.

Page 212.

“ principal or accessory, but does not enable the Jury to see clearly whether he is one or the other, the finding of that alternative by the Jury ought to expose him to punishment.”

188. The above observations we conceive will be found to answer the question put by Sir H. Seton, upon Clause 85, in this Chapter, “ why omit abetment simply, viz. being present at and aiding?”

189. Mr. Norton, after the remark quoted above, objectingly observes that “ those who *aid* and those who *conspire* and who may also be *present* and substantively *co-operate* in the act, ought to all intents and purposes to be considered as principals and not abettors.” We have shewn that with respect to those who are “ present” and “ substantively co-operate” this is just what is intended, and Mr. Norton himself remarks that “ Clause 3, of the 1st Chapter enacts as much,” “ but that,” says he, “ is not so enacted by *this* Chapter.” We do not see why it should be again enacted in this Chapter, the Clause referred to being intended, as is clearly expressed, to govern the whole Code. With regard to “ those who aid” and those who “ conspire,” though they are distinguished from the principal offenders for the sake of accuracy of definition, they are liable to be dealt with in the same manner, as we have already intimated.

190. As a specimen of Mr. Norton’s criticisms we may notice his remarks upon abetment by concealment. “ It may be asked,” he says, “ what is ‘concealing’? probably ‘not disclosing’ is meant—A party not disclosing the design of his friend or child to commit an offence is himself criminally guilty, though he may afterwards prevent or dissuade that very design from being effected.” The inaptitude of this illustration will be obvious when on turning to the definition it is observed that concealment amounts to “ abetment” only where the party *intends* or *knows* it to be likely that he may thereby facilitate the doing of the thing designed. This is the definition of what constitutes abetment: whether the abetment is criminal depends of course upon whether the thing is an offence or not.

191. “ Luckily,” Mr. Norton adds, “ there is no punishment awarded in the Code for concealing a design not carried into effect.” Is it to be believed that Mr. Norton sincerely thought that this happened by chance?

192. Again, in the very next paragraph of his Report, Mr. Norton mentions “ as an example of very loose style of legislation, even in an

“ illustration” “ that a person is declared (Clause 87) to steal a horse who takes him fraudulently, and if another *aids* him in that act (say by opening the stable door and leading the horse out) he *abets* that theft, but is not a *principal thief*.” This is an unaccountable misrepresentation, as will appear at once from the following quotation of the illustration to which he refers. “ A aids B to take a horse out of Z’s possession. Here if B took the horse fraudulently B is guilty of theft. But if A aided B believing that B had a right to take the horse, A is not said to have abetted the theft committed by B, though he has abetted the taking of the horse.” The illustration it will be perceived is the very reverse of what Mr. Norton represents it to be. His remarks are surely an example of an unhappily “ loose style” of criticism.

193. Sir R. Comyn, adverting to the word “ misconception” in Clause 87, refers to his remark on the same word in Clause 82, which we have already considered. Sir H. Seton, Mr. W. Hudleston, and Mr. A. D. Campbell, object to the passage in Clause 87 containing this word, as obscure. Sir H. Seton points to Clause 99 as liable to the same objection. The learned Judge doubts whether the misconception applies to the quality of the act in question as being an offence or not. In all the illustrations annexed to the Clauses in which this word is used, for the purpose of shewing the sense in which it is to be taken, the misconception concerns the matter of fact. We understand, as we have said before, that in using this word there is a reference to Clauses 62 and 63. The misconception, it would seem, respects the circumstances, taking them wrongly to be such as would warrant the act done according to law. We beg to refer to the observations we have offered above upon the two Clauses here adverted to.

Clauses 82, 87, 99, 100.

194. The Code distinguishes between cases in which the abetment is successful and those in which the effect intended is not accomplished. When the offence is committed, if the abetment is by instigation, conspiracy, or aid, the punishment is the same as if the abettor had been a party in the commission of it. Otherwise, the punishment is limited to one-fourth of the longest term of imprisonment provided for the offence intended, or fine, or both, which however is to be inflicted only, in abetment by instigation, where the abetment was attended with the actual delivery of a bribe, or with the threat of causing injury, or was committed by a person present instigating the offender to persist in the commission of the offence, and in abetment by conspiracy, when some act takes place, in pursuance of the conspiracy, and in order to the committing of the offence. In abetment by concealment, if the offence be committed and the abettor be a public servant, the offender is liable to one half of

Clauses 88, 95, and 97.

90, 91, 93.

102. the longest term of imprisonment for the offence; if not a public servant, he is liable to one-fourth.

195. The distinction here noticed having been overlooked by some of the Officers who have offered observations on this Chapter, they have been led to impute inconsistencies which do not exist. Another, Mr. Giberne, adverting to the distinction, expresses his disapproval of it, thinking that "the person who instigates another to commit an offence "under any and every circumstance" has actually committed "his portion of the offence." He does not say however whether he would have the instigator always made punishable with the punishment of the offence which he abetted, or how he would determine the punishment. Mr. Cochrane (the Company's Standing Counsel) on this point says that he is not prepared to think that as a general principle equal punishment should be awarded to the man who abets as to the party committing an offence.

Art. 14, Sec. 4, Chapter I.

196. The English Law, as it is expressed in the Digest, makes every party to a crime, as principal, in the first, or in the second degree, or as accessory before the fact, "guilty of that crime," and so far the Indian Code agrees with it. Instigations, &c. without effect are provided for separately by the English Law. In the Digest they are brought under the head of "Illegal solicitation." A specific penalty, viz. imprisonment not exceeding two years, or fine, or both, is prescribed, if the offence intended be a felony, if it be a misdemeanor the penalty is not to exceed one-half of that prescribed for the misdemeanor.

Chapter XXII. Art. 1.

Clause 89.

197. The punishment is cumulative by the Indian Code when the person who instigates an offence (actually committed in consequence) does so by committing another offence, as when A by putting B in fear of death induces B to burn a stack of corn belonging to Z. Here A is punishable for the instigation under Clause 88, and the putting in fear of death under Clause 482. It is the same where the instigation is attended with the threat of causing any injury.

Clause 91.

198. Mr. W. Hudleston and Mr. A. D. Campbell concur in objecting to the accumulation of punishment in this manner, the former expressing an opinion that the rule of punishing for the greater of two or more offences is preferable.

199. The principle of rendering the punishment cumulative when two offences are committed in one transaction, is followed to a considerable extent in this Code, but with discrimination; it is ordered in Clause 58, that punishments shall not be cumulative unless it be so expressly

provided, and in Clause 59, that in no case shall be combined the punishments provided by more than two penal provisions of the Code. The question of the propriety of cumulative punishment will be more particularly considered in its proper place, in reviewing the Chapter of Punishments.

200. We have said that we consider that all who, as being actually *present* and assisting in the commission of an offence, come directly within the definition of principals in the second degree in the English Law, are regarded by the Code as accomplices in the fact, or more strictly "accessories at the fact," and guilty of the offence, without distinction.

Russell 1, page 21.

201. But Clause 93, which applies to a person "*present* while any offence is committed" and "instigating the offender to *persist* in the commission of *that* offence" is thought to militate against this view, as the punishment is limited, in regard to imprisonment, to one-fourth part of the longest term provided for the offence. We apprehend that *if the offence were persisted in or renewed*, the person implicated as above would be deemed an accomplice in the fact or "an accessory at the fact" liable to the punishment of the offence. We conceive that this Clause is intended to meet a case in which the instigation has not had the effect intended. We infer this not only from its apparent tenor, but also from the position of the Clause among other Clauses providing for abetment by instigation when the offence appears not to have been committed.

202. The Clause at first sight appears obscure from the reference to an offence *committed* as identical with that which is abetted in the manner stated. The meaning as we understand it, may be best illustrated by an example, as follows: A is casually present when a mob attacks a house with the intention of sacking it. A takes no part at first, but seeing the attack suspended he instigates the mob to persist; if the attack is renewed in consequence he is liable to punishment equally with the rioters; if his instigation is without effect, he is answerable for the instigation under this Clause.

203. This Clause is limited to cases in which the offence instigated is punishable with rigorous imprisonment for a term of one year or upwards. We do not understand that it is meant to apply exclusively to cases in which *rigorous* imprisonment is prescribed *positively*, but to all cases in which it *may* be inflicted, excluding cases in which *simple* imprisonment is prescribed *positively*. This remark applies also to Clause 102.

204. Simple instigation to commit an offence, without the effect intended, is not punishable except under the Clause last noticed unless it be directed to the "public generally," or to "any number or class of persons exceeding ten," it is then punishable by imprisonment which may extend to three years, or fine, or both. Mr. Cochrane objects to the principle of this provision. Mr. J. F. Thomas thinks it will open the door to malicious prosecutions unless the instigation be confined to some overt acts like the illustrations. Mr. Hudleston adopts this objection, and adds that he thinks the provision needless. Mr. Campbell disagrees with Mr. Thomas and Mr. Hudleston.

Clause 94.

205. The suggestion of Mr. Thomas appears to us worthy of attention. Perhaps it may be most expedient to define the manner of instigation by the terms used in Clause 113, relating to attempts to excite feelings of disaffection to the Government, or such terms as may be settled when that Clause comes under consideration.

206. The number ten is obviously fixed arbitrarily. By Clause 127, it requires twelve persons to constitute a riotous assembly. It would seem advisable to make the number the same in both Clauses, if any number be specified. We are rather inclined to think it would be better not to specify a number. In that case the Clause should be modified by substituting for the words "or any number or class of persons exceeding ten" the words "or any class of persons."

Clauses 95 and 96.

207. We do not find any observations upon the provisions regarding abetment by conspiracy which appear to require notice, except the remark of Mr. Norton that "the conspiracy to commit an offence, say murder, is an offence, though nothing is done," which we have to note as a mistake; and his objection to Clause 96 on the ground that the same punishment applies to the most trivial acts and to acts by which the object of the conspiracy may have been all but effected. The weight of the objection will be easily estimated when it is perceived that there is purposely no minimum limit to the punishment, to admit of the Judge exercising a discretion, and applying "to the most trivial" acts the most trivial punishment. The objection holds, for as much as it is worth, in every instance in which a discretion is left to the Judge.

Clause 97.

208. We have stated above that we understand Clause 97, regarding abetment by aid, to comprehend persons who by the English Law are constructively considered to be principals in the second degree, though not present and not having any hand in causing the effect which constitutes the offence. Mr. Norton "presumes that abetment by doing

"an act; or by illegal omission of an act, in actual substantive aid of an offence, is really meant." We believe that he does not mean substantive aid by actual assistance *in the perpetration of the offence*, but some actual though not direct aid by which the perpetration of the offence has been facilitated, in contradistinction from what, he says, the literal construction of the Clause imports, namely, that "a person omitting a part of his duty, as by concealing any act with intention to aid it, although in fact he did not aid in the design at all, may be punished as though he had aided in an offence (say a murder) designed and committed." We apprehend that, if the murder was committed, and the party omitted what it was his duty to do, with the *intention* of aiding the commission of the murder, he would be liable to punishment under this Clause, whether by such omission he did or did not *in fact* aid the commission of the murder, and we have no doubt that he ought to be so punished as equally guilty whether his *intended aid* was effectual or not.

209. Mr. Norton complains of vagueness and uncertainty by the use of such words as "intention," &c. in this Chapter, seeming to forget how language has been forced by the constructive interpretations given to the English Law on this very head, whereby to satisfy the terms "present" and "aiding" it is held that a person need not be actually present, and need not actually assist.

210. Mr. Norton says he cannot with every effort understand the distinction between the "*illegal omission*" of a Police Officer which facilitates an offence under Clause 97, and the "*concealment*" of a Police Officer which likewise facilitates an offence under Clause 101. The difference appears to us palpable. Under Clause 97, the omission respects what is either doing or is about to be done at the present time, and could not be done, in the case given as an illustration, but for the omission, which is all but a participation. In Clause 101, the concealment refers to a *design to commit* an offence at a *future* time, the commission of which the concealment may in a manner facilitate, by not exciting that attention which would probably prevent it: but this is a remote and precarious aid, which though deserving of punishment, is surely very different from that which is supposed to be rendered in the former case, conducting by an immediate influence and a positive efficacy to the commission of the offence.

Clause 101.

211. Upon Clause 97 Mr. J. F. Thomas observes that, as it is worded, it appears to include a case like that of the London Police Officer, who by not interfering suffered the perpetration of a murder with the view to secure the reward called "blood money," by the after appre-

hension of the murderer. He remarks that "the Officer, however indefensible his conduct, and although his omission probably led to the murder being actually perpetrated, yet was not in league with and had no intention of favoring the offenders, which is the essence of the offence in this Clause, but his act nevertheless falls apparently within the definition of "aiding" by an illegal omission." We think that such an act or omission does fall, and properly so, within the definition, equally when it is prompted by the mercenary motive by which the London Police Officer was actuated, as when it proceeds from the desire to favor the offender. The "*intention*" is the same in either case "to aid the commission of the offence," and that is what constitutes guilt under this Clause, whatever may be the motive. It therefore appears that it would be unnecessary to modify the Clause as Mr. Thomas suggests, even if there were any such a system in operation here as that to which he alludes, which we need hardly say there is not.

212. Clause 98 makes the previous abettor of an offence liable to the punishment of a different offence which may be committed in consequence of his abetment of the intended offence, if he knew that such different offence was likely to be committed in the attempt to commit the intended offence. This appears to us to agree substantially with Article 13, Section 4, Chapter I of the Digest of the English Criminal Law. It differs in making the abettor liable to cumulative punishment if the intended offence be also committed, according to the principle of this Code.

213. Many objections are made to this Clause with reference to the condition that the abettor *knew* that the different offence was *likely* to be committed. Similar objections are made to other Clauses which we need not particularly notice. They are sufficiently answered we conceive by the observations we have already offered in commenting upon the Chapter of General Exceptions with respect to the definition contained in Clause 26.

Clause 99.

214. Upon Clause 99 Mr. W. Hudleston remarks that it "exhibits refinement bordering upon unintelligibility wholly out of place in a Criminal Code, and so worded that the meaning would escape discovery without the illustrations." The Clause appears to us also to be expressed somewhat obscurely, though certainly not to such a degree as to be unintelligible without the illustrations as Mr. Hudleston avers. These are however an important help.

Illustration (b.)

215. The meaning we gather to be, first, that when a person abets the doing of a thing which he knows to be a certain offence, and it is

done according to his intention, if from some misconception on the part of the doer his act does not fall within the definition of that offence, the abettor nevertheless shall be liable to the same punishment as if the doer could be convicted of that offence. Or if *in consequence* of the abetment, that is, in endeavoring to effect what the abettor intended, something is done which is an offence under one Clause of the Code, but would be an offence under *another* Clause, but for some misconception on the part of the doer which mitigates it, from which misconception the abettor is free, the abettor shall be liable to punishment under *that other* Clause. Secondly, that if a person abets the doing of a thing which is an offence, for example by supplying means for the purpose, and through and in consequence of such abetment, for example, by using the means supplied by him for committing the offence which he intended, a different and more heinous offence is committed intentionally, but without his knowledge, the abettor shall be liable only, to the punishment to which he would have been liable if the offence which he intended had been committed, or to the punishment to which the actual offender would have been liable, but for the intention entertained by him unknown to the abettor, by which his offence was aggravated so as to subject him to a higher penalty. (a)

216. The principle of the second provision seems to be recognized in Articles 16 and 17, Section 4, Chapter I. of the Digest.

217. If the scope of the Clause be as we have understood it, the provisions contained in it would seem to be by no means an unnecessary refinement.

218. The provision contained in Clause 100 appears to us clearly expedient. Clause 100.

219. Upon the Clauses regarding abetment by concealment we see no occasion for remark in addition to what we have already submitted. Clauses 101 and 102.

220. We come now to the Clauses relating to "subsequent abetment," corresponding with what in the English Law hitherto has constituted the offence of an "accessory after the fact," an offence which does not appear in the Digest of the Criminal Law Commissioners. "There seems to be no reason," they say in their 7th Report, "for continuing the provisions as to accessories after the fact, the offences of parties falling within this description at present being for the most part referable to the class of offences against public justice, we have dealt with them as such." So also in this Code acts by which according to the English Law a man would be liable to the punishment of an "accessory after the

Subsequent abetment.
Clauses 103 to 108.

fact," as harbouring and concealing an offender with the intention of preventing him from being taken into custody, are provided for in the Chapter "of contempts of the lawful authority of public servants."

221. Mr. Norton sweepingly objects to the provisions under this head, on the ground that "so far from being applicable as *universal* rules "it appears to his mind impossible to read one of them which could not "be in the most obvious manner falsified by other cases than those specified by way of illustration;" he does not however support this allegation by any instances.

222. He further avers that "under some of these Clauses, ignorance of the law and misconceptions of it form no excuse, under others "knowledge of the existing law in reference to the offences committed "and abetted, as clearly does form a substantive ingredient, and ignorance of that law an excuse. That knowledge of the law too required "as the criterion of guilt or innocence, has reference to *details* such as "the quantity of punishment (for instance) affixed to the crime abetted." Mr. Norton does not specify the particular Clauses to which these remarks point, but he seems to refer to Clause 104, in which a person is said subsequently to abet an offence when he abets "what he would know to "be an offence but for his ignorance of the law," as inconsistent with Clauses 105 and 106. He appears to think that under Clause 105 a man could not be convicted of subsequent abetment who did not know himself to be directed by law according to the words of the Clause, and under Clause 106, who did not know positively that the offence was "punishable with rigorous imprisonment for one year or upwards."

223. To take the last instance first, it is obvious to remark that the reference to the punishment is merely a way of intimating that the rule is not to be applied to the lesser offences. In the Digest it is proposed to classify crimes other than treasons, as felonies and misdemeanors, not as heretofore, but with reference to the punishments to which they are liable. Felonies to consist of crimes punishable with death or transportation, misdemeanors, of crimes punishable otherwise, that is, all other crimes. According to the nomenclature of the Digest to say that a felony has been committed is in other words to say that an offence has been committed that is punishable with death or transportation.* This explanation applies also to Clause 107. It seems to us that the wording of Clause 106 and Clause 107 ought to correspond. We prefer the wording of Clause 107 as the more simple, "whoever subsequently abets any "offence", &c., what is abetting an offence being already defined in Clauses 103 and 104.

* In Art. 28, Sec. 5, Chapter V. of the Digest relating to concealment of offenders, the punishment to which the party concealing an offender is liable depends upon whether the offence committed was or was not punishable by transportation, or was or was not punishable with death.

224. With respect to Clause 105 we do not suppose that it was intended to allow a party to escape by pleading ignorance that he was "directed by law to give information, &c." But to prevent such a construction we would suggest the substitution of the word "being" for "knowing himself to be." There appears no more reason for these words importing that the party knew what the law required of him, in this Clause, than in Clause 102, which makes concealment an offence.

225. Objection is made by Officers of all the Presidencies to the punishment for subsequent abetment in Clause 106 as too lenient. The abetment here is assisting to conceal an offence "by causing any marks "of the commission of the offence to disappear." The example is assisting a murderer to hide the body of his victim. The punishment may extend to one-twelfth part of the imprisonment for the offence. Murder is liable to the punishment of imprisonment for life, as alternative for death. By Clause 48 in calculating portions of terms of imprisonment, imprisonment for life is to be reckoned as equivalent to imprisonment for 24 years. The abettor is therefore liable to imprisonment for 2 years as the maximum term, with fine in addition at discretion. This punishment is considered too light for the case stated, and inadequate generally, on the ground that the subsequent abettor is in most cases a previous abettor also, though he may have kept himself free from any apparent complicity sufficient to convict him of that offence. It does appear to us that when a person previously abetting an offence by any act or omission intended to aid it, is punishable with the full penalty of the offence, a person so closely connected with the offence after its commission as to be within the definition in this Clause by acts manifesting a sympathy with the offender and strongly indicative of assent to the offence, ought to be punishable more severely than by a twelfth part of the penalty of the offence. The receiver of stolen property may be considered as a subsequent abettor, but such an offender is liable to imprisonment for three years, if the property has been obtained by theft, to transportation or imprisonment for life, if it has been obtained by dacoity.

Clause 97.

Clause 390.

Clause 391.

226. There is an "exception" to Clause 107, relating to the harbouring of offenders, declaring that it does not extend to "harbour given "by the husband and wife, or relation in the direct ascending or "descending line, or brother or sister of the person to whom harbour is "given."

227. A similar exception is annexed to Clause 177 and to Clause 206. It is objected to by several Officers as giving too great a license. Mr. J. F. Thomas says "This provision taken from a Code enacted for a

"different state of society is, I am inclined to think, only in part applicable to this country. I would retain the exception as regards the husband and the wife, the mother, the daughter, and the sister by whole blood. But I would not retain it in the case of brothers or sisters by half blood, nor even in the case of father and son, grandfather and grandson, nor of brothers, unless it was satisfactorily established, that these relatives were themselves wholly free from suspicion, not only in the special case in which they harboured, but that their characters, and habits, were at all times those of honest men. Constituted as society is in India, where whole castes, (as Cullers and Marawars in our Southern Provinces, Coorumburs, Cochawars, &c. elsewhere) are by birth, fraternities of thieves and plunderers, where each member of a family is at all times ready to join his relation in robbery, or theft, if the father, brother, &c. is allowed to render to his criminal relative this assistance ad libitum, we shall greatly diminish the security of person and property."

228. Mr. H. C. Tucker, of the Bengal Civil Service, thinks that the exception should only extend to husband and wife. Mr. E. H. Monckton, of the same Service, observes that "a man for example, who was in the habit of harbouring thieves,* ought not to get off if it was proved he had been in the habit of concealing his son under similar circumstances."

229. By the Law of England it is only the wife who is exempted from the penalty for receiving or harbouring an offender.

Art. 248. 230. By the French Code Penal are excepted "Les ascendants et descendants, epoux ou epouse, même divorcés, freres ou sœurs des criminels recelés, ou leur alliés aux mêmes degrés."

231. Mr. Livingstone's Code for Louisiana excepts the husband or wife of the offender; his relations in the ascending or descending line, either by affinity or consanguinity; his brothers or sisters; his domestic servants.

232. The exception in the Indian Code while it goes greatly beyond the narrow line of the Law of England it will be perceived falls short of both the other Codes referred to. We think it would be better to restrict it still more by excluding relations in the ascending or descending line beyond the first degree, and perhaps also brothers and sisters.

* This example is not exactly apt as the Clause does not apply to thieves, who are not punishable with imprisonment for seven years, except under the aggravation described in Clause 367.

CHAPTER XVIII. OF OFFENCES AFFECTING THE HUMAN BODY.

233. Sir R. Comyn, as we have already noticed, observes upon this important Chapter that the only part of it which appears to him objectionable is Clause 298, touching "voluntary culpable homicide by consent."

234. Mr. Giberne, one of the Judges of the Sudder Court at Bombay, makes the following remarks: "Chapter XVIII. may be considered one of the most important of the Code. The first class of offences against the body, includes certain omissions as well as acts, the line denoting which is admirably defined. The second mitigated form of murder, voluntary culpable homicide by consent is peculiarly adapted to cases likely to occur in the country, such as Suttees, administering medicines to procure abortion, &c. &c. In short all the different divisions and definitions of the crimes provided for in this Chapter have been arranged with such accuracy and care, the principles and reasoning in the Note M are so clearly and fully shewn, that it appears to me that all that was required has been accomplished, and every remark anticipated."

235. Mr. Norton says, "There is much in this Chapter to assist an effort as feasible as meritorious, that of a sound and distinctive digest of the various crimes of wilful injury to the person. At the same time I am compelled to the opinion that this effort has been too ill accomplished by the present Chapter to admit of its being brought into practical operation."

236. Mr. W. Hudleston says, "I do not perceive the necessity for the several novel designations of crime adopted in this Chapter, and with regard, generally, to the provisions for homicide, I am of opinion that the Law of England on this subject suffices for all practical purposes, and is every way preferable to the refinements of this Code."

237. We have already considered the remarks made by Mr. Norton upon the distinction between the doing an act with an intention to effect a certain result, and the doing it with a knowledge that it is likely

to produce that result, and those of Mr. A. D. Campbell, upon the confounding, as he expresses it, of intent with mere knowledge of what is likely; and we have discussed this leading principle of the Code by which men are held to be responsible for the consequences which they know are likely to result from their acts, as well as for what they directly intend, so fully, that there appears to be no occasion for further remark in vindication of the definitions in this Chapter which bring it prominently forward.

OF OFFENCES AFFECTING LIFE.

Note M. page 33.

238. The Commissioners call attention to the expression "omits what he is legally bound to do" in the definition of voluntary culpable homicide, which words, or other words tantamount in effect, frequently recur in this and other parts of the Code.

Page 34.

239. "What we propose," say the Commissioners, "is this, that 'where acts are made punishable on the ground that they have caused, or have been intended to cause, or have been known to be likely to cause a certain evil effect, omissions which have caused, or which have been intended to cause, or which have been known to be likely to cause the same effect shall be punishable in the same manner, provided that such omissions were on other grounds *illegal*,' according to the explanation of that term contained in Clause 28.

Chapter XV. Sec. 1, Art. 1.

240. In the Digest of the English Criminal Law framed by Her Majesty's Commissioners it is declared that "the law takes no cognizance of homicide unless death result from bodily injury caused by some act or unlawful omission," and it is explained that "the terms 'unlawful omission' comprehend every breach of duty imposed by the law to do any act or supply any thing necessary for the sustentation or preservation of human life, or for the prevention of injury to the person."

241. It seems to us that the line drawn in the Indian Code by the use of the adjectives "legal" and "illegal" applied to the duty and the omission respectively, is perfectly plain and intelligible, at the same time that it is just and right, and it does not appear to differ from the rule of the English law as laid down in the Digest. Nor do we see that the principle is excepted to expressly in any of the reports on the Code, though from the comments made upon some of the illustrations (by Mr. Hudleston* particularly) it would seem not to have been altogether approved, perhaps from not being perfectly understood.

* See remarks on the illustrations e, f, g, under Clause 294.

Page 56.

242. The next point to which the Commissioners call attention in the Note on this Chapter is the unqualified use of the words "to cause

death" in the definition of voluntary culpable homicide. "We long considered," say they, "whether it would be advisable to except from this definition any description of acts or illegal omissions, on the ground that such acts or illegal omissions do not ordinarily cause death, or that they cause death very remotely. We have determined however to leave the Clause in its present simple and comprehensive form."

243. "There is undoubtedly a great difference between acts which cause death immediately, and acts which cause death remotely; between acts which are almost certain to cause death, and acts which cause death only under very extraordinary circumstances. But that difference, we conceive, is a matter to be considered by the tribunals when estimating the effect of the evidence in a particular case, not by the Legislature in framing the general law. It will require strong evidence to prove that an act of a kind which very seldom causes death, or an act which has caused death very remotely, has actually caused death in a particular case. It will require still stronger evidence to prove that such an act was contemplated by the person who did it as likely to cause death. But if it be proved by satisfactory evidence that death has been so caused, and has been caused voluntarily, we see no reason for exempting the person who caused it from the punishment of voluntary culpable homicide." After giving some illustrations of their views on the subject, and discussing the reasons for which Mr. Livingstone excepted certain cases which their definition includes, they say finally: "The general rule, therefore, which we propose is, that the question whether a person has by an act or illegal omission voluntarily caused death shall be left a question of evidence to be decided by the Courts according to the circumstances of every case."

244. One of the cases alluded to as excepted by Mr. Livingstone is where death is produced by the effect of words on the imagination or the passions. This case is also excepted in the Digest of the English Criminal Law in which death resulting from "bodily injury" is "contradistinguished from death occasioned by any influence on the mind, or by any disease arising from such influence." The reason of this distinction is given by Her Majesty's Commissioners in the following quotation:—

Chap. XV. Sec. 1, Art. 1.

"If any man either by working upon the fancy of another, or possibly by harsh or unkind usage puts another into such a passion of grief or fear that the party either dies suddenly, or contracts some disease whereof he dies, though, as the circumstances of the case may be, this may be murder or manslaughter in the sight of God, yet in foro

4th Report p. 32.

“humano it cannot come under the judgment of felony, because no external act of violence was offered whereof the Common Law can take notice.” 1 Hale’s P. C. 429.

Note M. page 57.

245. The framers of the Indian Code say “it would be most difficult to prove to the conviction of any Court that death had really been the effect of excitement produced by words. It would be still more difficult to prove that the person who spoke the words anticipated from them an effect which, except under peculiar circumstances, and on very peculiar constitutions, no words would produce. Still it seems to us that both these points might be made out by overwhelming evidence; and supposing them to be so made out, we are unable to perceive any distinction between the case of him who voluntarily causes death in this manner, and the case of him who voluntarily causes death by means of a pistol, or a sword. Suppose it to be proved to the entire conviction of a Criminal Court that Z, the deceased, was in a critical state of health, that A, the heir to Z’s property, had been informed by Z’s physicians that Z’s recovery absolutely depended on his being kept quiet in mind, and that the smallest mental excitement would endanger his life, that A immediately broke into Z’s sick room, and told him a dreadful piece of intelligence which was a pure invention, that Z went into fits, and died on the spot, that A had afterwards boasted of having cleared the way for himself to a good property by this artifice. These things being fully proved, no Judge could doubt that A had voluntarily caused the death of Z; nor do we perceive any reason for not punishing A in the same manner in which he would have been punished if he had mixed arsenic in Z’s medicine.”

(b) A with the intention or knowledge aforesaid, relates agitating tidings to Z, who is in a critical stage of a dangerous illness. Z dies in consequence. A has committed the offence of voluntary culpable homicide.

246. Mr. Norton, Mr. Hudleston and Mr. A. D. Campbell all object to the illustration (b) which is appended to Clause 294 to shew that the definition includes cases in which death is produced by the effect of words, on the principle above advocated, but it does not appear to us that any of them has given due consideration to the reasoning in support of it; certainly none of them has answered that reasoning.

247. Mr. Pyne however observes that such tidings (as supposed in the illustration) may be communicated without a particle of malice, and still with the knowledge that the narrator is likely thereby to cause the death of his auditor. This he illustrates by a passage in the Memoirs of Sir Walter Scott, in which the publisher of his works is quoted as saying that to have made him aware of the condemnation of one of his works, in his then state, would have been his death warrant. Upon which Mr. Pyne asks, supposing his friends to have done so, and the fatal event con-

templated to have followed, should such a consummation have subjected them to be branded as murderers?

248. The case, it seems to us, would depend upon whether it could be alleged with truth, and satisfactorily proved, that the communication was made in good faith for the benefit of the party, in circumstances that his consent to suffer the consequences might be fairly considered as implied. The case being so would fall under the exception contained in Clause 70. In the instance of Sir W. Scott, if, for example, he were unduly relying on the value of the copyright of the work in question in making some arrangements of his affairs, we can conceive that it might be certainly for his benefit, within the meaning of the exception, to communicate the truth to him. It is hardly conceivable that his friends would make such a communication to him, knowing that it would probably be his “death warrant,” without some cause for which they believed it to be their indispensable duty to him to do so.

249. Having maturely considered the matter, we come to the same conclusion with the authors of the Code, that if death is certainly caused by words deliberately used by a person with the intention of causing that result, or with the knowledge that in the condition of the party to whom the words are spoken it is likely that they will make such an impression upon him as to cause his death, and without any such excuse as is admissible under any of the provisions in the Chapter of General Exceptions, there is no sufficient reason why that person should be excepted from the penalty of culpable homicide, any more than one who has caused death by the infliction of a bodily injury which he knew to be likely to cause death. Here is the wilful doing of that which is known to be likely to produce evil, manifesting the *mens rea* essential to criminal responsibility; the evil produced is death; the efficient cause, the words spoken. It is scarcely agreeable to reason, that having traced the effect to its cause, the law should refuse to acknowledge it as an effective cause; or that the Judge should be obliged to say, it is true the effect was produced by the operation of words, but words in law are not an act, therefore the speaker is not criminally responsible.

250. Another case mentioned as excepted from the definition of homicide by Mr. Livingstone, but included in that given in this Code, is where “a person dies of a slight wound which from neglect or from the application of improper remedies has proved mortal.”

Note M. p. 58.

251. Two examples are given to illustrate the views of the authors of the Code on this point. The first case is as follows: A inflicted a

slight wound on Z, a child who stood between him and a large property. It is proved that the ignorant and superstitious servants about Z applied the most absurd remedies to the wound, and that under their treatment the wound mortified and the child died. Letters from A to a confidant are produced. In those letters A congratulates himself on his skill, remarks that he could not have inflicted a more severe wound without exposing himself to be punished as a murderer, relates with exultation the mode of treatment followed by the people who have charge of Z, and boasts that he always foresaw that they would turn the slightest incision into a mortal wound. Of this case we must say that it appears to us a most improbable one: though *if* such evidence were produced we could not but agree to the conclusion of the Commissioners that the party proved to have acted in the manner represented ought to be punished as a murderer, because it would be clear that in inflicting the slight wound he intended to cause the death of the person wounded. We can however scarcely imagine a person inflicting such a wound with the intention imputed, in the expectation that though it was but "the slightest incision" it would be so ill-treated by the ignorant and superstitious servants about the wounded person that it would certainly prove mortal. We can easily imagine a person with the feelings supposed congratulating himself on the result of his act so turned to his advantage, but it is difficult to conceive him contriving his act so astutely, and counting with such foresight, as is predicated, on the involuntary co-operation of others to effect his object while they meant to remedy the injury he had caused.

252. In the second case given by way of illustration there is, as observed by the Commissioners, no doubt whatever as to the intention, and therefore we agree with them that however slight the wound inflicted may have been, yet if it ultimately proves mortal, there is no reason for not punishing the person who inflicted it with the intention of murder, as a murderer.

253. It is because it is hardly possible to conceive murder to have been originally intended in the first of the two instances here adverted to, that we are doubtful of the propriety of putting it as a case within the definition in Clause 294, for fear of its leading to a latitude of construction which under some supposed analogy may include predicaments quite beyond its scope.

254. Mr. A. D. Campbell remarks that "though the Commissioners in express terms state, that in India 'we have reason to fear 'neglect and bad treatment are far more common than good medical 'treatment,' instead of urging this as the strongest possible reason why

"the case of a person who dies of a *slight* wound, which *from neglect* 'or from the application of *improper remedies* has proved mortal,' should, as in Mr. Livingstone's Code, be excepted from homicide, they actually urge it as the very reason why, in this country in particular, the inflicter of a mere scratch, should in such cases, on the contrary, be constituted a murderer."

255. Mr. Campbell it appears to us has failed to apprehend the bearing of the remark which he quotes. The meaning of the Commissioners we conceive to be this, that whereas in countries in which good medical treatment is common it is difficult to suppose that a person inflicting a slight wound on another could contemplate his death as a probable result, such a result may be supposed to enter into his contemplation in a country where bad medical treatment is far more common than good, and therefore the definition of homicide ought not to exclude death resulting from a slight wound as the primary or original cause.

256. It is laid down in the Digest of the English Criminal Law that it is homicide if death be caused by bodily injury "although by proper remedies and skilful treatment death might have been prevented." So also, although through neglect or ill-treatment, a fever or other disorder ensue from the injury which is the immediate cause of death. "But it is not homicide" "where the death is not caused by the injury done, but by unskilful treatment or other cause subsequent to the injury."

Chap. XV. Sec. 1, Art. 4

257. Russell says, "Upon this subject it has been ruled, that if a man give another a stroke not in itself so mortal but that with good care he might be cured, yet if the party die of this wound within the year and day, it is murder, or other species of homicide, as the case may be: though if the wound or hurt be not mortal, and it shall be made clearly and certainly to appear that the death of the party was caused by ill applications by himself or those about him, of unwholesome salves or medicines, and not by the wound or hurt, it seems that this is no species of homicide. But when a wound not in itself mortal, for want of proper applications, or from neglect, turns to a gangrene or a fever, and that gangrene or fever is the immediate cause of the death of the party wounded, the party by whom the wound is given is guilty of murder, or manslaughter, according to the circumstances. For though the fever or gangrene, and not the wound, be the immediate cause of the death, yet the wound being the cause of the gangrene or fever, is the immediate cause of the death, *causa causati*. Thus, it was resolved that if one gives wounds to another, who neglects the cure of them, or

Vol. 1, p. 428.

"is disorderly and doth not keep that rule which a person wounded should do, yet if he die it is murder or manslaughter according to the circumstances; because if the wounds had not been the man had not died: and, therefore, neglect or disorder in the person who received the wounds shall not excuse the person who gave them."

Death caused by false evidence in a Court of Justice.

Illustration (d.)

258. The following case is given under Clause 294 as falling within the definitions of "voluntary culpable homicide." "A, with the intention, or knowledge aforesaid, falsely deposes before a Court of Justice that he saw Z commit a capital crime. Z is convicted and executed in consequence. A has committed the offence of voluntary culpable homicide."

Chap. X.
Page 42.

259. The reason is stated in Note G, on the Chapter of Offences against public justice. "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."

Art. 191. 260. Mr. Livingstone seems to have proceeded on the same principle. By his Code it is provided that "if any one by means of perjury shall cause another to be convicted of a crime, he shall suffer the same punishment that is incurred by the commission of the crime of which such person has been convicted by means of the perjury."

4th Report p. 34. See also Art. 8, Sec. 2, Cl. 15, of Digest. 7th Report p. 224.

261. The following are the remarks of the English Criminal Law Commissioners on this subject: "The heinous crime here alluded to was punishable with death by the Roman Law as a species of assassination.

"See Digest, lib. 48. tit. 8, *Lex cornelia de sicariis*. Our earlier writers, adopting the doctrine of the Civil and Canon Law, speak of it as capital homicide by the law of England; but Sir Edward Coke declares "that it was not holden for murder in his time," 3 inst. 48; and Mr. J. Foster (Crown Cases, p. 132) says that "the practice of many ages backwards doth by no means countenance the opinion" expressed by the old authorities. See Blackstone's Commentaries, Vol. IV. p. 196, and Mr. Christian's Note. Lord Mansfield, however, and several of the Judges in his time, appear to have entertained a contrary opinion. See 1 East's P. C. 333. From the great number of facts, (some of them, such as the precise ground of the verdict, being very difficult of proof) which intervene between the act of the offender and the death of the object of his malice, it would be very difficult to prosecute such an offence effectually, and there are strong reasons of policy against admitting it to be murder, founded on the danger of deterring witnesses from giving evidence in capital cases, if it must be at the peril of their own lives. Besides, if causing sentence of death and execution by means of perjury be murder, the causing whipping or imprisonment by the same means would amount to the offence of assault and false imprisonment—a doctrine which it would be impossible to sustain. By the Bavarian Law, Art. 292, and also by the Prussian Law, Art. 1412, 1413, this crime, though punishable with death, is classed among fraudulent offences, and does not constitute homicide. The Code Penal places it under the head of false testimony." We may add that the Code Penal (Art. 361) in the case of a person being condemned upon false testimony to a more severe punishment than compulsory labour, makes the false witness liable to the same punishment.

262. Mr. Hudleston takes up the objection to bringing this offence within the definition of "homicide" which is stated by Mr. Christian in his note upon Blackstone, Vol. IV. p. 196, and alluded to in the above remarks. "In this country," he adds, "the provision for making this perjury capital would involve the danger of conviction of such perjury upon false evidence. A new door would thus be opened to conspiracy."

263. His colleague, Mr. A. D. Campbell, differs from him and agrees with the Commissioners. Referring to Mr. Christian's observation quoted by Mr. Hudleston, that "few honest witnesses would venture to give evidence against a prisoner tried for his life, if thereby they made themselves liable to be prosecuted as murderers," Mr. Campbell says, "This appears to me a pure fallacy, by begging of the question. It first wrongly assumes that capital punishment is to fall on the honest instead of on the dishonest witness; and from these, evidently erro-

"neous premises, a deduction is drawn necessarily fallacious. Honest witnesses, all over the world, give evidence against prisoners tried for their lives, although they daily see the dishonest witness, who perjures himself, punished by the pillory, or otherwise—why, I ask, should they not equally continue so to do, though that punishment were increased, in particular cases, even to death? The difference would be one in degree alone, the principle would remain unaltered."

264. Mr. G. W. Bacon assents to what is said by the Commissioners in the Note on this point, and thinks it "quite just and right" to treat this offence as culpable homicide.

Page 26. 265. In their 5th Report the English Criminal Law Commissioners say—"In our last Report we remarked that the causing of the death of an innocent man by means of perjury is not punishable as murder by the English Law. There can however be no doubt that any conspiracy to effect such an object is a crime which is justly punishable with great severity." In the Digest they recommend that the latter offence shall be rendered liable to the penalties of the 7th class, viz. Transportation for life, or for any term not less than seven years, or imprisonment for any term not exceeding three years.

Chap. IV. Sec. 3, Art. 26.

266. On the whole we are of opinion that the offence in question falls naturally within the definition of voluntary culpable homicide, which could not be expressed properly in terms that did not cover it; and but that we think it desirable to restrict rather than to extend capital punishment, and that it would be in effect an extension of it to make the perjurer liable to be convicted of homicide, which would be murder under Clause 295, when his false swearing has caused the condemnation and execution of an innocent person, we would not hesitate to recommend that this part of the Code be left untouched. For the reason last stated however we would advise that the illustration (d) be omitted under Clause 294, and that Clause 191 in the Chapter of offences against public justice be declared applicable generally to the offence of giving false evidence with the intention of causing a person to be convicted of a capital crime, whether the object intended be effected or not. The punishment which may be awarded under this Clause is transportation for life, or rigorous imprisonment for life, or for a term not less than seven years, and fine.

MURDER. 267. By Clause 295 it is declared that voluntary culpable homicide is "Murder" unless it be one of the three mitigated descriptions therein-after enumerated, whereof the first is "Manslaughter." It is "Man-

"slaughter" (Clause 297) "when it is committed on grave and sudden provocation by causing the death of the person who gave that provocation."

MANSLAUGHTER.

268. According to the Digest of the English Criminal Law, "Homicide is Manslaughter whensoever the killing is wilful, but extenuated under certain circumstances." It is so extenuated when it is committed "under the influence of passion" excited by any act done or attempted or threatened "of an injurious or insulting character to the person of the party killing or of any other person," or "by any other grave cause of provocation" "to the party killing or any other person." By the Indian Code "provocation is designated as 'grave,' when it is such as would be likely to move a person of ordinary temper to violent passion."

Chap. XV. Sec. 3, Art.

Sec. 2, Art. 32.

269. Under the English law the plea of provocation is not available when it has arisen from mere words, or gestures. There is no such restriction in the Indian Code. The Commissioners observe on this point as follows: "Neither the English law nor the French Code extends any indulgence to homicide which is the effect of anger excited by words alone. Mr. Livingstone goes still further. 'No words whatever,' says the Code of Louisiana, 'are an adequate cause, no gestures merely shewing derision or contempt, no assault or battery so slight as to shew that the intent was not to inflict great bodily harm.' We greatly doubt whether any good reason can be assigned for this distinction. It is an indisputable fact that gross insults by word or gesture have as great a tendency to move many persons to violent passion, as dangerous or painful bodily injuries. Nor does it appear to us that passion excited by insult is entitled to less indulgence than passion excited by pain."

Digest, Chapter XV.
Sec. 2, Art. 34.

Note M. p. 59.

270. With reference to these observations, Mr. Pyne makes the following remarks: "It is notorious that the most common mode of offering insult among natives of all classes, is by the display of contemptuous gestures and the use of irritating abuse, a habit so inveterate indeed as to lose much of the offensiveness which would mark it when addressed to communities more sensitive and alive to this description of annoyance. An indignity offered to a person in a more civilized state by a reflection upon his integrity, an imputation upon his courage, or a stain upon his honor, might excite in the minds of such men sudden gusts of passion which the law scarcely might control, but upon the mass of Indian society, the refinement of feeling which bars such attacks is wanting, and no gestures, words, or signs, could, I conceive, raise

“ in their minds that indignation of feeling at unmerited reflections,
 “ which would justify the commission of voluntary culpable homicide
 “ under the plea of ‘grave’ provocation emanating from such a cause;
 “ and I am therefore disposed to think, from the obtuseness of feeling
 “ which pervades the community on this head, that the most grievous
 “ reproaches would not exonerate the party offended from the guilt of
 “ murder, if in resenting them he made use of any deadly weapon with
 “ the intention of producing death, and it is moreover highly essential to
 “ the security of life, that no such opening of committing murder under
 “ a mitigation of punishment depend upon contumelious gestures,
 “ contemptuous actions, or insulting words, should be held out to the
 “ native community, as from the inbred tendency, of the lower classes
 “ especially, to give unrestrained freedom to the most indecent invectives,
 “ the deliberate murderer may by the exercise of a little ingenuity reduce
 “ his offence to the grade of manslaughter.”

271. These remarks are deserving of attention, but it seems to us that Mr. Pyne has overlooked the discretion which is purposely left to the Court to judge whether the provocation be such as would be likely to move a person of ordinary temper to violent passion, not *any person*, it is to be understood, but a person of the same habits, manners, and feelings. A discreet Judge would of course take into consideration such points as are adverted to by Mr. Pyne, and would properly reject the plea of provocation by insulting words in one case, while he would as properly admit it in another, according as the party might be shewn to belong to a class sensitive to insults of this kind, or otherwise. The framers of the Code deemed it inadvisable to lay it down as a *rule* that insults by words or gestures should be considered an adequate cause of provocation, while, for the reason assigned, they thought it proper to *allow* the plea of provocation where it may be evident that such insults have as great a tendency as bodily injuries to excite violent passion. That there are many persons of such sensitive feelings among the higher ranks of the Natives of India is a truth which needs no proof, though unquestionably few of the great mass of the people would be much affected by words which to a European of the same rank and condition would cause the highest degree of irritation.

272. The English Commissioners make the following remark upon the article excluding the plea of provocation arising from mere words, &c.
 “ We have framed the article as nearly as we could in conformity with
 “ the authorities, which, whilst they, in many instances, recognize very
 “ slight causes of extenuation, do not extend an express negative beyond
 “ the limits of our rule. It seems to us, however, to be very question-

“ able whether this rule, large as it may seem, is strictly in accordance
 “ with principle, for words or gestures may often be infinitely more irri-
 “ tating and provoking than a personal injury of a trivial nature. It is
 “ extremely difficult, if not impossible, to define all the causes of provo-
 “ cation which ought to extenuate homicide, and we do not see any mode
 “ by which the object of the law can be satisfactorily accomplished, un-
 “ less it be by making the existence of reasonable provocation, within
 “ certain limits, a matter of fact to be decided by a jury. In France the
 “ difficulty has been in a great degree evaded by the law introduced in
 “ 1832, enabling juries to find ‘attenuating circumstances,’ and though
 “ we think a general law of this kind is liable to serious objection, the
 “ occasional introduction of a similar principle where precise definition is
 “ impracticable might perhaps be desirable.”

273. The Indian Code does not allow the extenuation of “volun- Clause 297, *Explanation*.
 tary culpable homicide” to “manslaughter” on the plea of provocation, if that provocation be given by any thing done in obedience to the law, or authorized by the law of Civil or Criminal procedure, or done by a public servant in the exercise of his lawful powers, or by any person in the exercise of the right of private defence against the offender.

274. Mr. W. Hudleston, commenting on Clause 297, says generally, “the definition of manslaughter in the law of England appears to me preferable to this—there it is clear and distinct, here it is vague and liable to diversity of interpretation.” He points particularly to the illustration (*d*) of provocation given in the exercise of the right of private defence, as contradicting the English law which he prefers. Mr. Norton adverting to the same illustration, “notices the construction given to death caused by a party who in a sudden affray and in resentment of a blow kills his antagonist—this is construed *murder* in case the blow resented was given in self-defence following upon an assault by the killer. Now, (he observes) this construction of guilt, depending on who was the first actual personal aggressor and not on the suddenness and heat of the affray, is quite as contrary to principle as it is to the English law.” Mr. Norton concludes thus, “it is clear that the Commissioners have not adverted to the doctrines and principles of the English law of self-defence.”

275. With all deference to Mr. Hudleston and Mr. Norton we are inclined to think that they are mistaken in averring that the illustration in question contradicts the law of England. The case is this—A attempts to pull Z’s nose; Z in defence strikes A; whereupon A kills him. By the Penal Code this is not manslaughter but murder. What is it by the

law of England? We apprehend that it is either "murder," or "homicide justifiable in self-defence." According to the Digest of the English Criminal law "homicide when necessary for self-defence is justifiable" "although the party using the plea was guilty of an assault" (as in this case) "which led to the fatal result," *provided*, among other things, that "he killed the assailant *from necessity in order to avoid immediate death*." Now in the case supposed there is no appearance of any such necessity. It is therefore not "homicide justifiable in self-defence." We take it to be the alternative "murder." Mr. Norton thinks it is "manslaughter," "for the actual first aggression *may* have been slight and the provocation to it great, and the continuance of the affray and the heat and "danger to the killer arising out of it imminent and engrossing." But all this is contrary to the supposition. The aggression is supposed not to have been slight, but one extremely provocative, "A attempts to pull Z's nose," an aggression which if completed is viewed by the law as of so grave a character that if Z killed the aggressor he would not be guilty of murder but of manslaughter; no provocation whatever is alleged for the aggression; and there is no intimation that A was in any danger of further injury from Z if he had "retreated from conflict," which is another point to be proved in support of the plea of justification on the ground of self-defence. "It is agreed," it is said, "that if a man strike another upon malice prepense and then fly to the wall, and there kill him in his own defence he is guilty of murder." See authorities quoted in Tomlins, Art. Homicide II. 2.

276. Mr. A. D. Campbell says, "contrary to my colleague, I think "under the reasons given in Note M pages 59 and 60, that the principle "of this Clause (297) is right, but I entertain doubts of the propriety of "most of the virtual exceptions from its text, which are given under "the head of '*Explanation*.' I mean with regard to the words which "follow passion, for in what is done under cover of obedience to the law, "and still more under cover of its authority, or by public servants in the "lawful exercise of their powers, or even in self-defence, there may be "given such grave and such sudden provocation, as never, in justice, "ought to permit the death to amount to murder, but should confine it "to the lower crime of manslaughter. As well explained in the Notes, "the essence of extenuation from murder to this crime, consists entirely "in the provocation given."

277. We apprehend that grave provocation given by any thing done under cover of obedience to the law, or under cover of its authority, or by a public servant, or in defence, *in excess* of what is strictly warranted by the law, in point of violence, or as regards the means used,

or the manner of using them, and the like, would be admissible in extenuation of homicide under this Clause. For example, take the case of Wat Tyler referred to in the Note to this Chapter. Here was a public officer, a tax gatherer, who came to "exercise his lawful powers" in that capacity, but doing so in a manner unwarranted and highly offensive, Tyler was excited to "violent passion," and in his rage killed him on the spot. The Commissioners upon this say, "so far, indeed, should we be from "ranking a man who acted like Tyler with murderers, that we conceive "that a Judge would exercise a sound discretion in sentencing such a "man to the lowest punishment fixed by the law for manslaughter."

278. Under the above construction of the exceptions in respect to provocation subjoined to Clause 297, we see no valid objection to them, but if our construction be wrong, and we do not feel perfectly confident of its correctness, we should be disposed to think that some qualification is requisite.

279. We entirely agree with the authors of the Code in allowing such provocation as that which excited Wat Tyler to commit homicide, to be adequate in law, that is to say, in allowing the plea of provocation in cases in which the act done may have no tendency to cause pain or danger, or in any way to injure the person, and may wound only the honor or the affections; and it seems to us that this is allowed by the English law, by which, according to the Digest, passion excited by any act done "of an "insulting character, to the person of the party killing or of any other "person," is sufficient to extenuate the guilt of killing.

Chapter XV. Sec. 2, Art.
32.

280. But manslaughter by the law of England includes not only cases in which homicide is wilful but extenuated, but "also where death "is occasioned not wilfully, but culpably through want of reasonable care "and caution, also where death is occasioned not wilfully but in consequence of any unlawful violence or injury to, or endeavor to injure the "person of any other."

Chap. XV. Sec. 3, Art. 2.

281. We presume that Clause 304 of the Indian Code is intended to provide for such cases, among other cases of homicide described in Note M, as "culpable yet not voluntary." This Clause will be considered in its proper place.

p. 63.

282. "The second mitigated form of voluntary culpable homicide," say the Indian Law Commissioners, "is that to which we have given the "name of '*voluntary culpable homicide by consent*.' It appears to us that

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p. 64.
Clause 298.

" this description of homicide ought to be punished, but that it ought not
 " to be punished so severely as murder." " Our reasons for not punishing
 " it so severely as murder are these. In the first place the motives which
 " prompt men to the commission of this offence are generally far more
 " respectable than those which prompt men to the commission of murder.
 " Sometimes it is a strong sense of religious duty, sometimes a strong
 " sense of honor, not unfrequently of humanity. The soldier who, at the
 " entreaty of a wounded comrade, puts that comrade out of pain, the
 " friend who supplies laudanum to a person suffering the torment of a
 " lingering disease, the freedman who in ancient times held out the
 " sword that his master might fall on it, the high born native of India
 " who stabs the females of his family at their own entreaty in order to
 " save them from the licentiousness of a band of marauders, would,
 " except in Christian societies, scarcely be thought culpable, and even in
 " Christian societies, would not be regarded by the public, and ought
 " not to be treated by the law as assassins."

" Again, this crime is by no means productive of so much evil to
 " the community as murder. One evil ingredient of the utmost import-
 " ance is altogether wanting to the offence of voluntary culpable homi-
 " cide by consent. It does not produce general insecurity. It does
 " not spread terror through society. When we punish murder with such
 " signal severity we have two ends in view. One end is that people may not
 " be murdered. Another end is that people may not live in constant dread
 " of being murdered. This second end is perhaps the more important of
 " the two. For if assassination were left unpunished the number of persons
 " assassinated would probably bear a very small proportion to the whole
 " population. But the life of every human being would be passed in con-
 " stant anxiety and alarm. This property of the offence of murder is not
 " found in the offence of voluntary culpable homicide by consent. Every
 " man who has not given his consent to be put to death is perfectly certain
 " that this latter offence cannot at present be committed on him, and that it
 " never will be committed, unless he shall first be convinced that it is his
 " interest to consent to it. We know that two or three midnight assas-
 " sinations are sufficient to keep a city of a million of inhabitants in a
 " state of consternation during several weeks, and to cause every private
 " family to lay in arms and watchmen's rattles. No number of suicides,
 " or of homicides committed with the unextorted consent of the person
 " killed, could possibly produce such alarm among the survivors."

" The distinction between murder and voluntary culpable homicide
 " by consent has never, as far as we are aware, been recognized by any
 " Code in the distinct manner in which we propose to recognize it. But

" it may be traced in the Laws of many countries, and often, when neg-
 " lected by those who have framed the Laws, it has had a great effect on
 " the decisions of the tribunals, and particularly on the decisions of tribu-
 " nals popularly composed. It may be proper to observe that the burn-
 " ing of a Hindoo widow by her own consent, though it is now, as it
 " ought to be, an offence by the regulations of every Presidency, is in no
 " Presidency punished as murder."

283. In the Digest of the English Criminal Law it is declared that
 " homicide is neither justified nor extenuated by reason of any consent
 " given by the party killed."

Chapter XV. Sec. 2, A¹
38.

284. Of the Clause in the Indian Code which recognizes " volun-
 " tary culpable homicide by consent" as a distinct offence less than murder,
 " Sir R. Comyn observes, " the Clause, it is true, is guarded by several
 " provisions, one of which relates to the state of mind of the party con-
 " senting to be killed, but, putting aside for argument's sake all religious
 " considerations of a future state, and merely adverting to man's strong
 " natural love of life, even in the most desperate circumstances, the mere
 " fact of a person consenting to be killed would indicate a morbid state
 " of mind sufficient to raise a doubt of his sanity. I cannot think that
 " in any country, or under any religion, *voluntary* homicide should be
 " leniently dealt with, or that any special circumstances, like those sup-
 " posed in the Note, would justify a law introducing the novel offence of
 " homicide by consent."

285. Sir J. Awdry, referring to the Chapter of General Exceptions,
 " says—" I agree to the exceptions grounded on the sanctity of human life,
 " and I wish that they (the Commissioners) had elsewhere followed up the
 " principle instead of providing that homicide by consent should not be
 " murder. The prerogative of mercy would much better be allowed to
 " apply when necessary to such cases, than a rule be laid down that a
 " man has to some extent a right to authorize its destruction."

286. Mr. Hudleston says " it appears to me no alleviation of homi-
 " cide that I have another's consent to kill him." Mr. A. D. Campbell
 " on the other hand considers that the reasoning in page 61 of Note M
 " fully justifies the general principle."

287. Mr. Norton says " I had imagined that the Clause 298 was
 " devised with a view mainly of punishing duels with a mitigated sen-
 " tence, and for distinguishing deaths by such a deliberate act from
 " murders. I was disposed under that impression to intimate my concur-

“rence. But neither in the illustrations or the Notes is any such object alluded to, and the only application of the Clause seems to me to be to cases of extraordinary local superstitions (better legislated upon specifically) or to those which are almost, or purely imaginary. The Clause in this view appears to me unnecessary and liable to ridicule.”

288. Mr. Greenhill, a Judge of the Sudder Court at Bombay, understands this Clause to include fatal duels.

289. The Judges of the Sudder Court North Western Provinces, observe that duelling is not specifically alluded to in the Code—but they conclude that it is provided for in Clause 294 and Clause 320 according as death or wounding may have ensued.

290. We observe that in the Draft of the Code first printed a duel was given as an illustration of “voluntary culpable homicide by consent.” The wording of the definition was slightly altered on revision, but we think Clause 298 as it stands takes in the case of a person killed in a duel as one “who suffers death or takes the risk of death by his own choice.” And if the Clause be retained, if voluntary culpable homicide by consent be recognized as a distinct offence, we know not but it may be the best way of dealing with a species of crime which it has hitherto been found impossible to deter men from by the dread of capital punishment. It is in vain to denounce a penalty which is so contrary to the general sentiment, that except in cases marked by extreme malignity, or some special aggravation rousing indignation against the offender, it could not be executed without shocking the public sense. Yet this is just what must be said of the penalty of death threatened by the existing law to the person who kills another in what is called a fair duel—threatened but so rarely enforced, that it carries no terror with it, no terror at least of that which it threatens. It might be well worth a trial whether the certain expectation of punishment for culpable homicide by consent, the enforcement of which would surely be approved by the public mind, would not be more efficacious in preventing duels in which life is risked, than the present empty denunciation of the law. The penalty proposed is imprisonment of either description for a term which may extend to fourteen years, and must not be less than two years, which may be combined with fine at discretion.

291. It is probable that the authors of the Code were led to distinguish this form of voluntary culpable homicide, by the consideration of the case stated in the first illustration (a). of a Hindoo widow who with her own consent has been burned with the corpse of her husband.

They were obliged to provide for this case which was already the subject of penal enactments in the Regulations for the Company's Courts. They found that “the burning of a Hindoo widow by her own consent though it is now, as it ought to be, an offence by the Regulations of every Presidency, is in no Presidency punished as murder.” By Regulation XVII. of 1829 of the Bengal Code, copied exactly in Regulation I. of 1830 of Madras, and followed substantially in Regulation XVI. of 1830 of Bombay, the offence is declared to be “culpable homicide,” punishable in the Presidencies of Bengal and Madras by fine, or by imprisonment, or by both fine and imprisonment at the discretion of the Court, and in the same manner, except with a limitation of imprisonment to 10 years, in the Presidency of Bombay. This is not a case of “extraordinary local superstition” as Mr. Norton suggests, but a matter of national concern affecting a whole people, for which the Penal Code for India must legislate. The Commissioners had to consider whether they would rank this offence as murder, as falling within the definition thereof, or reduce it by a special exception to a lower grade of culpable homicide, following the existing law which had been enacted upon the most careful and solemn deliberation. They concluded that it ought not to be treated as murder. They had then to frame an exceptive definition, and the question would naturally arise whether the terms of the definition should be limited specifically to cases of Suttee, or be made general enough to comprehend other cases depending upon the same principle. This we presume was the process, the result we find in Clause 298, the terms of which are general, including all cases in which “the person whose death is caused was above 12 years of age, and suffers death or takes the risk of death, by his own choice.”

292. We must here consider the remark of Mr. A. D. Campbell before alluded to, that the limitation as to age will, “contrary to what is contemplated by the Code, make any one guilty of murder who induces Suttee by a widow under 12 years of age.” He conceives that the Commissioners meant merely to indicate the age at which persons may be taken generally to be capable of consenting, but with reference to the very early age at which females reach puberty in India and are married, he thinks that the above limitation will work differently from their intention, and exclude cases in which the party was capable of consenting and did give a free and intelligent consent to suffer death, which he supposes they did not mean to exclude.

293. We have before mentioned that there is a difference between Clause 69 and Clause 70 on this point. Under Clause 69 only a person above 12 years of age can give such a consent as will justify. Under

Clause 70, construed as it must be with reference to Clause 31, a free and intelligent consent given by a person under 12 years of age will justify, if he were able to understand the nature and consequences of that to which he gave his consent. In the Note referring to these Clauses there is no notice of this difference. In respect to both it is said indifferently that the consent required is the free and intelligent consent of a person "of ripe age." It seems however to be a condition of Clause 70, that the act in question should be proved to have been "bonâ fide for the benefit" of the party who has suffered by it, a condition which is not found in Clause 69.

Note B. p. 16 and 17.

294. With respect to the case under consideration, we can hardly imagine that it was advisedly intended to make the difference between murder and culpable homicide by consent depend upon the circumstance of the widow at whose Sutte a person may have assisted, having been under or above 12 years of age, if she was "ripe" in both body and mind; supposing, for example, that she cohabited with her husband, and performed the ordinary duties of a wife with judgment and intelligence, and was one of whom there could be no doubt that she was able to "understand the nature and consequences of that to which she gave her consent." But it is clear that by Clause 298, if the widow be under 12, however ripe otherwise, any one assisting her to burn herself with the corpse of her husband must be found guilty of murder. We think this ought not to be. The obvious remedy is to reject the words "being above 12 years of age," and to substitute for them the words being "capable of making an intelligent choice," and to insert the same words in Clause 31 in addition to the words "intelligent consent."

295. Mr. Campbell further remarks with reference to the explanation annexed to Clause 298 that nothing is more common than for "native women of all ages to throw themselves into wells on the merest momentary impulse of passion, excited generally by the most trifling causes, such as an unexpected reprimand, a thwarted wish, the colic, &c. and those who are afflicted by such female folly, are, as its alleged instigators, too often harassed most unjustly by the Police, for fatal consequences produced by the deceased alone." We are inclined to think that the explanation by which "inducing a person voluntarily to put himself to death" is declared to be voluntary culpable homicide by consent, would give an opening to a great deal of vexation and oppression in the manner suggested by Mr. Campbell. The word "inducing" is so comprehensive that it would afford ample verge and scope to malice and corruption to work safely in getting up pretended charges against innocent persons founded on circumstances in their domestic history

which may be plausibly distorted, and in causing distressing inquiries thereupon into family matters. We are led to conclude that it will be better to omit the explanation. Cognizance would then be taken only of such cases of purposed inducement to suicide as clearly amount to murder. There may indeed arise cases in which it would be improper to treat the person who had induced another to commit suicide as guilty of murder, although the circumstances of the case might be clearly within the definition, and the purpose might be evident, as for example where the high born native of India induces the females of his family to take poison in order to save themselves from pollution in an expected assault of a licentious soldiery, but such are cases to which, we agree with Sir J. Awdry, the prerogative of mercy would properly apply.

296. The third mitigated form of voluntary culpable homicide designated as "voluntary culpable homicide in defence," is defined in Clause 299. The punishment proposed is the same as for manslaughter, viz. imprisonment of either description for a term which may extend to fourteen years, or fine or both.

VOLUNTARY CULPABLE
HOMICIDE IN DEFENCE

Clause 303.

297. The Commissioners observe that this portion of the law is closely connected with the law of private defence, and must necessarily partake of its imperfections. But wherever the limits of the right of private defence may be placed, and with whatever degree of accuracy they may be marked, they are inclined to think that it will be always expedient to make a separation between murder and homicide falling within the definition in this Clause. "The chief reason is that the law itself invites men to the very verge of the crime designated as voluntary culpable homicide in defence. It prohibits such homicide indeed; but it authorizes acts which lie very near to such homicide, and this circumstance greatly mitigates the guilt of such homicide."

Note p. 62.

298. In cases in which it prohibits homicide, it authorizes the infliction of any harm short of death which may be necessary for the purpose of defence. "And it seems difficult (they observe) to conceive that circumstances which would be a full justification of any violence short of homicide should not be a mitigation of the guilt of homicide. It is to be considered also (they say) that the line between those aggressions which it is lawful to repel by killing, and those which it is not lawful so to repel, is in this Code, and must be in every Code, to a great extent an arbitrary line."

299. Referring to Clause 76 which authorizes the infliction of death in defence in certain cases of assault, and to Clause 79 which autho-

rizes the same in certain cases of theft, mischief and criminal trespass, the definition declares that homicide committed in defence in other cases, under circumstances that would have justified it if the right of defence extended to the causing of death in such cases, is not murder, but voluntary culpable homicide in defence. An illustration (c) is given to shew that it is murder if the circumstances would not have justified the infliction of death, even if the right of defence extended so far. This appears clear enough. But Mr. Norton says, "with every effort to understand Clause 299, turning back to the Clauses therein referred to, and their explanations and illustrations, applying the illustrations subjoined, and consulting the Notes on this Clause, which form no constituent part of the Code, I am obliged to give it up in despair." He adds, "if I were to judge from my own capacity, I should doubt whether this portion of the Code was intelligible to any class." We need not point out the exaggeration which is so obvious in these remarks, as it is in Mr. Norton's criticisms on many other parts of the Code. We shall only observe, that among the many persons who have reviewed the Code, no other appears to have found it impossible to comprehend the definition in question, though several persons complain of it as obscure.

300. Mr. Hudleston is one of those who find fault with this definition. Having remarked that "it is not particularly intelligible, nor made so by the very peculiar illustrations;" he adds, regarding the substance of the enactment, "as observed by Mr. Blane, the natives of India could never understand the subtleties of this part of the Code, nor in my opinion those of any other country. The restrictions of the Code upon the right of private defence seem little suited to encourage among the people of India a manly spirit or energetic resistance to the attacks of robbers." Mr. Blane, after the remark quoted by Mr. Hudleston as above, expresses his apprehension that the first case of punishment of this kind would have a disheartening effect. Upon similar grounds the same gentlemen and others object, as we have before noticed, to the rules regarding the right of private defence. It is surprising however that these gentlemen, particularly Mr. Hudleston, who pointedly observes that he has not overlooked the explanations in Note M, should not have perceived that the tendency of the enactment in question is to favor persons who have been led in an energetic exercise of the right of defence to step beyond the prescribed line. The law of England, of which Mr. Hudleston so often declares his preference, treats as murder what is here brought under the mitigated description of voluntary culpable homicide in defence, a mitigation introduced, say the Commissioners, "in order that the Courts may have it in their power to inflict a slight or a merely

"nominal punishment on acts which though not within the letter of the law which authorizes killing in self-defence, are yet within the reason of the law."

301. Mr. Norton it seems would adhere to the English law, of which he says—"the lines of separation of the various shades of guilt or of justification may be narrow, but I conceive by the English law they are clear and well founded in principle."

302. We think that the provision contained in Clause 299 is right in principle; and though at the first perusal the definition may appear somewhat obscure, yet it seems to us that it needs only to be deliberately analyzed to become perfectly clear, and we doubt whether it could be recast in a more lucid form.

303. With respect to the punishments for murder, viz. death, or transportation for life, or rigorous imprisonment for life, to which fine may be added, Mr. Hudleston says—"I prefer the provisions of our Regulations, which define the grounds for mitigating the capital punishment." He does not specify the provisions which he had in his mind. In the general law relating to murder in the Madras Regulations, which Mr. Hudleston must be understood to refer to, there is no such definition: but a discretion is given to the Judges not to pass sentence of death, if there appear to them to be "alleviating circumstances" in the case—a discretion sufficiently arbitrary.

304. Mr. Hudleston objects to the punishment for manslaughter as too severe: but the maximum punishment for this offence by the Code is imprisonment for fourteen years, while the law of the Madras Presidency, *authorizes* imprisonment for *life* in cases of culpable homicide not amounting to wilful murder, although seven years is the ordinary limit. The law was the same in Bengal till 1825, when seven years was fixed as the maximum limit. The law of Bombay limits the term of imprisonment to ten years, and Mr. Greenhill, one of the Judges of the Sudder Court at that Presidency, expresses his opinion that the extreme punishment proposed by the Code is unnecessarily severe. The Judges of the Sudder Court, North Western Provinces, observe, that the penalties laid down for "culpable homicide by consent," and "in defence," are heavier than our Courts "have been accustomed to inflict for the same sort of offence," but that they are unwilling to designate them as too severe without having before them the Code of Procedure.

305. Mr. A. D. Campbell, of the Madras Sudder Court, thinks the penalty in all the Clauses 301 to 303, but particularly in Clause 303, is too severe, and that too much discretion is left to the Judges.

PUNISHMENTS FOR OFFENCES AFFECTING LIFE.

Reg. VIII. of 1802, Sec. 15.

Madras.
Reg. VII. of 1802, Sec. 15, Cl. 2, corresponding with Sec. 3, Reg. IV. of 1797, and Sec. 15, Cl. 2, Reg. VII. of 1803, of Bengal.

Bengal.
Reg. XII. 1825, Sec. 7, Cl. 1.
Sec. 27, Reg. XIV. of 1827, of Bombay.

Cl. 302 and 303.

306. Mr. J. F. Thomas, of the Madras Presidency, with reference to the same Clauses, says "It would be well I conceive if some rule were laid down which should distinguish cases where persons guilty of voluntary culpable homicide may be, comparatively, but little to blame, from cases which come within a shade of murder. The provisions as they now stand in the case of manslaughter and homicide in defence, are, I think, open to the objection, that the same measure of penalty may be inflicted on the least as on the most aggravated case, and all is left to the discretion of the Judges. Is this latitude necessary or expedient?"

307. Colonel Sleeman adverting to the provision of Clause 302, which prescribes two years as the minimum of imprisonment to which a person convicted of "voluntary culpable homicide by consent" shall be sentenced, advises that this restriction be omitted, and that the offence be put exactly upon the same footing as the other mitigated forms of voluntary culpable homicide in Clauses 301 and 303. It appears to us however, referring to the strong opinions against permitting the consent of the person who has suffered death to be a ground of mitigation at all, that the distinction which has been made, by prescribing the minimum above mentioned, is judicious.

308. The discretion to be vested in the Judges in meting the punishment for offences, and the fitness of the scale of penalties to be applied by them, are general questions which fall to be considered in treating of the Chapter of punishments. We shall only say here that it does not appear to us that the penalties in the Clause we have been considering are out of proportion with reference to the scale which seems to have been generally kept in view, or that a greater latitude of discretion has been given to the Judge in this than in other parts of the Code.

309. We come now to Clause 304, which provides for death caused by any act or illegal omission "so rash or negligent as to indicate a want of due regard for human life," described in the Note as homicide "culpable yet not voluntary." The next Clause 305, provides for cases in which the act or illegal omission which caused death is a distinct offence by itself. In such cases the punishment of the distinct offence is to be added to that prescribed by Clause 304 for the negligent causing of death. The definition in Clause 304 appears to include the cases described in the 2d* and 3d† Clauses of the Article which contains the definition of manslaughter in the Digest prepared by Her Majesty's Commissioners on Criminal Law, the cases in the 1st Clause of that Article being those to which the definition of manslaughter is confined by Clause 297 of this Code.

HOMICIDE CULPABLE YET
NOT VOLUNTARY.

* "Where death is occasioned not wilfully but culpably through want of reasonable care and caution."

† "Where death is occasioned not wilfully, but in consequence of any unlawful violence, or injury to, or endeavor to injure the person of any other." Chap. XV. Sec. 3, Art. 2.

310. The Indian Law Commissioners observe that "there will probably be little difference of opinion as to the expediency of providing a punishment for the rash and negligent causing of death. But it may be thought that we have dealt too leniently by the offender who while committing a crime causes death which he did not intend to cause or know himself to be likely to cause." Page 63.

"The law as we have framed it differs widely from the English law. 'If,' says Sir William Blackstone, 'one intends to do another felony and undesignedly kills a man, this is murder,' and he gives the following illustration of the rule—'If one gives a woman with child a medicine to produce abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it.'"

"Under the provisions of our Code, this case would be very differently dealt with according to circumstances. If A kills Z by administering abortives to her with the knowledge that those abortives are likely to cause her death, he is guilty of voluntary culpable homicide, which will be voluntary culpable homicide by consent if Z agreed to run the risk, and murder if Z did not so agree. If A causes miscarriage to Z not intending to cause Z's death, nor thinking it likely that he shall cause Z's death, but so rashly or negligently as to cause her death, A is guilty of culpable homicide not voluntary, and will be liable to the punishment provided for the causing miscarriage, increased by imprisonment for a term not exceeding two years. Lastly, if A took such precautions that there was no reasonable probability that Z's death would be caused, and if the medicine were rendered deadly by some accident which no human sagacity could have foreseen, or by some peculiarity in Z's constitution such as there was no ground whatever to expect, A will be liable to no punishment whatever on account of her death, but will of course be liable to the punishment provided for causing miscarriage."

311. The Commissioners offer arguments in defence of this part of the Code. Supposing "it will be admitted that, when an act is in itself innocent, to punish a person who does it because bad consequences which no human wisdom could have foreseen have followed from it, would be in the highest degree barbarous and absurd," they ask, if the act be itself a high offence, ought that circumstance alone to make the person punishable for the consequences of his misfortune—to be liable, for example, to the punishment of murder if death was the issue of it? They argue that it ought not—that to pronounce a man guilty of an offence because a misfortune befell him while he was committing

another offence, is to confound all the boundaries of crime. Proceeding with their argument they observe, that "to punish as a murderer every man who while committing a heinous offence causes death by pure misadventure, is a course which evidently adds nothing to the security of human life." "The only good effect which such punishment can produce will be to deter people from committing any of those offences which turn into murders what are in themselves mere accidents. It is in fact an addition to the punishment of those offences, and it is an addition made in the very worst way." They conclude "that when a person engaged in the commission of an offence causes death by pure accident, he should suffer only the punishment of his offence without any addition on account of such accidental death."

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312. Upon this subject the English Law Commissioners make the following remarks in their 4th Report: "It may be very questionable whether, in point of principle, an effect wholly unexpected, and unconnected with the intention and act of the party, except by accident, can properly be made the foundation of criminal responsibility; for as the object of punishment is the prevention of crime, it ought properly to be annexed to such acts as are in themselves culpable by reason of their mischievous tendency, and the intention with which they are done, and not to such as are simply accidental and unintentional. By the law of England this doctrine is in many instances reversed, and the criminal intention incident to the act intended but not perpetrated, or not in question, is supposed to be transferred to the act which was the mere accidental consequence. Thus a party doing the same act in the same manner, but who by mere accident and not through want of caution, kills another, may be, according to his intention in doing that act, though such intention be wholly unconnected with the accidental result, guilty either of murder where his intention was to commit a felony, or of manslaughter where his intention was to commit a bare misdemeanor or trespass, or an act *malum in se*, or purely innocent, where the act, although unlawful, was merely *malum prohibitum*." After giving examples illustrative of the impropriety of the English law in this respect, they say in conclusion—"whilst we think that a mere accidental killing in the endeavor to do an illegal or criminal act, wholly unconnected with any danger or mischief to the person cannot on any just principle be brought within the scope of the law of murder, it appears to us that the same objections do not apply, or at all events, do not apply with the same force, to the case where death is occasioned in the endeavor to commit a crime with violence to the person or habitation of another, and consequently is attended with some degree of risk to the person, although it may

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"not be so great as to constitute murder without resorting to the consideration of the offender's intention. For here the result is not a matter of pure accident wholly unconnected with the criminal intent, and consequently the enhanced punishment is justified by one of the main principles of Penal Laws, namely, the prevention of crimes of violence attended with danger to the person." In the 7th Report however they retract this qualification, and express a positive opinion that "the intent to commit a minor crime ought not in any case by reason of a purely accidental consequence to be deemed equivalent for penal purposes to a wilful causing of that consequence." Thus the English Commissioners arrived in the end at the same conclusion with the authors of the Indian Penal Code; and they modified their definition of wilful killing accordingly by omitting after the words "to kill," the words "or do great bodily harm," which stood in the Draft contained in their 4th Report, according to the view *then* entertained by them, as expressed in the above quotation. The provisions on this subject in Mr. Livingstone's Code are also, as observed by the Indian Law Commissioners, framed on the same principles, though they differ in details from those under consideration.

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313. Mr. Norton says of Clause 304, that he considers the provision contained in it to be just and expedient, but that he is quite unable to reconcile it with Clauses 69 to 72. He does not however point out any inconsistency, and we cannot conjecture what he alludes to.

314. Although he approves of Clause 304, Mr. Norton says "when I find under the next Clause and its illustration that killing in the attempt to commit a rape is a specimen of this rash and negligent way of killing, and that such offence, with certain exceptions, is to be punished as a combination of two offences, and either to be doubly punished, or punished by substitution of the punishment attached to the commission of the crime attempted, I am lost in confusion and uncertainty. I have equal difficulty in learning what the law is, and how to apply it." We think that Mr. Norton could hardly have been left in such perplexity, if he had considered the enactments here in question with due attention. He would have understood that Clause 304 provides for a case in which death has been caused by culpable rashness, or negligence, *not* in committing or attempting to commit an offence, while Clause 305 provides for the aggravated case of death so caused, in committing or attempting to commit an offence. In the latter case the punishment is to be that prescribed for the offence committed or attempted, with the punishment of involuntary culpable homicide (Clause 304) superadded. If the attempt be an offence by itself, it is explained that

still the punishment of the *offence attempted*, and *not* the punishment of *the attempt* is to be awarded. We see no confusion or uncertainty here; but enactments so clear and intelligible as to leave no excuse for error in applying them.

315. Mr. Norton apparently finds fault with the illustration under Clause 305, namely, the case of a man attempting to commit a rape on a woman, and in the attempt involuntarily causing her death. Here the death of the woman being, to use the words of the English Commissioners, "an effect wholly unexpected and unconnected with the intention and act of the party, except by accident," is a homicide, which though culpable is not voluntary, and therefore does not fall under the definition of murder in this Code, nor under that proposed by the English Commissioners in their Digest; the homicide is culpable, because the circumstances evince on the part of the offender "a want of due regard for human life." On this ground the culprit is punishable, while he is punishable also for the crime which he intended to perpetrate, that is rape. Under this double liability he may be sentenced to rigorous imprisonment for a period extending to 16 years.

316. Mr. Norton does not explain particularly why he objects to the illustration, or how he thinks the case ought to be treated. Mr. Hudleston objects to the illustration "as a violation of all sound principle." "By the law of England," says he, "the act is 'murder, and so it ought to be.' This objection founded on the authority of the law of England may be considered sufficiently answered by the observations we have quoted from the English Law Commissioners.

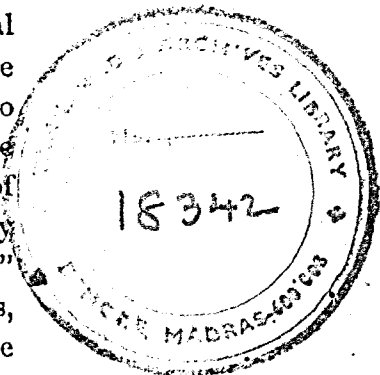
317. Mr. Pyne observes, "It is possible to conceive circumstances 'under which the ravishment of a delicate woman would in all probability be attended with fatal consequences; and instances are not wanting where brutal excitement has led a plurality of ravishers to violate a woman. To cause death by such means appears to me an offence equally grave with culpable homicide. Take for example a rape committed on an infant 6 or 7 years of age from which death ensues; a recent case of this kind has come before the Courts.' It is clear that the case here last mentioned would fall under voluntary culpable homicide, because it would be a just inference from the circumstances that the offender knew he was likely by his brutal act to cause the death of the infant; and wherever the circumstances justified such an inference the offender ought to be charged with murder.

318. Referring to the words "an offence *other than the offence defined in Clause 327*," which appear in Clause 305, Sir H. Seton questions the propriety of "defining an offence by reference to another, 'not specifically, but as contained in a subsequent Section of the Code,'" and Colonel Sleeman suggests that the words in Italics should be omitted. They might be omitted without affecting the definition, for it is clear enough that the offence described in Clause 327 is but a lesser degree of that to which Clause 304 applies, and of course merges in the latter. The words appear to have been introduced to guard against even the semblance of inaccuracy.

319. Mr. G. W. Bacon thinks there are many cases of homicide in perpetration of another offence that have no connection with "pure accident," or "rashness, or negligence," and taking such to be murder, as being attended with violence, he would punish them accordingly. Upon this we have to observe, that when homicide is committed in the perpetration of another offence, if it is not accidental nor attributable to rashness or negligence, it must fall within the definition of voluntary culpable homicide, and will be punishable as murder, as Mr. Bacon thinks it should be.

320. Mr. A. D. Campbell observes that he can nowhere discover in the Code the provision for death by pure accident alluded to in Note M. p. 65. There is no such provision in the Code, and none is required. It is unnecessary to declare formally that an act purely accidental is not an offence, if the definitions are so framed, as we believe they are, that the effect of a mere accident cannot be charged as an offence.

321. Upon Clause 306, relating to the abetment of suicide committed by a child under 12 years of age and others incapable of rational judgment, Mr. J. F. Thomas says, "The inducement to commit the 'offence here pointed out must be in the ordinary course of events so 'exceedingly slight, that it scarcely seems necessary to place the offence 'on a level with the most atrocious murder, and annex the penalty of 'death, &c. It would in practice probably be found that a less penalty 'than death would be sufficient to check the commission of the crime.' Upon Clause 307 relating to the abetment of suicide in general, he says, "I greatly doubt the necessity of such heavy penalties to repress the 'offence. Five years imprisonment where fine is imposed, I should consider ample, and better adapted to the character of the offence in the 'existing state of society. If the rule 'to do an act (Clause 24) de- 'note omission' is to be applied largely to this Clause, it will require 'great modification in my opinion, for the instances of suicide which



"might be prevented by persons are numerous; and at present they have not the most remote idea that they are acting criminally, and abetting a penal act by such omission. They ought not therefore to be liable to the heavy penalties here provided."

322. These Clauses refer to abetment "by aid," the definition of which contained in Clause 97, shews that the offence consists in a person "doing any act or omitting what he is legally bound to do with the *intention* of aiding," &c. The question to what extent *omissions* ought to be made punishable when they produce, are intended to produce, or are known to be likely to produce the same evil effects as *acts*, is discussed in the Note to the Chapter under consideration. The conclusion is that such omissions, if they are illegal according to the explanation of that term in Clause 28, ought to be punished in the same manner as acts, and this is the rule of the Code. It seems to us that the rule would fall to be applied under these Clauses chiefly in such a case as this, where a person legally bound to take care of the person of another has by an illegal omission of his duty *intentionally* given him the opportunity, or permitted him to obtain the means of killing himself.

323. It would apply also, we conceive, in the case of a person seeing another preparing to destroy himself, say by hanging, and allowing him to accomplish his purpose without any attempt to prevent him, if as may be expected, the law of procedure makes it a common duty incumbent upon all men to assist in preventing offences about to be committed in their presence. The intention here would be inferrible from the circumstances. In the former case collateral proof of the intention would be requisite. But we apprehend that it is *active* aid which is principally intended in these Clauses, and to which the higher penalties are meant to be applied.

* 2nd Proviso.

324. Clause 306 corresponds with Clause 298* inasmuch as the latter excepts from its provisions the same classes of persons as are mentioned in the former, and leaves the offence of causing the death of such persons, though with their consent, to be dealt with as murder; so Clause 306 attaches the penalties of murder to the offence defined therein. We have the same remarks to make here as are made upon Clause 298, as to the age of 12 years being fixed absolutely as that under which a child is to be taken as incapable of forming an intelligent judgment.

325. Clause 307, again, corresponds with Clause 298 in attaching to the offence defined in it, which is closely allied to 'culpable homicide by consent,' the same punishments as are applicable to the latter.

326. In concluding our review of the provisions regarding "offences affecting life," we think it proper to notice a point on which there is a difference of considerable importance between the law of England and the Indian Code.

327. "The law" (of England) "takes no cognizance of homicide unless the party injured die of the injury within one year and a day thereafter." There is no such limitation in the Indian Code.

Digest, Chapter XV., Sec. 1, Art. 7.

328. In their 4th Report the English Criminal Law Commissioners observe upon the above rule, which they characterise as arbitrary, that "it cannot but be regarded as some sacrifice in point of principle, to allow a murderer to escape, merely because the deceased, from natural strength of constitution, or from accidental circumstances connected with the injury, happened to linger for more than a year." They did not however "consider themselves to be justified in suggesting any alteration of this ancient rule," remarking that they were not aware that any practical inconvenience had resulted from it.

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329. We find that in an early draft of the Indian Code there was a limitation. The reason for abandoning it is not recorded, but we may conjecture that it was deemed objectionable on account of "the sacrifice in point of principle" which it involves. Probably the English Criminal Law Commissioners would have thought this a sufficient reason for not admitting a limitation, if it had not been for the "ancient rule." There is no limitation in the Regulations of Bengal and Madras; but the law of Bombay bars the charge of murder if death does not take place within six months.

330. We are decidedly of opinion that it is not advisable to follow the English law in admitting a limitation which is confessedly objectionable in principle, and which would be new in India, except within the Presidency of Bombay and the jurisdiction of Her Majesty's Courts.

331. In explanation of the provisions contained in Clauses 308 and 309, the Commissioners make the following observations: "These Clauses appear to us absolutely necessary to the completeness of the Code. We have provided, under the head of bodily hurt, for cases in which hurt is inflicted in an attempt to murder; under the head of assaults for assaults committed in attempting to murder; under the head of criminal trespass, for some criminal trespasses committed in order to murder. But there will still remain many atrocious and deliberate attempts to murder which are not trespasses, which are not

ATTEMPTS to commit voluntary culpable homicide.
Note p. 66.

"assaults, and which cause no hurt. A, for example, digs a pit in his garden and conceals the mouth of it, intending that Z may fall in and perish there. Here A has committed no trespass, for the ground is his own; and no assault, for he has applied no force to Z. He may not have caused bodily hurt, for Z may have received a timely caution, or may not have gone near the pit. But A's crime is evidently one which ought to be punished as severely as if he had laid hands on Z with the intention of cutting his throat."

332. Again they say, "similar attempts may be made to commit voluntary culpable homicide in any of the three mitigated forms. A, for example, is excited to violent passion by Z, and fires a pistol intending to kill Z. If the shot proves fatal, A will be guilty of manslaughter, and he surely ought not to be exempted from all punishment if the ball only grazes the intended victim."

"It is to meet cases of this description that Clauses 308 and 309 are intended."

333. Sir R. Comyn, Mr. Norton, Mr. Hudleston, and Mr. James Thomas object to the phraseology of these Clauses as vague and obscure. Sir R. Comyn particularly observes "that carrying an act or omission to the length the offender *contemplates*, as sufficient to cause death," is a mode of expression utterly destitute of legal precision.

334. Mr. Hudleston says he cannot perceive the necessity of either of these provisions. His colleague Mr. A. D. Campbell, on the contrary, thinks them fully justified by the reasons given in the Note, but he considers it "desirable that they should if possible be made less obscure."

335. Colonel Sleeman proposes to substitute the word "considers" for "contemplates" in the passage referred to by Sir R. Comyn. And observing that "the door of repentance should be kept open as long as possible in law, as well as in religion," he suggests the addition of the following words—"and does not himself repent and interpose to save the intended victim from the consequences of that act or omission."

336. Mr. Greenhill observes with reference to Clause 309, that the terms "voluntary culpable homicide" used therein include murder, which the illustrations shew was not intended.

337. It is clear from the note as well as from the illustrations, that Clause 309 was meant to apply to attempts to cause death under circumstances which if death ensued would make the offence to be voluntary

culpable homicide of one of the mitigated descriptions specified in Clause 295, attempts to commit murder being provided for expressly by Clause 308, and it appears to us to be advisable to declare this by introducing after the words "voluntary culpable homicide," the words "of one of the three mitigated descriptions enumerated in Clause 295," or inserting instead of "he would be guilty of voluntary culpable homicide," "he would be guilty of manslaughter or voluntary culpable homicide by consent," or "voluntary culpable homicide in defence."

338. As to the word "contemplates," which is thought not to be sufficiently precise, it does not appear to us that the meaning is at all doubtful, or that it would be made clearer by adopting Colonel Sleeman's suggestion. We do not think it necessary to alter this word or otherwise to change the phraseology of these Clauses (except as above suggested in Clause 309,) with a view to elucidation and precision. It appears to us that with the aid of the illustrations the sense can scarcely be mistaken by any one of ordinary understanding giving his mind fairly to the consideration of the subject.

339. By Clause 308, a person attempting to commit murder though he fail in his purpose, if he shall have taken all the steps, which according to his plan were necessary to accomplish it, will be punishable with transportation for life, or imprisonment for life, or for a term not less than seven years, and also by fine. This Clause is applicable to cases in which no harm is done. Where bodily hurt is inflicted in such an attempt, the offence will be liable to the same punishment, but under a different Clause,* and so in cases of assault† and trespass.‡

* 320. † 343. ‡ 429.

340. Under the law of England as it stands at present, attempts to commit murder, although no bodily injury be inflicted, are punishable with transportation for life, or for any term not less than fifteen years, or imprisonment for any term not exceeding three years. The Criminal Law Commissioners have recommended that the minimum of transportation be reduced to seven years.

Digest Chapter XV. Sec. 5, Art. 3.

341. By Clause 309, attempts to cause death under circumstances which would reduce the offence, if the object were accomplished, to one of the mitigated forms of voluntary culpable homicide, carried to the same point as specified in Clause 308, will render the offender liable to be punished with imprisonment for a term which may extend to three years, or fine or both. If killing a person in a duel fall under Clause 298, then any person shooting at another in a duel, we apprehend, will be within this Clause, whether the other be wounded or not.

342. In the Digest of the English Criminal Law Commissioners it is proposed that whoever shall by any means whatever wilfully endanger the life of any person shall be liable to imprisonment for a term not exceeding three years, or fine, or both.

343. "Although no evil effect be produced" (say Her Majesty's Commissioners) "yet criminal endeavors consisting in manifest overt acts ought justly to be dealt with as penal." This is the principle upon which the provisions in question are founded.

344. With respect to the amendment proposed by Colonel Sleeman with the view of saving a person who having laid a plan of murder repents, as in the example of A intending to murder Z by means of a spring gun (in the illustration (a) subjoined to Clause 308), if A after setting the gun repents and removes it, we are of opinion that it is unnecessary, for in the case supposed we apprehend that without the words proposed to be added, A would not be chargeable under Clause 308. The last act undoing the previous act, he could not, we conceive, be charged with that previous act as an offence, unless for anything he knew it might have had effect in the mean time. For example, if A set the spring gun in the morning expecting that Z would pass the place in the afternoon and knowing that he could not pass before noon—in this case if A repenting of his purpose removed the spring gun before noon, that is, before it was possible it could have effect, it appears to us that the last act would exonerate him; not so, if he only knew that Z was to pass sometime in the course of the day, it might be the same hour, and that it was a mere accident that he did not pass before he removed the spring gun. In the former case he kept it in his power to prevent the mischief intended and did take the necessary step to prevent it in time.

345. The act of the Indian Legislature No. XXX. of 1836, made it an offence punishable with imprisonment for life with hard labour to have belonged to a gang of *Thugs*. In the first of these two Clauses it is explained that "whoever belongs or has at any time belonged to any gang of persons associated for the purpose of gaining a livelihood by inveigling and murdering travellers in order to take the property of such travellers, is designated as a 'Thug.'" In Clause 311 it is prescribed that a Thug shall be punished with transportation for life, or imprisonment of either description for life, and shall be also liable to fine.

246. Mr. Greenhill thinks that the words "gaining a livelihood" in Clause 310 are "unnecessary and objectionable," and it seems to us that their introduction imposes a restriction not within the intention of

the Legislature in the laws passed on this subject just before and after the date of the Code. It appears therefore to be a question for the consideration of Government whether they should be retained. It may be better to insert the word "habitually" before "associated" and to omit the words between "of" and "inveigling." We are not aware why transportation for life was not authorized in Act XXX. of 1836, and no reason occurs to us for excepting "Thugs" in particular from this mode of punishment which is prescribed generally for offences of the same degree.

347. Clauses 312 and 313 contain provisions on the subject of abortion. By the former the woman herself if she voluntarily cause herself to miscarry, and every person who voluntarily causes a woman to miscarry, except for the purpose of saving her life, is liable to punishment. The law of England does not punish the woman; and she is not punishable by Mr. Livingston's Code. The woman is punishable by the French Code.

OF THE CAUSING OF MIS-
CARRIAGE.

348. The framers of the Indian Code themselves express apprehensions that their provisions, or any other provisions on this subject, may be abused in this country to the vilest purposes, and they say that if they cannot in the Code of Procedure lay down rules to prevent such abuse they are inclined to think it would be their duty to advise that the offence of abortion, where the mother is a party to it, should be left wholly unpunished, rather than it should be repressed by provisions which would occasion more suffering to the innocent than to the guilty.

Note M. p. 66.

349. Mr. J. F. Thomas says of Clause 312—"This Clause appears to me to confound offences distinct in themselves, and which should not be visited by a like measure of punishment."

"The high caste young widow, who, to hide her shame, should at the risk of life cause herself to miscarry does not, under the peculiar circumstances in which she is placed by the institutions of society, commit an offence in any respect of like criminality with the seducer of a young girl, or married woman, who to cover her crime should cause such woman to miscarry. The offences are so distinct that I think separate and special provisions should be made for them. In the one instance a penalty of not less than two years would only meet the case; in the other a trifling punishment in addition to the degradation of a criminal trial would be ample. I much doubt the policy of providing heavy penalties for the repression of the offence of causing miscarriage by the woman herself, whilst the barbarous

“institutions of the country create the offence. My experience would also lead me to propose that miscarriage should be defined. I have known groundless and false charges of this nature brought and the parties exposed to the pain of a criminal investigation, when there was no evidence whatever as to the existence of the fœtus, and it was not established therefore that the woman was with child, or that there had been an abortion. ‘Every woman being with child’ may open the door to vexatious accusations. I would throw on the accuser the onus of establishing in limine that the fœtus was distinctly formed and manifest on its abortion, before the charge of causing miscarriage should be entertained. If this was not alleged in the charge it should not be held that ‘the woman was with child’;—an explanation might be added that to be with child in the eye of the law, the charge must allege the abortion of a fœtus fully formed.”

350. Mr. Hudleston observes that the remarks of Mr. Thomas appear to deserve consideration, in which Mr. A. D. Campbell concurs. Mr. Sharkey and Mr. Greenhill suggest that it should be specified that the woman was “quick with child.” Mr. Sharkey opposes Mr. Thomas’s views generally and particularly in regard to the punishment proposed, which he thinks by no means sufficient, as the offence is often little short of murder.

351. Mr. James Thomas also considers the punishment inadequate. Mr. Pyne says, “This is one of those offences which if death takes place it is difficult to distinguish from murder. I do not consider that the combined penalties provided in Clause 312 and in Clause 304 are sufficient to ensure that degree of caution which the preservation of human life demands.” Referring to Clause 313, he observes that “the offence here is of a deeper dye, and yet if not aggravated by hurt is not liable to greater punishment. It might without undue harshness be doubled.”

352. We apprehend that an attempt to procure abortion issuing in the death of the woman may sometimes fall under “homicide by consent” and sometimes under “murder” according to the circumstances, where it appears that the party making the attempt knew from the condition of the woman or otherwise that it was likely to cause her death.

353. As to the Clause 313, we conceive that generally some hurt will be caused which will afford ground for enhancing the punishment.

354. Colonel Sleeman says—“The evils inflicted upon society in India by the police under the power invested in them by this law are so very great, and must unavoidably continue to be so if it remains

“in force, that I should certainly expunge it from the Code. I would merely enact 312: ‘Whoever voluntarily causes a woman with child to miscarry without her free and voluntary consent, except in good faith for the purpose of saving her life, shall be punished with imprisonment of either description for a term which may extend to three years, or to fine, or both.’ To this should be added the cumulative Clause.”

355. We are on the whole inclined to support Colonel Sleeman’s suggestion, but it seems to us that it will be sufficient to omit from Clause 312 the words before “every person” and to let the rest stand. The next Clause 313 may be left unaltered.

356. By Clause 314 it is explained that “all bodily pain, disease, and infirmity, is designated as ‘hurt.’”

OF HURT.

357. “We have found it,” say the authors of the Code, “very difficult to draw a line between those bodily hurts which are serious and those which are slight. To draw such a line with perfect accuracy is indeed absolutely impossible; but it is far better that such a line should be drawn though rudely, than that offences some of which approach in enormity to murder, while others are little more than frolics which a good-natured man would hardly resent, should be classed together.”

Note p. 67.

“We have therefore designated certain kinds of hurt as ‘grievous.’”

“We have given this name to emasculation,—to the loss of the sight of either eye,—to the loss of the hearing of either ear,—to the loss of any member, or joint,—to the permanent disfiguration of the head, or face,—to the fracture or dislocation of bones.” And “after long consideration, we have determined to give the name of grievous bodily hurt to all hurt which causes the sufferer to be in pain, diseased, or unable to pursue his ordinary avocations, during the space of 20 days.”

Clause 315.

“What we propose is that the voluntary infliction of simple bodily hurt shall be punished with imprisonment of either description which may extend to one year, or fine, or both; the voluntary infliction of grievous bodily hurt with imprisonment of either description for a term which may extend to ten years and must not be less than six months, to which fine may be added.”

p. 69.

Clause 318.

Clause 319.

"These are the ordinary punishments. But there are certain "aggravating and mitigating circumstances which make a considerable "difference."

Clause 320.

Clauses 321, 322.

Clauses 323, 324.

Note p. 69.

358. The aggravated cases are hurt, in an attempt to murder; hurt, simple and grievous for the purpose of extortion; hurt simple and grievous by means the use of which generally indicates great malignity, as by a sharp instrument, fire, or any heated substance, or by any corrosive or explosive substance, or by poison, or by means of any animal. There is no distinction of simple and grievous hurt in the case of an attempt to murder. "It does not appear to us," say the Commissioners, "that where the murderous intention is made out the severity "of the hurt inflicted is a circumstance which ought to be considered in "apportioning the punishment, though it is undoubtedly a circumstance "which will be important as evidence."

359. Referring to Clauses 321 and 322 they say, "We propose "that when bodily hurt is inflicted by way of torture the punishment "shall be very severe. In England happily such a provision would be "unnecessary. But the execrable cruelties which are committed by "robbers in this country for the purpose of extorting property, or information relating to property, render it absolutely necessary here."

Clauses 325, 326.

360. The cases of mitigation are those in which the hurt is caused on grave and sudden provocation. The principles on which the Clauses providing for such cases are framed are the same as those on which the law of Manslaughter is framed.

Clauses 327, 328.

361. For hurt caused involuntarily, but culpably, the rules provided bear a close analogy to those provided for cases of involuntary culpable homicide.

Clause 329.

362. And there is a provision corresponding in principle with that contained in Clause 308, for attempts to cause hurt not punishable as assaults, by which the offender is made liable to imprisonment for half the term to which he would have been liable if he had actually caused the hurt intended.

363. Mr. Hudleston observes of Clause 314 that it "is open to the "objection of giving to a word a meaning not its own." The word of which this is said is "hurt." Mr. Hudleston appears to object to its including "all bodily pain, disease, and infirmity;" and it must be acknowledged that this is a very wide definition, comprehending pain, disease, and infirmity resulting from natural causes, or from "the visita-

tion of God in a natural way," as well as pain,* &c. caused by the act of man. But there can be no misapprehension in consequence, as in defining subsequently the offences which consist of hurt, the application of the term is practically limited to hurt caused by the act or omission of man.

364. Of Clause 315 Mr. Hudleston says, "I consider this Clause "as marked by needless particularity; it is a part of the system adopted "in this work to which I have stated my objections of attempting to "define every possible act of criminality. Mr. J. F. Thomas points "out omissions in the specifications which are instances of the mischief "of the principle." He adds—"The provisions connected with this "Clause appear to me also to overload the Code with unprofitable "verbiage in amplification and particularization quite uncalled for. I "allude to the Clauses to 329 inclusive."

365. It is to be regretted that Mr. Hudleston did not, like Mr. J. F. Thomas, apply himself to the consideration of the specifications contained in Clause 315 with a view to point out such defects as he could discover in order that the Clause should be made as perfect as possible, rather than content himself with suggesting the possibility of mischief occurring in practice from some undetected omission, without, as far as appears, having found any ground for the surmise. This remark applies to many of the general observations of Mr. Hudleston. It would have been better also, we think, if, instead of generally condemning the Clauses to 329 inclusive as quite uncalled for, Mr. Hudleston had shewn how they might have been dispensed with, without leaving those offences which fall under the definition of hurt, and do not also fall under the head of assault, exempt from punishment. The reasons for introducing these Clauses into the Code, which are stated in the Note to this Chapter, are not noticed by Mr. Hudleston.

366. Mr. Norton says—"I concur in the definitions of what shall "be grievous hurt and the expediency of making them." But speaking of the provisions regarding personal injuries in general, which compose the remainder of this Chapter, he makes the following remarks: "When "abstract rules of qualification of all sorts of offences against the person "by assault, imprisonment, or by other injury, only to be understood and "applied by reference to explanations and illustrations, shall be attempted to be put in practical operation, I can surmise all sorts of difficulties and misconceptions and arbitrary constructions as likely to arise." "I might expend pages in exhibiting instances," he says, but he exhibits not one; and with the above summary remark he passes over all the

detailed provisions regarding "hurt," (316 to 329) the definitions of "wrongful restraint and wrongful confinement," "assault," "kidnaping," "rape," and "unnatural offences," and the provisions for the punishment thereof, (330 to 362).

367. The following are the observations of Mr. J. F. Thomas referred to by Mr. Hudleston. Upon the first head in Clause 315, he says—"to emasculation I would add, or injury to the *membra privata*. "In this country the enormities which appear in cases where dancing girls have been parties, and in robberies where the object has been not to injure so much as to force through fear confession of concealed property, appear to me to require this addition. For whether the wounds, or the injury actually received, are trifling and do not amount to hurt, as defined under "eighthly," this act ought still, I think, to be repressed by severe penalties, as peculiarly offensive to the feelings of the party injured, as well as most dangerous—the slightest excess causing the severest suffering." Upon the words "dislocation of any bone other than a tooth," in the seventh head, he says, "This would not provide for a class of cases which came before me in the Northern Division, where the sufferers had the *whole* of their teeth forcibly removed; and I am not clear that the offence could be brought under any of the prior provisions."

"To meet the case I would suggest an explanation to the effect that the removal of the whole, or the greater part of the teeth, permanently weakening the powers of the jaw, does not come within the provision for fracture or dislocation of a bone other than a tooth; but under the preceding head, the sixth."

368. Mr. A. D. Campbell supports the suggestion of Mr. Thomas regarding the first head in this Clause, observing that some horrible cases occur to his recollection evincing the propriety of it. Mr. Campbell also supports the suggestion of Mr. Thomas regarding the seventh head, remarking that it is the native mode of depriving a conjuror of his art to knock out all his front teeth, deemed indispensable to the due pronunciation of his incantations.

369. We are inclined to think that the addition to the first head proposed by Mr. Thomas is unnecessary, seeing that when this barbarous kind of hurts is caused for the purpose of extortion, &c., as in the cases alluded to by Mr. Thomas, it is punishable severely under Clause 321; and there being no ground, as far as we know, to believe that it is an offence of which there has been such experience under other circumstances as to call for its being distinguished specially.

370. With respect to the seventh head which excepts the fracture or dislocation of a tooth, we observe that "striking out the *fore tooth*" is included in the definition of maiming in the Digest of the English Criminal Law Commissioners, which also includes the kinds of hurt described under the first, second, fourth, fifth, and seventh heads. We apprehend that the case stated by Mr. Thomas of the forcible removal of the *whole* of the teeth falls under the fifth head as "permanently impairing the powers of a member or joint," that is to say, the jaw, and that the fracture or dislocation of several teeth would properly be treated as an offence under the same head; but it seems to us that it would be better to specify this kind of hurt under the seventh head. We would not designate the fracture or dislocation of a single tooth, even the fore tooth, as grievous hurt, but when more than one tooth is removed by violence the case may be considered as aggravated as the fracture or dislocation of one of the small bones. We would therefore add to the seventh head the words "or of two or more teeth."

Chapter XV. Sec. 5. Art. 6.

371. The Commissioners have taken some pains to explain the grounds upon which they framed the definition under the eighth head in this Clause, by which a hurt whereby the sufferer is in pain, or diseased, or unable to follow his ordinary pursuits, during the space of twenty days, is designated as grievous. The provision they state was suggested by Article 309 of the French Code. Thinking that the length of time during which a sufferer is in pain, diseased, or incapacitated from pursuing his ordinary avocation, though a defective criterion of the severity of a hurt, is still the best criterion that has ever been devised, they adopted it from the above Article, but they framed their penal provisions on a principle quite different from that by which the authors of the French Code appeared to have been guided, taking into consideration both the extent of the hurt and the intention of the offender. This will be found explicitly declared in the explanation to Clause 317.

Note p. 67, 68.

372. Mr. Pyne objects to the definition of grievous hurt with reference to the second head in Clause 76 relating to the right of private defence, thinking that it allows too great a latitude to suffer a person to resist to the death from fear of receiving an injury which may render him unable to follow his ordinary pursuits for twenty days. Again he observes that a very trifling injury to hand or foot may prevent a clerk or laborer from following his ordinary pursuits for twenty days. Mr. Boldero also remarks that the provision is likely to work unequally, as one may from the nature of his pursuit be more easily disabled than another. Mr. Sharkey observes that the specification of twenty days is likely to lead to arbitrary sentences. Mr. H. Frere thinks that making the time of incapacity from work the test of whether a hurt is grievous, is inap-

plicable to India, where artificial means are constantly resorted to to disguise the real state of the case, and where medical assistance to find out the truth is frequently not procurable.

373. The words "grievous bodily harm" are used in the English Statutes and in the Digest of the English Criminal law along with "maim" "disfigure" and "disable," but while the term "maim," as before noticed, is explained in the Digest, no explanation is given of the other expressions. But it seems to be understood that "to disfigure" is to do a man some external injury which detracts from his personal appearance, but does not weaken him; so the cutting off a man's ear or nose comes under this term by the English law, as it does, we apprehend, by this Code. Again "to disable" is to do something creating a permanent disability and not a mere temporary injury. It is not requisite, it appears, that "a grievous bodily harm" within the meaning of the law, should be either permanent or dangerous. Grievous bodily harm neither permanent nor dangerous is but a vague definition, yet it seems to be the closest that has been given by authority; probably in the practical administration of the law there is a pretty near approach to the rule laid down in this Code.

374. We cannot but think that there is reason in the exceptions taken to estimating the severity of a hurt by the time during which the sufferer is unable to follow his ordinary pursuits, as a rule which will operate unequally. The man who lives by daily labour suffers far more by being kept from his work for twenty days, than he who has independent means, and whose ordinary pursuits may be intermitted for that time without causing him any material privation. Again an injury to the right hand may in the case of a clerk keep him from his work for twenty days, which if it happened to the left hand would be of no consequence. An injury to the foot may prevent one man from following his business, in which walking is necessary, which if it happened to another man in a sedentary employment would not interrupt him at all. The proposed criterion is therefore unsatisfactory, but some criterion is necessary and it will be difficult to devise a better. The following may perhaps be convenient—"such hurt as from the pain or disease it has caused, or the time it has prevented the sufferer from following his ordinary pursuits, is equivalent to the fracture or dislocation of a bone."

375. Upon Clauses 316 and 317, which define what it is "voluntarily to cause hurt" and "voluntarily to cause grievous hurt" respectively, Mr. G. W. Bacon makes the following remarks: "The intention may be easily proved from the previous conduct of the offender, but

"how we are to get at what degree of hurt he knew himself likely to inflict, I know not. We will take the illustration (a) to Clause 329. "A intends to hurt Z, but it is impossible that he should have known it to be likely that the hurt would be grievous under any of the first seven definitions of Clause 315; or that Z would in consequence of it be confined to his room for twenty days, under the eighth. Hurt not at all grievous is received by Z. Is A to be punished under Clause 318, or 329, or both? It is clear that hurt of both degrees may be the consequence of A's conduct, but that's no reason for our inferring that it was his intention to cause grievous hurt, or that he knew it to be likely that the hurt would be of a grievous kind. Instead of troubling ourselves with what the offender thought was likely to happen, we ought to enquire and decide whether his act was such, as would by its nature more probably cause grievous than simple hurt, and whether from previous enmity there was reason to conclude that the offender intended the former rather than the latter."

376. Now in the case put by Mr. Bacon it appears to us not only possible that A should know, but inconceivable that he should not know it to be likely that Z would sustain grievous hurt, perhaps a fracture or dislocation, by his horse falling over the rope intentionally tied by A across the road by night for the purpose of causing him to fall. If Z suffered hurt, but not grievous hurt by the fall, A might be arraigned either under Clause 318 for "voluntarily causing hurt," or under Clause 329 for the *attempt* to cause *grievous* hurt, but not under both.

377. We agree with Mr. Bacon in what we conceive to be his meaning as to the duty of the Judge, that is to say, that he is not to trouble himself with seeking for direct proof of what the offender thought was likely to happen, but is to infer it from the nature of his act, taking him to have intended grievous hurt, or at least to have contemplated grievous hurt as likely to occur, when he did what every body knows is likely to cause grievous hurt, and the more certainly drawing this conclusion where there is evidence of previous enmity against the party who has suffered. If the act was such that nothing more than simple hurt could reasonably be thought likely to ensue from it, then although grievous hurt may unexpectedly have ensued, it would be his duty to convict the offender of simple hurt only under Clause 316, judging that grievous hurt was not in his contemplation; for according to Clause 317 a person can be convicted of grievous hurt only when the result and the intention correspond, or when grievous hurt has been suffered from an act which was intended to cause grievous hurt, though it may be of a different kind.

378. Mr. Greenhill suggests that the minimum term of imprisonment should be omitted in Clauses 319 and 321, which define the punishments for "grievous hurt," and "hurt for the purpose of extortion," giving instances of cases which seem to fall within the definitions of those offences respectively, but which it would be improper to visit with the least degree of punishment therein prescribed. "Where the range is so great and the degrees so indefinite, he thinks it would be enough to 'fix the maximum,' an opinion in which we agree. On the same ground we agree with Mr. Pyne in thinking that the minimum term of imprisonment under Clause 322, viz. seven years, is likely to be found too severe a punishment in some cases, when the injury which has been sustained, although it may fall within one of the definitions of grievous hurt, is really not of an aggravated nature.

379. Mr. Greenhill asks whether Clause 320, which punishes hurt in an attempt to commit murder with transportation for life as the maximum, and imprisonment for seven years as the minimum, "is not inconsistent with 309 whereby a person firing at another with intent 'to murder, but misses his aim, is only liable to three years.'" Mr. Greenhill appears to have made a mistake on this point, for Clause 309 does not apply to an attempt to commit *murder*, but an attempt to cause the death of a person, which if it had succeeded would have rendered the offender guilty of voluntary culpable homicide not amounting to murder. The punishment for an attempt to commit murder (Clause 308) is the same as that laid down in Clause 320.

380. Upon Clause 323 which provides for the punishment of hurt caused by means of the edge or point of any sharp instrument, &c. Mr. Greenhill asks if this would include a pointed piece of wood, and suggests, if it is intended to confine the penalty to an instrument the point or edge of which is metal, that it should be so expressed. The same suggestion he offers with respect to Clause 324. The instrument must be a *sharp* instrument with an *edge* which will cut, or a *point* which will stab; any instrument which answers to this description we apprehend will be within the definition whether made of metal or not.

381. The Sudder Court for the North Western Provinces observe that "the Code does not seem to make provision for the offence of 'administering poisonous or deleterious drugs in victuals or drink with 'the view to stupify and rob persons, reckless whether death may be the 'consequence of the act or not.'"

382. In making this remark the Court must have overlooked Clauses 323 and 324, which provide among other things for "hurt" and

"grievous hurt" caused by means of "any substance which it is deleterious to the human body to inhale or swallow." The maximum punishment for grievous hurt so caused is imprisonment for fourteen years. The Court recommend transportation for life.

383. We think with Mr. Pyne that it is advisable to omit the minimum under Clause 324, as under Clauses 319 and 321, for the reason above stated.

384. We observe that in the provisions of the English law for the punishment of cutting, &c. with intent to maim, disfigure, or disable, or to do some other grievous bodily harm, attempting to murder by poison, &c., there is no minimum limit to the imprisonment to which the offender may be sentenced.

385. We have remarked that the term "maim" in the English Criminal law includes the hurt designated as "grievous" under the 1st, 2nd, 4th, 5th and 7th heads of Clause 315. *Attempts* to maim, disfigure, or disable, or to cause some other grievous bodily harm, are classed together in the English law, and are punishable by transportation for life, or for any term not less than fifteen* years, or imprisonment for any term not exceeding three years. By this Code the maximum punishment for grievous hurt comprehending disfiguration and temporary disabling, as well as the hurts which come under the description of maiming, as above, is imprisonment for ten years, but this cannot be inflicted for an attempt to cause hurt unless the hurt has been actually caused. An *attempt to hurt* when the hurt intended has not been produced, is punishable by imprisonment for half the term to which the offender would have been liable if his attempt had succeeded.

* Proposed in the Digest to be reduced to seven years. Art. 5, Sec. 5, Chap. XV.

Clause 323.

386. While by this Code hurt caused in an attempt to murder is punishable with transportation for life or rigorous imprisonment for not less than seven years, the same offence by the law of England is capital, and attempts to murder, although no bodily injury be effected, are punishable with transportation for life as the maximum.

387. We find Mr. Hudleston alone objecting generally to the rules regarding wrongful restraint and wrongful confinement contained in Clauses 330 to 339. He says—"This part of the Code appears to me to be 'over-legislation.' The illustrations are remarkable for perverted ingenuity 'not unfrequently displayed in this work.' Referring to the explanations under Clause 330 and to the illustration (d) he observes, that 'voluntarily causing a man to believe a dog savage, who is not savage, and

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"threatening to set him at the said man, so preventing the man from going along a path, does not appear a very simple description of wrongful restraint." "To the Clauses which follow to 338 inclusive," he adds "I prefer the English law of false imprisonment."

Russell 1, p. 606.

388. It is to be wished that Mr. Hudleston had explained what he understood to be the English law on this point, and in what respect he preferred it. It seems that in the administration of the law of England the forcible detention of a person in the street is held to be *imprisonment*. Does Mr. Hudleston think it better that there should be a necessity for such a forced construction to bring the wrongful detention of a man under the law, than that there should be a distinct provision for that offence and another provision for the more aggravated offence of wrongful confinement? Mr. Hudleston objects to the Code in some places as giving to words a meaning not their own; on this ground he surely ought to object to the English law in the instance here given, for saying that to detain a man forcibly in the street is to *imprison* him. Clause 330 of the Code lays it down that to prevent a person from proceeding in any direction in which he has a right to proceed, that is, for example, to detain him forcibly in the street, is wrongful restraint, while wrongful confinement, obviously an aggravated form of wrongful restraint, is by Clause 331 defined to be preventing a "person from proceeding beyond certain circumscribing limits," or, as it is explained in the note, "keeping a man within limits out of which he wishes to go and has a right to go."

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389. Mr. Hudleston does not expressly object to the explanation subjoined to Clause 330, though he says of the example by which it is illustrated that it is not a very simple description of wrongful restraint. Let us take another example. Suppose that A presents a pistol at Z and threatens to fire at him if he goes in a certain direction in which he has a right to go, and thereby prevents him from going in that direction. Would Mr. Hudleston say that A does not wrongfully restrain Z, though in truth the pistol is not loaded?

390. Mr. Greenhill proposes a verbal alteration in Clause 334, that is, to substitute the definite words, "and less than ten days," instead of "or more," with reference to Clause 335, which provides for a confinement extending to ten days or more. As Clause 334 is obviously intended to apply to cases of confinement for three or more days less than ten, it may be as well to express this distinctly.

391. Upon Clause 335, which provides that confinement aggravated by duration for ten days or more, shall be punished with imprisonment

for a term which may extend to three years with additional imprisonment of from one to three days for every day of such wrongful confinement, Sir H. Seton questions the principle on which the punishment is enhanced, observing that retaliatory punishment is a relique of barbarism, and has always the appearance of vindictiveness. The remark applies equally to Clauses 336 and 337.

392. We admit the objection in general; but in these cases, while the punishment is enhanced according to the duration which constitutes the aggravation, "we have attempted to frame the law on this subject," say the Commissioners, "in such a manner as to give the offender a strong motive for abridging the detention of his prisoner."

393. One cannot conceive of a wrongful confinement continued for ten days or more without deliberation and reflection and a special regard to the penal consequences, and when a man sees that by persisting in his offence he is every day becoming liable to a certain additional punishment, the motive to set his prisoner free will grow stronger daily. This reason we think obviates the general objection in these instances.

394. The other aggravations are when a person persists in wrongfully confining another notwithstanding a writ has been issued for his liberation; and when the confinement is for the purpose of extortion. The special provisions for these aggravated cases appear to us to be proper, except in prescribing a minimum of punishment. We would not fetter the discretion of the Judge further than by fixing the maximum in the three Clauses 335 to 337. The punishment for imprisonment according to the Digest of the law of England is imprisonment for any term not exceeding three years, or fine at discretion, or both. In the aggravated cases of confinement provided for by Clauses 335 to 337, imprisonment is prescribed peremptorily and fine may be added at discretion.

Clause 336.

337.

395. With reference to Clause 338, the Commissioners say, "We have also provided a separate punishment for a person who while detaining another in wrongful confinement omits to supply his prisoner with every thing necessary to health, ease, and comfort." The Clause more definitely says, with any thing he knows to be "necessary to prevent the person confined from being in danger of death or hurt." The punishment is imprisonment for a term which may extend to one year, or fine, or both. We understand that the offender may be sentenced to punishment under this Clause, and also for the offence of wrongful confinement under one or other of the Clauses relating thereto. Here are two offences committed not by doing one thing, but by an illegal act and

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an illegal omission distinct from each other and each constituting a distinct offence, and therefore not within the scope of Clause 58, which at first sight may appear to apply. It is said in the Note that "the effect of this provision is that a person who wrongfully confines another will be answerable for any bodily hurt which he may cause by wrongfully omitting so to supply his prisoners." It would seem rather that he is made answerable for any hurt which his omission is likely to cause, though such hurt may not be caused. The illustration intimates that if hurt is caused the offender will be liable to punishment for the hurt in addition, as we understand, to the punishment for the confinement, the punishment for the omission under Clause 338 merging therein.

OF ASSAULT.
Note M. p. 71

396. In their Note upon the provisions regarding Assault the authors of the Code say, "We have found great difficulty in giving a definition of assault, and are by no means satisfied with that which we now offer. As, however, it at present appears to us to include all that we mean to include, and to exclude all that we mean to exclude, we have adopted it in spite of the objections which we feel to its harsh and quaint phraseology. We have adopted it with the less scruple because we trust the illustrations will render it intelligible to an attentive reader."

397. The definition of assault is contained in Clause 340 as follows: "Whoever intentionally uses force, or attempts to use force to any person, without that person's consent, in order to the committing of any offence, or intending or knowing it to be likely that by such use of force he may cause to the person to whom the force is used injury, fear, or annoyance, is said to commit an assault."

Chapter XV. Sec. 5, Art.
48.

Art. 43.

Notes p. 71. See also p.
67.

398. The definition of assault in the Digest of the English Criminal law runs thus: "An assault consists in an attempt or offer, by a person having present ability, with force to do any hurt or violence to the person of another." The definition in the Code appears to include what is termed "Battery" in the English law, which is defined in the Digest to be "any the least hurt or violence unlawfully and wilfully or culpably done to the person of another." The Commissioners remark that "a large proportion of the acts designated as assaults will be offences under the heads of hurt and restraint. But there will be many assaults which it is absolutely necessary to punish, yet which cause neither bodily hurt nor unlawful restraint." To cover these offences, the definition is necessarily framed in terms which include the former also.

399. Where there is real hurt the charge we may suppose will be laid usually under the more appropriate head.

400. It is not we apprehend to the definition of assault in Clause 340 that the observations above quoted as to the harshness and quaintness of the phraseology apply, but to the elaborate explanation given in the preceding Clause 339 of what is meant by the essential words "uses force" in that definition.

401. There is no such explanation in the Digest of the English Criminal law. But Mr. Livingstone thought it necessary in giving his definitions of assault and battery, which he observes do not materially differ from those contained in the English law, to explain, both by definition and illustration, what is meant by the term "violence" which he uses instead of force.

402. Upon the explanation in Clause 339 of this Code, Sir H. Seton suggests for consideration, "whether the meaning of actual force might not be left to common sense, and constructive force only defined." Mr. Hudleston says he "cannot bring himself to believe that a definition so artificial as this will be adopted in preference to the sort of definition of assault and battery used in the law of England." "For the sake of maintaining 'literal truth,' in which it might be questioned whether or not the Law Commissioners have succeeded, common sense appears to me to be sacrificed." "It would require an Army of Magistrates to dispose of the complaints invited as it were by the illustrations to Clause 340, which moreover seem below the dignity of law." Mr. A. D. Campbell, colleague of Mr. Hudleston, dissents from the latter remarks, but concurs in the former.

403. In defining the term "violence," Mr. Livingstone uses the words "physical force," as words intelligible by themselves. He explains that "by violence is meant any physical force applied either immediately by any part of the body of the person using it, or by the instrumentality or intervention of any other matter, whether animate or inanimate, and it comes within the definition (of battery) whether the violence be produced by secondary means intentionally prepared by the offender, or be caused by his immediate act." This explanation is followed by illustrations exemplifying each of the modes of applying physical force.

404. It appears to us that it is unnecessary to define what is meant by using force directly, and that all that is required is to define the mode in which force may be used indirectly. We think therefore that Clause 339 may be omitted, and that it will be sufficient to subjoin to Clause 340 a simple explanation that a person may use force to another within

the meaning of the definition, not only by his bodily power directly affecting or acting upon that other person, but by means of any person, or of any animal, or of any inanimate substance, disposed or moved by him so as to affect or act upon that other person.

405. Illustrations may be given to exemplify force used by the instrumentality or intervention of other persons, or of animals or inanimate substances. In some of the cases there may be hurt, in others not, but this makes no difference. And although the party intended to be affected may not be affected, yet under the definition the attempt will be sufficient to constitute assault if it was made in order to the committing of any offence, or with the intention of causing or the knowledge that it was likely to cause injury, fear, or annoyance to the person against whom the attempt was aimed.

406. Upon Clause 341 which defines what it is "to make shew of assault," Mr. J. F. Thomas makes the following observations, in which Mr. W. Hudleston and Mr. A. D. Campbell express their concurrence. "It deserves, I conceive, much consideration whether this enactment is adapted to the existing state of society; unless some special damage, or injury has been sustained, in consequence of this shew of assault, it would be better to leave such acts unpunished, than to open so wide a door, as this Clause must, to frivolous and vexatious accusations."

"Every bazar fracas, where the parties are loud and angry, is accompanied with abundant gestures and shew of assault, but it appears to me nevertheless, on principles of general policy, inexpedient to encourage a resort to the Criminal Courts in these and similar cases, unless some special hurt or injury has ensued. If a party is of that rank and estimation in society, that any preparation or shew of assault degrades him, he may have his remedy by civil action. This I am inclined to believe a better course, than to make the act of shew of assault, as it now is, in all cases a crime."

407. What is here classed as a distinct offence less than assault, amounts to assault by the law of England, as laid down by Russell, "Drawing a sword or bayonet, or even holding up a fist in a menacing manner, &c. &c. at a person who is within reach, or any other similar act, accompanied with such circumstances as denote at the time an intention coupled with a present ability of using actual violence against the person of another, will amount to an assault."

Russell 1, p. 604.

408. The explanation subjoined to Clause 341 intimating that mere words do not amount to a shew of assault is conformable to the law of England. And we conceive that the further intimation that words may however be taken as circumstances giving a meaning to the gesture or act which they accompany, so as to make it amount to shew of assault, is also consonant to the English law.

409. Mr. W. Hudleston says, "I do not perceive why special provision for 'assault' should be made in Clauses 343 to 345 inclusive," viz. in attempting to murder, to commit the offence of kidnapping, and to cause grievous hurt. An answer is supplied by his colleague Mr. A. D. Campbell—"I deem 343 to 345 necessary in cases where proof may be forthcoming to nothing but the 'assault' accompanied by attempt to commit the specified crimes." He should have said, and perhaps he meant, where the attempt in fact was not carried beyond the assault. An attempt at murder carried beyond assault to such a length as the offender contemplates as sufficient to cause death falls under Clause 308. The punishment is the same in both cases, on the principle that "where the murderous intention is made out the severity of the hurt inflicted is not a circumstance which ought to be considered in apportioning the punishment."

Note p. 69.

410. By Clause 346 an assault on a woman in an attempt to commit rape on her, is punishable with imprisonment of either description for a term which may extend to three years, and must not be less than six months, and fine at discretion. The Sudder Court for the North Western Provinces are of opinion that if this Clause contemplates provision for all acts short of penetration, the punishment is inadequate. Mr. W. Hudleston observes that in many cases seven or fourteen years would not be excessive, to which Mr. A. D. Campbell assents. We apprehend that in the law of England this offence falls under the general head of "an assault with intent to commit a felony," which is punishable by fine and imprisonment. By the Article in the Digest which provides for such an assault it is declared to be punishable with imprisonment not exceeding two years, or fine at discretion, or both. But another Article provides that whosoever shall attempt to commit a felony by any assault, &c. done with the immediate intent to accomplish the criminal object, shall, though he fail in such attempt, be liable to imprisonment for any term not exceeding three years, or fine at discretion, or both. This, which probably would be applied to the case in question, it will be observed, agrees with Clause 346 of the Code, except that by the latter the imprisonment is not to be less than six months.

Art. 49, Sec. 5, Chapter XV.

Art. 8, Chapter XXII.

* Note M. p. 71.

411. It is observed in the Note that severe punishments are provided for assault when it is committed with intention of dishonoring the sufferer, or when it is an outrage to female modesty. Clause 347 applies to an assault of the latter description, and Clause 348 to one of the former description. The punishment is imprisonment not exceeding two years, or fine, or both. The law of England appears not to provide for such assaults specially.* But they are specially provided for in Mr. Livingstone's Code. The punishment denounced therein for the former offence is imprisonment not exceeding one year or less than two months, and fine not exceeding 2,000 Dollars nor less than 200, and for the latter double the punishment assigned to the species of assault that is committed, but with a proviso that the fine shall not be less than 200 Dollars, nor the imprisonment less than sixty days.

412. Mr. W. Hudleston thinks that these Clauses, and the rest to 352 inclusive, "might advantageously be omitted," while Mr. A. D. Campbell on the contrary deems the distinctions made by them judicious and proper.

413. Sir H. Seton questions the use of so vague a term as "dishonor" in a Criminal Code. Mr. Greenhill observes, "To dishonor does not appear sufficiently definite, and if intended to apply to mere insult, such as pulling a man's nose or laying a whip across his shoulders, the punishment seems disproportionate to the penalties of the preceding Clauses." Mr. E. Monckton remarks that it would be an outrage to the modesty of one woman to do to her what would be thought nothing of by another. A kiss that would be highly resented by a lady might be no affront to the maid. He thinks illustrations would be useful.

414. When it is considered that such an insult as that mentioned by Mr. Greenhill will, by reason of the provocation arising from it, extenuate the act of killing the offender by the person insulted so as to make him guilty of manslaughter instead of murder, it may be thought fitting to visit it with a severe punishment. The same reason applies to assault outraging the modesty of a woman, "such an assault, (for example) as called forth the memorable blow of Wat Tyler."

415. There is a sufficient discretion allowed as to the extent of punishment to admit of a due regard being paid to variety of condition and circumstances, making the same act less offensive to one person than to another.

Clause 349.

416. An assault in attempting to commit a theft of property which a person is actually wearing or carrying is punishable by imprisonment

of either description which may extend to two years, or 2-3ds of the term of imprisonment which may be inflicted for the offence of theft, but in the latter case the imprisonment is to be rigorous. An assault in attempting wrongfully to confine a person is punishable by imprisonment of either description which may extend to one year, with fine limited to 1,000 Rupees. The Sudder Court, North Western Provinces, say they do not perceive why the punishment for the latter offence should be less than that for assault in an attempt to steal according to Clause 349. They appear to have overlooked that the punishment in Clause 349 exceeds that provided for "wrongful confinement." The punishment for assault in attempting to confine wrongfully is the same as for wrongful confinement.

Clause 350.

Clause 333.

417. Mr. G. W. Bacon suggests that confinement and assault to confine, under false pretence of lunacy, ought to be particularly noticed and severely punished. It does not appear to us that it is necessary to distinguish such cases. The maximum punishments authorized may be considered sufficient to meet the aggravation mentioned by Mr. Bacon.

418. Assault upon grave and sudden provocation is not wholly excused, but the punishment is limited to imprisonment for one month as the maximum, or a fine not exceeding 200 Rupees, or both. "Shew of assault" is liable to the same punishment.

Clause 351.

Clause 352.

419. Of kidnapping the Commissioners observe, "The crime consists, according to our definition of it, in conveying a person without his consent, or the consent of some person legally authorized to consent on his behalf, or with such consent obtained by deception, out of the protection of the law, or of those whom the law has appointed his guardians." "This offence may be committed on a child by removing that child out of the keeping of its lawful guardian or guardians. On a grown man it can only be committed by conveying him beyond the limits of the Company's Territories, or by receiving him on board of a ship for that purpose." These definitions are contained in Clauses 353 and 354.

OF KIDNAPPING.
Note M. p. 72.

420. The punishment for simple kidnapping is imprisonment of either description not exceeding seven years and not less than one year, also fine.

Clause 355.

421. The punishment is enhanced in cases in which the kidnapping is committed with murderous* intentions, or with the intention of inflicting grievous bodily hurt, or of reducing the sufferer to slavery, or for the purpose of rape, or of unnatural lust.†

* 356. Transportation or rigorous imprisonment for life or imprisonment for not less than seven years, also fine.
† 357. Imprisonment of either description not exceeding fourteen and not less than two years, also fine.

422. The offence of child-stealing simply by the law of England is punishable with transportation for seven years, or imprisonment not exceeding two years, proposed in the Digest to be extended to three years. The child must be under the age of ten years. The age specified in the Code is twelve years.

423. Upon the provisions in the Code regarding this offence, Mr. Pyne makes the following remarks: "Kidnapping is a crime so injurious to society under either of the definitions given in Clause 353, but more particularly from the Territories of the East India Company, that I am inclined to think the punishment here provided is too mild for the magnitude of the offence, the object of which may be perpetual imprisonment, an aggravation of crime unprovided for. The facility with which persons may be made away with without exciting observation among their relations or the police has been lamentably exemplified in the recent discovery of Thuggee, and once across the boundary of the British Territory the succour of the law will rarely be extended to them."

"With reference to kidnapping being made for the purpose, or liable to the consequence of subjecting the person to unnatural lust, the utmost penalty of the law, short of capital punishment, does not appear to me too rigorous for the offence—the punishment provided in Clause 362 is, I am of opinion, both as to its minimum and maximum proportions more appropriate than the limited period of imprisonment set forth in this Clause."

424. The Sudder Court, North Western Provinces, propose to add to Clause 357 the words "or the dedicating that person to prostitution." They observe that "cases are of common occurrence in this country in which children are left at fairs, or abandoned in times of famine and distress, and provision is required for the punishment of persons appropriating such children with evil intentions."

425. We are not prepared to advise any alteration of the punishments proposed in the Code.

426. It seems to us to be worthy of consideration whether the definition of kidnapping a child may not be enlarged, so as to include the illegal taking and detaining of a child not *actually* in the keeping of his lawful guardian at the time of such taking, for example, a child who has strayed and been left behind at a fair, still more a child whose parents have been murdered in order that the murderers may obtain possession of the child.

Vide Extract from Major Sleeman's Report on Megapunnais at p. 347.
Report of Indian Law Commissioners on Slavery in India.

427. While we think with the Sudder Court, North Western Provinces, that it is a serious aggravation of kidnapping when it is committed with the intention of devoting a child to prostitution, yet we do not conceive it to be necessary to provide for that aggravation specially, considering that the offence may be punished under Clause 355 with imprisonment extending to seven years, and fine at discretion, which we deem to be sufficient.

428. It is explained that Clause 358 was intended for the punishment of persons exporting laborers by Sea from the Company's Territories, in contravention of the Act recently passed on that subject. The Act referred to must have been V. of 1837, afterwards repealed. The Acts on this subject at present in force are XV. of 1842 and XXI. of 1843 for the Island of Mauritius, and XXI. of 1844 for Jamaica, &c.

429. It seems to us that if provision is to be made in this Code for the punishment of acts contravening the said laws, it should be in exact correspondence with what is therein enacted on the subject, and this would be best done by adopting in the Code, with such verbal alterations as may be necessary in order to uniformity of expression, the definitions of the offences and the penalties to be inflicted contained in Sections IX., X. and XIII. of Act XV. of 1842, with which those contained in Sections X., XI. and XIV. of Act XXI. of 1844 are identical.

430. We have now to notice the suggestion of Colonel Sleeman to introduce in this place a declaration that the right of parents over their children does not extend to the disposing of them by sale, and provisions for the punishment of persons who shall sell or buy human beings within the Company's Territories, or shall import human beings into the Company's Territories for sale.

Letter to Secy. to Govt. of India, dated 18th February 1840, and Notes of Colonel Sleeman upon the Penal Code.

431. The Law Commissioners had this suggestion under consideration in preparing their Report upon Slavery in India.

Letter from Secy. to Govt. of India, dated 9th March 1840, enclosing an extract from the above letter, dated 18th February 1840.

432. The subject is treated in the portion of that Report entitled "Observations," p. 345 to 353. The recommendations of the Commissioners in which they were unanimous, are stated at p. 365-6. We quote the following remarks from p. 353:—

"The prohibitory part of our recommendations is in conformity, it will be seen, with those which Major Sleeman has made upon the same subject. But in the permissive part we have ventured to go beyond what he thinks expedient. He dreads the consequences of allowing contracts for the services of infants terminating at the age of maturity."

“ ‘Who shall say’ he asks ‘into what hands or into what country such
 “ ‘children shall be transferred before that time comes?’ ”

“ This is undoubtedly an evil to be guarded against, but we think
 “ that the system of registration which we recommend may be so orga-
 “ nized as to accomplish that purpose. We have the high authority of
 “ Major Sleeman himself for asserting that in seasons of calamity the
 “ permission to purchase and sell children saves no doubt a great number
 “ from starvation. We could not therefore make up our minds to take
 “ away altogether this resource from the starving poor, unless we were
 “ prepared to suggest some other. But we are afraid that it would not
 “ be possible in this country to set up any tolerably safe and economical
 “ machinery for the distribution of public charity. We therefore propose
 “ to permit these apprenticeships.”

433. It was proposed to declare it to be lawful for the parents or
 guardians of minors to apprentice them till majority, or for any shorter
 period, and to punish any other person who should pretend to apprentice
 or sell a minor, and any person who should purchase or receive as an
 apprentice any minor from any person whom he had not good reason to
 believe to be the parent or guardian of such minor, and any person having in
 his possession one or more minors with the intention of selling or apprentic-
 ing them, not being the parent or guardian of such minors.

434. The views of the authors of the Penal Code on the subject of
 Slavery are stated in Note B, p. 22 to 25. By Section IV. Act V. of
 1843 it is enacted, according to their opinion, that any act which would
 be a penal offence if done to a free man, shall be equally an offence if
 done to any person on the pretext of his being in a condition of slavery.

435. The private sale of a free person for the purpose of being
 dealt with as a slave is not prohibited by this law, but as under Sec-
 tion IV. of the Act no person so sold could be dealt with as a slave
 against his will, it amounts to a virtual prohibition, which may be effec-
 tual as regards adults who can avail themselves of the protection of the
 law, without any further provision.

436. But with respect to children a further provision appears to
 be requisite. We think it should be made penal to sell or purchase a
 child under any circumstances.

437. The existing law of Bombay makes it an offence to sell a
 child under ten years of age, although already in a state of slavery, and

to sell a free child of any age into slavery, except in time of famine; in
 the case of a free child the power of selling in such an emergency is con-
 fined to the parent.

438. We think that the sale of children by their parents, even in
 time of famine, should be prohibited. It does not appear to us to be
 right to permit it for the sake of the parents, that is, to enable the
 parents to get something for themselves besides being relieved from the
 burden of supporting the child, and it appears to be unnecessary for the
 sake of the child in order to save it from starvation, for we apprehend
 that it will not be more difficult to find a person willing to take the
 charge of a child in such extremity where nothing is to be paid to the
 parents, than to find one to purchase it for a price. The latter would
 have no greater power to retain the child in his service than the former.

439. We do not find any objections to the definition of rape ex-
 cept with regard to the 3d and 4th descriptions.

OF RAPE.
 Clause 359.

440. The 3d description of rape is when it is committed with the
 consent of the woman, but “ when her consent has been obtained by put-
 ting her in fear of death or of hurt.” Mr. A. D. Campbell and Mr. Pyne
 recommend that the words “ or of hurt” be omitted, on the ground, as
 stated by Mr. Pyne, that “ when the fear of the most trivial hurt pro-
 “ duces consent, the woman’s reluctance or chastity cannot be over great
 “ or rigid.” Mr. D. Greenhill proposes the words “ grievous hurt” in-
 stead of “ hurt.” We concur in this suggestion. The words of the English
 law on this point as given in the Digest are “ grievous bodily harm.”

Art. 21, Sec. 5, Chapter
 15.

441. The 4th description of rape is when it is committed with the
 consent of the woman, but “ when the man knows that her consent is
 “ given because she believes that he is a different man to whom she is or
 “ believes herself to be married.”

442. Mr. J. F. Thomas suggests that this protection should not be
 restricted to the case of *married* women alone. He thinks that slave
 girls and other women, who from the institutions of the country may
 not be married, but who cohabit with one man, and whose children are
 recognized as his by the father, are equally entitled to protection; he
 proposes to add after the words “ to whom she is or believes herself to
 be married” the words “ or with whom she cohabits.”

443. We rather incline to the opinion of Mr. Thomas that it is
 desirable to give to females in the circumstances which he indicates the

same protection in the case in question as is given to married women; but an obvious objection to such an extension of the provision is that it would give occasion to a troublesome collateral inquiry, likely sometimes to be turned into a trial of the complainant's conduct. Should the suggestion of Mr. Thomas be adopted we think it would be advisable to subjoin to the words, "or with whom she cohabits," the words following, "in such a manner that children born of her during the cohabitation will be entitled by the law of the parties to claim a maintenance from him," or words to that effect.

444. Again Mr. Thomas objects to the "exception which declares that sexual intercourse by a man with his own wife is in no case rape." He says "I doubt the propriety of this exception. The early age at which children are married and are in the eye of the law wives, makes it necessary that protection should be given to them by the law till they are of age to reside with their husbands. I remember a case of forcible violation and great injury to a child where the offender was the husband." Mr. Hudleston and Mr. A. D. Campbell concur with Mr. Thomas.

445. Although marriages are commonly contracted among Mahomedans and Hindoos before the age of puberty on the part of the female, yet usually the bride remains in the house of her parents till she is of a fit age for the consummation of the marriage, and it may be fairly presumed that the parents, her natural guardians, will in general take care to prevent abuse in this respect. There may however be cases in which the check of the law may be necessary to restrain men from taking advantage of their marital right prematurely. To meet such cases it may be advisable to exclude from the exception cases in which the wife is under nine years of age. Instances of abuse by the husband in such cases will then fall under the 5th description of rape.

446. We may observe that by the Statute 9 Geo. IV. Cap. 74 which governs the administration of Criminal Justice by Her Majesty's Courts in India, the age under which the carnal knowledge of a girl is a crime of the same degree with rape, is eight years; by the law in force in England it is ten years.

447. By the law at present in force in England the punishment for the crime last mentioned as well as for rape is transportation for life: by the Statute for India the punishment for both is death. The punishment prescribed by the Code is imprisonment not exceeding fourteen years and not less than two years, with fine in addition at the discretion of the Court.

Sections 64 and 65.
Clause 360.

448. Mr. J. F. Thomas thinks that both the maximum and minimum are fixed too low by the Code. He observes that "it would not be rare to find women of caste by whom death would be considered a less evil than the violation of their persons by some low caste fellow. In a society so constituted the offence of rape should be visitable with the higher penalty of imprisonment for life." "I can perceive," he proceeds to say, "no good reason for so low a penalty as two years. If rape at all it must merit a higher penalty. This large range of two to fourteen years in the case of an offence not capable scarcely of degrees, for either there was or there was not a forcible violation, goes rather to meet cases of doubt as to the fact than degrees in the offence. If the fact of forcible violation was fully established I can perceive no ground, even if the woman was without character, for lessening the security of person. If not established then there was no rape, and let it be dealt with as an assault if it be thought proper, or acquittal is preferable if there is the slightest doubt of the fact." Mr. A. D. Campbell agrees with Mr. Thomas; Mr. Hudleston is of opinion that the punishment should not be less than imprisonment for seven years.

449. We cannot admit that this offence is not capable of degrees. Mr. Thomas has himself suggested cases differing very greatly in degree. On the one hand let us take the case of the chaste high caste female, who would sacrifice her life to save her honor, contaminated by the forcible embrace of a man of low caste, or of one who is below caste, say a Chandala or a Pariah. On the other hand that of the woman without character, or any pretension to purity, who is wont to be easy of access. In the latter case if the woman, from any motive, refuses to comply with the solicitation of a man and is forced by him, the offender ought to be punished; but surely the injury is infinitely less in this instance than in the former.

450. The punishment at present inflicted by the Company's Courts is ordinarily limited to imprisonment for seven years, and we suppose that in the worst cases the term of fourteen years is not exceeded. We think it advisable to allow the wide discretion permitted by the Code.

451. The Law Commissioners observe that Clauses 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said. They therefore leave the provisions proposed therein without comment to the judgment of the Governor General in Council. Mr. A. D. Campbell in concurrence with Mr. Blane censures the false delicacy which has in their opinion caused a most improper ambiguity in these Clauses, leaving it uncertain whether they

UNNATURAL OFFENCES.

apply to mere indecent liberties, or extend to the actual commission of an offence of the nature indicated.

452. It appears to us clear enough that it was meant to strike at the root of the offence by making the first act tending to it liable to the same punishment, if the Judge shall deem it proper, as the offence actually accomplished. This is a new principle, and it would have been better if the Commissioners had explained for what reason they adopted it, in respect to the offences here contemplated in particular. We conceive that there is a very weighty objection to the Clauses in question, in the opening which they will afford to calumny, if for an act so slight as may come within the meaning of the word "touches," a man may be exposed to such a revolting charge and suffer the ignominy of a public trial upon it.

453. Colonel Sleeman advises the omission of both these Clauses, deeming it most expedient to leave offences against nature silently to the odium of society. It may give weight to this suggestion to remark that the existing law on the subject is almost a dead letter, as appears from the fact that in three years only six cases came before the Nizamut Adawlut at Calcutta, although it is but too true we fear that the frequency of the abominable offences in question "remains," as Mr. A. D. Campbell expresses it, "a horrid stain upon the land."

No. 7. 454. Mr. Livingstone, we observe, makes no mention of offences of this nature in his Code for Louisiana, and they are omitted in the revised Statutes of Massachusetts, of which the Chapter "of offences against the lives and persons of individuals" is appended to the 2d Report of the English Criminal Law Commissioners. By the French Penal Code offences of this description do not come within the scope of the law unless they are effected or attempted by violence, except the sufferer be under the age of ten years.

Art. 332.
231.

455. The English Law Commissioners stated in their 2d Report that it was their intention to enter upon the consideration of the laws relating to offences of this description, but in their 4th Report they observed that as the mitigation of capital punishment had since the 2d Report was made been maturely considered by Parliament without leading to any alteration of the law relating to these offences, they for the present thought it unnecessary to make remarks upon them, and it does not appear that they afterwards resumed the subject.

CHAPTER XIX.

OF OFFENCES AGAINST PROPERTY.

456. In their Note upon this Chapter the authors of the Code advert to the peculiar difficulties that oppose the efforts of the Legislator to define with clearness and precision the offences which are the subject of it. "The offences defined in this Chapter," they observe, "are made punishable on the ground that they are violations of the right of property. But the right of property is itself the creature of the law. It is evident, therefore, that if the substantive Civil law touching this right be imperfect and obscure, the Penal law which is auxiliary to that substantive law, and of which the object is to add a sanction to that substantive law, must partake of the imperfection or obscurity. It is impossible for us to be certain that we have made proper penal provisions for violations of civil rights till we have a complete knowledge of all civil rights; and this we cannot have while the law respecting those rights is either obscure or unsettled. As the present state of the Civil law causes perplexity to the Legislator in framing the Penal Code, so it will occasionally cause perplexity to the Judges in administering that Code. If it be matter of doubt what things are the subject of a certain right, in whom that right resides, and to what that right extends, it must also be matter of doubt whether that right has or has not been violated."

Note N.

Page 73.

"It would, evidently," they continue, "be impossible for us to determine in the Penal Code all the momentous questions of civil right which in the unsettled state of Indian jurisprudence will admit of dispute. We have, indeed, ventured to take for granted in our illustrations many things which properly belong to the domain of the Civil law, because, without doing so, it would have been impossible for us to explain our meaning. But we have, to the best of our judgment, avoided questions respecting which, even in the present state of Indian jurisprudence, much doubt could exist. And in the text of the law we have, as closely as was possible, confined ourselves to what is in strictness the duty of persons engaged in framing a Penal Code. We have provided punishment for the infraction of rights, without determining in whom those rights vest, or to what those rights extend. We are inclined to hope that even if the Penal Code should come into operation before the Code of Civil rights has been framed, the number

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"of cases in which the want of a Code of Civil rights would occasion perplexity to the criminal tribunals will bear but a very small proportion to those in which no such perplexity will exist."

"All the violations of property proposed to be made punishable by this Chapter," it is remarked, "fall under one or more of the following heads:—

- " 1. Theft.
- " 2. Extortion.
- " 3. Robbery.
- " 4. The criminal misappropriation of property not in possession.
- " 5. Criminal breach of trust.
- " 6. The receiving of stolen property.
- " 7. Cheating.
- " 8. Fraudulent Bankruptcy.
- " 9. Mischief.
- " 10. Criminal trespass."

457. The Commissioners observe that "all these offences resemble each other in this, that they cause, or have some tendency, directly or indirectly, to cause some party not to have such a dominion over property as that party is entitled by law to have."

458. They remark that "every offence against property may be fraudulently committed. But theft, extortion, robbery, the criminal misappropriation of property not in possession, criminal breach of trust, the receiving of stolen property, fraudulent bankruptcy, and cheating, must be in all cases fraudulently committed. Fraud enters into the definition of every one of these offences. But fraud does not enter into the definition of mischief, or of criminal trespass."

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459. After stating that they believe it to be impossible to mark with precision by any words the circumstances which constitute possession, and giving instances illustrative of the difficulty, the Commissioners say, "For the purpose of preventing any difference of opinion from arising in cases likely to occur very often, we have laid down a few rules (See Clauses 17, 18, 19) which we believe to be in accordance with the general sense of mankind as to what shall be held to constitute possession. But, in general, we leave it to the tribunals, without any direction, to determine whether particular property is at a particular time in the possession of a particular person, or not."

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460. The Chapter begins with the definition of "Theft." Between this head and that of "Robbery" is interposed the definition of "Extortion," an arrangement suited to the definition of "Robbery," in which it is declared that to constitute the offence so designated there must be either theft or extortion. Clause 363.
Clause 375.
Clause 368.

461. In theft, as it is defined in this Chapter, the object is to take property which is in the possession of a person out of that person's possession. This renders it necessary to introduce separate provisions under the head of "Criminal misappropriation of property not in possession," Clause 383. After this is the head of "Criminal breach of trust," Clause 386. Then that of "Receiving stolen property," Clause 389, which includes cases in which property is transferred by the last two offences as well as by theft and robbery. Last of the offences classed as fraudulent is "Cheating." Clause 363.

462. We have already noticed Mr. Norton's comment upon the definition of the term "fraudulently" in Clause 16, as including highway robberies among frauds.* Here with reference to the definition of theft in Clause 363, after offering a definition of his own, regarding which he says, "whether it be clearer than that in the Code, or whether it be more or less comprehensive than it ought to be, or than that in the Code, I shall not argue;" he adds, "it appears to me at all events that the ingredient of the crime expressed by the terms whoever *intending* to take *fraudulently* a thing which is *property*, moves that thing in order to such taking, is vague enough to lead to various constructions and to various difficulties in the way of proof." Mr. Norton's definition of course omits the term fraudulently. His objection to the use of this term is the more remarkable as he professes to follow the law of England, and it is employed in the more ancient definitions of theft or larceny according to that law, as well as in the modern work of Sir E. H. East, which, say the English Criminal Law Commissioners, "has in practice been very much used as a substitute for a Digest." In their 4th Report the English Criminal Law Commissioners proposed a general definition as follows: "A fraudulent intention to appropriate that which belongs to another is an ingredient common to the offences of OF THEFT.

- " Theft, including robbery;
- " Extortion by threats;
- " Obtaining by false pretences;
- " Cheating;
- " Embezzlement."

See also prefatory remarks, p. 52, 4th Report.

* Mr. A. Begbie makes remarks somewhat to the same effect, but apparently overlooking the definition in Clause 16.

• Bracton and Glanville, cited by Russell 2, p. 93.
Russell ut sup.

463. We subjoin for the sake of easy comparison the definitions of theft in the Code and in the Digest:

Indian Penal Code, Clause 363—"Whoever, intending to take fraudulently any thing which is property, and which is not attached to the earth, out of the possession of any person, without that person's consent, moves that thing in order to such taking is said to commit 'Theft.'"

7th Report.

Digest of the English Criminal Law, Chapter 18, Section 1, Article 1—

"Theft consists in,

"1st. A taking and removing of something;

"2nd. Being of the property of some other person and of some value;

"3rd. Without consent to transfer the right of property given by a person authorized so to consent, or notwithstanding consent so given, if such consent shall be obtained by intimidation;

"4th. And also without consent to part with the possession given by a person authorized so to consent, or, notwithstanding consent so given, if such consent shall be obtained by intimidation or fraud;

"5th. With intent to despoil the owner and fraudulently appropriate the thing taken and removed."

Clause 16.

464. In comparing these definitions, it is to be remembered, that to take fraudulently in the phraseology of the Code means to take a thing "with the intention of causing wrongful gain to one party by means of wrongful loss to another party."

465. According to the Code Penal, Article 369, "Quiconque a soustrait fraudulensement une chose qui ne lui appartient pas, est coupable de vol."

466. The following is Mr. Livingstone's definition, Article 645, "Theft is the fraudulently taking of corporal personal property, having some assignable value and belonging to another, from his possession, and without his assent."

467. "Explanations" and numerous "illustrations" are subjoined to the definition of theft in the Code, in order to explicate and elucidate as far as possible what is abstruse in it. So also the definition in the Digest is followed by expository Articles, which correspond in many points with the explanations in the Code.

468. In the Code for example in explanation of the words of the definition, "a thing not attached to the earth," it is declared that "a thing which is attached to the earth becomes capable of being the subject of theft as soon as it is severed from the earth," and again, "a moving effected by the same act which effects the severance may be a theft." In like manner in the Digest, after an explanation that the law of theft extends to all moveable property, it is declared that it extends "also to property severed from the realty, although it be severed at the time and for the purpose of taking and removing the same."

Art. 6, Sec. 1, Chapter XVIII.

469. Referring to the explanations in the Code Mr. Norton says, "the *moving* any thing *attached to the earth* in order to such taking (such a taking as is contemplated in the definition) and the mere *severing* it from the earth, are distinguished, the latter being a theft, and the former not, but that distinction seems to me peculiarly subtle, to say the least of it." Mr. Norton perhaps forgot that the distinction here noticed, by which a severance is necessary to make that a theft which else would not be a theft, is the rule of the English Criminal law in cases of ordinary theft of moveables, for though it be "well settled that the felony lies in the very first act of removing the property and therefore that the least removing of the thing taken from the place where it was before with an intent to steal it, is a sufficient asportation, though it be not quite carried away," yet there must be a *severance*. Thus "in a case where goods in a shop were tied to a string which was fastened by one end to the bottom of the counter, and a thief took up the goods and carried them to the door as far as the string would permit, and was there stopped, this was holden not to be a felony, because there was no severance."

Russell 2. p. 96.

470. The rule is different in regard to things *severed from the realty*. There must be a severance, but the severance and the *instant* taking of the thing severed do not constitute a theft. The following are the observations of the English Criminal Law Commissioners on this point: "We have already had occasion to observe upon the distinction which the law makes between mere moveables and adherents to the realty. This gives rise to the rule that one who severs property

4th Report p. 53.

"from the realty and forthwith carries it away, is not guilty of theft, but of a trespass only. This rule is, in many respects, opposed to reason and convenience, the more especially as it has been extended by means of a very fanciful doctrine to mere moveables, not because they are adherents to, but because they 'savour of the realty.' The effect of the rule has been to leave a considerable class of property without adequate protection from the Criminal law, and to induce the necessity of making many supplementary laws for partially remedying the defect. The rule itself is one of vague and indefinite operation, leaving it wholly uncertain what length of time must intervene between the severance and the taking to constitute the guilt of theft."

Art. 6, Sec. 1, Chapter XVIII.

471. The remedy proposed is to abolish the rule, and this is the object of the article we have quoted above, whereby the English law will be brought into conformity on this point with that proposed in the Code.

* See Art. 5, which explains that it is not essential that the thing taken "be completely freed from all impediment to further removal."

472. It is proposed also to abolish the rule as to severance in the case of moveables,* so that on this point likewise the Digest agrees with the Code.

First Report p. 9.

Vol. 4. p. 229.

Chapter XVIII.
Sec. 1, Art. 1.

4th Report p. 57.

473. The English Criminal Law Commissioners in their Digest of the Common law relating to theft as actually in force, adopted the definition given by Blackstone—"Theft is the felonious taking and carrying away of the personal goods of another." In the definition proposed in the Digest submitted in their 7th Report which we have transcribed above, they use the word "removing" instead of the phrase of "carrying away." This alteration is intended to obviate the necessity of an explanation that by "carrying away" is not meant what the words import, but "merely a removal to any distance, however small."

Art. 3.

Art. 4.

474. According to the explanation in the Digest the taking and removing together constitute the same thing as is expressed in the Code by the single word "moving," as that is illustrated by the examples subjoined to Clause 363. The "taking" of the Digest is comprehended in the "moving" of the Code. The taking is said to be the act by which the offender has such possession of the thing that he is enabled to remove it. The "removing" is the essential act. The one can scarcely be distinguished from the other, more particularly in the case of driving an animal, where there is in reality no taking, no actual *prehension* or laying hold of the subject of theft prior to its removal. The word "taking" therefore appears to be mere surplusage.

475. By Mr. Livingstone's Code, "Taking alone without carrying away is sufficient within the definition," and "taking may be either by a removal, or simply by laying hold upon the article."

Article 64:
Clause 6.
Clause 7.

476. Other alterations of the English law relating to theft, of considerable importance, are proposed by the Commissioners, particularly in respect of the *possession* of property the subject of theft. As it stands, the law, say the Commissioners, makes "possession by the proprietor essential to the offence," and it makes "a constructive possession by the proprietor sufficient to satisfy the rule, though it be contrary to the fact, and even although the offender had the actual possession by delivery from the proprietor."

4th Report p. 54.

477. The Commissioners consider the doctrine in respect of possession by the proprietor to be wrong in principle, and they show how the Courts of Criminal law have endeavored to escape from it and "to enlarge the boundaries of the law of theft by forced and subtle constructions, in order to reach offenders guilty of fraudulently appropriating goods entrusted to their possession." They argue that "in principle possession by the proprietor of the article stolen is not essential to the offence. For the essence of the offence is the fraudulent appropriation or attempt to appropriate that which belongs to another; and if the offender fraudulently take what belongs to another, it is immaterial, except for mere technical purposes, who had, or whether any one had actual possession of the property at the time of the taking, so as the offender himself had not possession." "It is only for the mere purpose of technical description that it is necessary in a prosecution for such an offence to state whose property was stolen; even this cannot be invariably required, in as much as it may frequently happen that although the guilt of the offender can clearly be proved, the owner cannot be discovered, and it would be absurd that an offender should derive impunity from a circumstance not essential to the offence. Such a description of the property is to be given where circumstances admit of it, as serves to particularize the offence, and afterwards identify it if need be; but it is obvious that for this purpose the naming the person from whose actual possession the property was taken, though he were not the owner, would as well, or even better serve the purpose intended, than if the owner himself were to be named."

Page 52.

Page 53.

478. The Commissioners propose "to make possession by the owner in all cases immaterial to the offence of theft, and to embrace at once, by a direct substantive law, offenders who having lawful possession of property, are guilty of fraudulent embezzlements;" and their definitions are framed according to this view.

Page 54.

479. It will be observed that the definition of theft in the Code does not render it necessary to ascribe the property to any person as owner; the person to be named is "the person from whose actual possession the property was taken" or attempted to be taken; the matter to be charged is that the offender intending to take fraudulently a particular thing which is property, that is to say a thing over which some person has a right of property, out of the possession of A. B. without the consent of A. B., moved that thing in order to such taking. In the Digest it is expressly declared that "theft may be committed by taking and removing the property of another although the actual owner be unknown." It appears to us that the definition in the Code with the separate provision for the fraudulent misappropriation of property *not in possession*, is likely to give rise to fewer difficulties in practice on the points in question than that which is proposed in the Digest.

480. Sir H. Seton considers that in Clause 363 "an attempt" has been made "to incorporate all the subtleties of the English law of larceny in a single definition," and thinks the propriety of the attempt questionable; as also "the adoption of that part of the law of England which converts the attempt to commit a theft into constructive theft," by the use of the words "moves that thing" in order to the taking thereof.

481. Mr. W. Hudleston observes that the definition describes "an attempt at that which is theft by the law of England," appearing not to be aware that such an attempt as the definition describes is, as Sir H. Seton remarks, constructive theft by that law. He says "I do not see any good reason for the alteration involving the abandonment of a definition to which the people of India have long been accustomed and perfectly understand, 'the felonious taking and carrying away the personal goods of another.'"

482. We know not how Mr. Hudleston conceives this definition to have been given to the *people of India*, or how it can be said that they have long been accustomed to it.

483. Mr. Hudleston proceeds to say, "The illustrations (a) and (b) are not instances of theft according to any Code that I have seen." With respect to the former illustration, which applies to the "Explanations" (2d and 3d) notifying that things attached to the earth by being severed become capable of being the subject of theft, and that a moving within the meaning of the definition may be effected by the act which severs, the instance being the cutting down a tree, we have shewn that by the Digest as well as by the Code, such a case will fall under theft.

484. With respect to the illustration (b) Mr. A. D. Campbell well observes, that Mr. Hudleston must have forgotten Lapier's case cited by Mr. Christian, the Editor of Blackstone, to shew that any the least removal of a thing is a sufficient "carrying away" within the definition given by Blackstone, or to use Mr. Campbell's words, is "with the stretch of language necessary to justice so usual with the English law quoted by him (Mr. H.), absurdly strained by it into the falsity of 'carrying away.'"

4 Blackstone, p. 231, Note of the Editor.

485. Mr. Hudleston again remarks of the illustration *m* that it is "questionable," of *u* that it is "absurd," *y* "bad," *z* "worse;" to which Mr. Campbell aptly replies, "these may be extreme cases, but I do not think they deserve the epithets he (Mr. H.) bestows on them,—they clearly explain the principle of the new law."

486. The Code differs from the Digest in the "explanation" that "a person may commit theft though he intends to restore the property after taking it," whereas by Article 30, Section 1, Chapter XVIII. of the Digest, it is declared that "it is not theft where the intent is to deprive the owner of the temporary possession only and not of his absolute property in the thing taken." Thus the intent expressed in the definition given in the Digest is "to despoil the owner and fraudulently appropriate the thing taken and removed;" while the intent expressed in the definition in the Code is merely to "take fraudulently," that is to say, to take with the purpose of causing wrongful gain to the party taking or some other, by means of wrongful loss to the party from whom the thing is taken, or by depriving him of the benefit which he would have enjoyed from it if it had not been taken from him.

487. This is illustrated by the following example: "A and Z are gardeners. Z has reared a pine-apple of extraordinary size, in hope of obtaining a prize. A takes the pine-apple without Z's consent, produces it before the judges as his own and obtains the prize. He then sends back the pine-apple to Z. Here, as A took the pine-apple fraudulently, A has committed theft, though he has restored the pine-apple." A is held guilty of theft because he took the pine-apple from Z with the fraudulent intention of gaining for himself a benefit which Z would have gained by it, if it had not been taken from him, or, in the words of the definition in Clause 16, "with the intention of causing a wrongful gain to himself by means of a wrongful loss to Z." Mr. Norton finds fault with this illustration on the ground that to construe such a *use* of an article as "theft," involves the meaning of the terms in the text, "intending to take fraudulently," in inexplicable confusion. We think that the illustration, though it is somewhat quaint, sufficiently serves the purpose

for which it was intended, and is necessary for that purpose, namely, to shew the application of the principle enunciated in the explanation just adverted to. But we are not agreed as to this principle. One of us is inclined to concur in the opinion of the authors of the Code, conceiving that when a man fraudulently takes and uses as his own, that which does not belong to him, thereby wrongfully depriving another person of the benefit to which he was lawfully entitled from the use thereof, and wrongfully gaining that benefit for himself, he does all that is essential to the offence of theft, and that it is immaterial whether the wrongful possession and wrongful privation be, or were intended to be, temporary or otherwise. The offender in such a case actually "deprives the owner" of the thing taken, and has and deals with it as his own property in "fraud of the owner," and with "intent to despoil him," to use the words of the Digest, (Chapter XVIII., Section 1, Article 27); and it seems to make no essential difference whether he meant to appropriate the thing permanently or not. The other of us is disposed to think that the English Criminal Law Commissioners are right in preserving the restriction which is expressed in the article of their Digest quoted above.

488. Objection has been taken to another illustration (*o*) under this Clause on the ground that the case stated is an attempt to get money by false pretences, or by "cheating" according to this Code, and not theft. The case is stated as follows:—"A takes an article belonging to Z out of Z's possession, without Z's consent, with the intention of carrying it back to Z and of pretending to have found it, in the hope of thus obtaining a reward from Z." This indeed seems to fall within the definition of cheating in Clause 392, viz. "Whoever by intentionally deceiving any person fraudulently induces the person so deceived to deliver any property to any person." Here A takes an article the property of Z out of his possession, and bringing it back intentionally deceives Z into the belief that he had found it, and thereby fraudulently induces Z to give him a reward. A cheats Z because Z is led to give the reward by A's false representation that he had done him a service—that there was a quid pro quo. But the case also falls within the definition of theft, because A takes the article fraudulently, that is with the intention of procuring a wrongful gain to himself by means of a wrongful loss to Z, namely, with the intention of fraudulently obtaining a reward from Z as for a service rendered to him which was not rendered.

489. Sir H. Seton observes with reference to the illustration (*w*), shewing how joint property may be taken fraudulently by one of the

joint proprietors from the other so as to be within the definition of theft, that "by the English law theft cannot be committed by a joint proprietor." This is true, except as provided in a late Statute, in the case of members of Banking Co-partnerships, as noted in Article 8, Section 1 and Section 8, Chapter XVIII. of the Digest. The principle of the exception here referred to we conceive to be the same as that which induced the Indian Law Commissioners to frame their definition of theft so as to include cases in which one of two or more joint proprietors fraudulently takes the common property out of the possession of the other or others, intending to appropriate it to his own sole use, or to sell it and appropriate the whole price. The Statute referred to applies when one member of a Co-partnership steals money, &c. belonging to the Co-partnership with intent to injure or defraud such Co-partnership.

490. Among the illustrations of theft in the Code are several, (*l*) (*m*) (*n*), in which the article stolen is the property of the person who commits the theft. By the law of England at present it is theft where the owner takes and carries away a chattel "with a design to despoil the person having lawful possession of it of all his interest therein by reason of such possession." "This rule," it is stated, "includes amongst others, cases where the owner steals from his own bailee, agent or servant, if either they or any other person would be liable to himself for the loss." We apprehend that the cases stated in the illustrations above-mentioned would be construed as theft by the law of England, because in each case the person who had possession would be regarded as vested with that special property under which the thing taken might be laid in the indictment as of the goods and chattels of such person. "A bailee, a pawnee, and the like," says Russell, "have such special property."

Digest of the Common Law relating to theft in the First Report of the Commissioners on Criminal Law, p. 16.

Russell 2, p. 155.

Russell 2, p. 157.

491. But the Criminal Law Commissioners propose to alter the law on this point, considering that "this is one instance among many of extending the law of theft beyond the proper limits for the sake of reaching an offender." Therefore in the Digest of the law of theft submitted in their 4th Report, they introduced an article declaring that "theft cannot be committed by one who is either the sole, or a joint, or a part owner of the thing taken."

4th Report, Note to Art. 22, p. 65.

Article 22, p. 65.

492. This is modified in the Digest submitted in the 7th Report, by omitting the words "the sole," retaining "a joint or a part owner." We do not conceive that any difference was intended by this omission, as the Commissioners refer without remark to the note to the article we have quoted from the Digest in the 4th Report, as explaining the new

Article 8, p. 244.

rule. We suppose it was thought to be perfectly clear that their definition of the offence did not admit of a charge of theft being brought against a person being the sole owner of the thing taken.

493. Under the definition in the Code, as the ownership does not come into question, it requires no straining to bring within its terms cases such as are exemplified in the illustrations (l) (m) (n); and we think that cases of the kind fall properly under the description of theft, as we find in them what is commonly recognized as the essential characteristic of that offence, namely, a fraudulent taking with intent to despoil, and it matters not, in our view, that the offender is the owner of the thing taken, if he took it fraudulently according to the hypothesis, with intent to despoil the possessor of the interest which he had by reason of his possession, or to cause wrongful loss to him and wrongful gain to himself by such taking.

Page 78. 494. The Commissioners explain in the Notes that they have not made it a part of their definition that the property taken should be of some assignable value, because of the general provision in Clause 73, by which they conceive that the same end is obtained by a different road.

Page 75. 495. Observing that the distinction between "theft," "criminal misappropriation," and "breach of trust," "becomes fainter and fainter as we approach the line of demarcation and at length the offences imperceptibly fade into each other," the Commissioners point to the provision contained in Clause 61 as calculated to obviate all the inconveniences which might arise from doubts as to the exact limits which separate them.

Page 77. Thus, if a case which is plainly theft comes before a Judge the offender will be punished as a thief. If it is plainly breach of trust the offender will be punished as guilty of breach of trust. If the case be one of those thefts which are hardly distinguishable from breaches of trust, or one of those which are hardly distinguishable from theft, the Judge will not trouble himself with subtle distinctions, but will proceed to sentence the offender under Clause 61 to a punishment common to the penal provisions between which the doubt lies.

496. This meets the objection of Mr. Norton to the illustration (f) under Clause 363, there presented as a case of theft, which Mr. Norton says is "to all intents and language" a case of "criminal breach of trust" as defined in Clause 386.

497. The reason why it is brought under "theft" is stated in the illustration, namely, that the plate of Z taken by his butler A, was still

in Z's possession, though also in A's possession. And another illustration is given to point out the difference between "theft" and "breach of trust" in circumstances nearly similar. (g.)

498. In the Digest of the English Law Commissioners there is an article containing a provision to the same effect as the illustration to which Mr. Norton excepts. Page 245, Art. 24. (f.)

499. The framers of the Code observe upon the offence defined in Clause 383, under the designation of "Criminal misappropriation of property not in possession," that it is one which it may be thought they ought to have placed among thefts:—"If we call it theft," they say, "we speak the popular language, if we call it misappropriation of property not in possession, we avoid an anomaly, and maintain a line which, in the great majority of cases, is reasonable and expedient. On the whole we are inclined to maintain this line."

500. Mr. Norton remarks—"It is quite impossible to calculate the limits to which arbitrary constructions may carry the provision of Clause 383, making it a crime *fraudulently* to take into a party's possession property in no person's possession, except he may be altogether ignorant of the superior claims of another person, or of the means of discovering him. It seems to me one of those Clauses suggested by the specific cases exemplified in the illustrations to the Clause." In another place he says, "Few I believe, will concede to the propriety of considering all property which may have been fraudulently taken into possession from no person's possession (except he may be ignorant of any other person's superior claim,) as 'stolen property,' (Clause 383) under whatever circumstances so fraudulently taken into possession." It is strange that Mr. Norton should refer to Clause 383 as treating property so taken into possession as "*stolen* property." To his other remarks we shall simply oppose the provisions in the Digest of the English Criminal Law Commissioners which regard cases of this description as falling under the law of theft. By Article 12, Section 1 of Chapter XVIII. under the general head of "*Fraudulent* appropriation," it is declared that "theft may be committed by the taking and removing of the property of another although the actual owner be unknown." By Article 14 it is declared that "where the taking is upon a finding or other casualty, the quality of the act depends on the intention of the party at the time, and it is not theft unless the party took and removed the property with intent to despoil the owner, and fraudulently to appropriate the thing taken, although such owner be unknown."

501. The aggravations of theft of a general nature expressly provided for, are 1st, when it is committed within any building, tent, or vessel, used as a human dwelling, or within any building used for the custody of property, in pursuance of a conspiracy in which a person residing or employed within, and one not residing nor employed within, are engaged; 2d, by a person having made preparation for causing death, or hurt, &c. There is a special provision also for theft on a letter or packet in the possession of an Officer of the Post Office.

502. It is remarked by Mr. A. D. Campbell, who expresses a general opinion that much contained in this Chapter is a great improvement on the English law, especially as regards the more correct definition of offences, and the discrimination of the various degrees of aggravation in the same offence, that it differs from the existing Regulations in not proportioning punishment in offences against property, with reference to the value of the property, and he concludes that this is because it contemplates sentence of restitution or fine equivalent to it, as part of the punishment. Other Officers remark the same difference and object to it as a defect, considering, as one of them expresses it, that it puts the thief of lacs and the thief of a few rupees for want, on the same footing. In making this objection the Officers last referred to appear to have overlooked the provision authorizing the imposition of a *fine without any limitation* of the amount *in addition to* imprisonment which may extend to three years.

503. Mr. W. Hudleston and Mr. W. Anderson are of opinion that the term of imprisonment ought to be extended. The latter suggests that the limit should be seven years, which is that which now obtains by the Regulations of Bengal and Madras in cases of theft to an amount exceeding 300 Rupees, and in the Presidency of Bombay in cases which, with reference to the amount stolen, fall under the head of "robbery."

504. It is to be observed that when theft is attended with any of the aggravations defined in Clauses 420 to 424, the punishment is cumulative, admitting of additional imprisonment for one year, two years, or three years, as the case may be.

505. Upon this arrangement Mr. Strange remarks that "whatever is gained by it in critical accuracy, in practice is risked by attempting to legislate separately for what in effect are integral crimes. To punish a common act of night burglary, besides making reference to definitions, recourse must be had to four different Clauses, three of which are far removed from the first (365,) and an account must be summed up,

* By Section 39 of this Regulation "thefts" are such "robberies" as from the *smallness of the amount stolen* and other reasons may be considered trivial.

"before it can be ascertained to what punishment the burglar may be sentenced." There is an appearance of difficulty as the case is here put, but we do not think it likely that there will be any real inconvenience in practice after the new way is once perfectly understood.

506. Referring to Clause 365, Mr. W. Hudleston says, "I agree with Mr. J. F. Thomas that a distinction ought to be made between houses of different descriptions." The following are the observations of Mr. Thomas: "Any building or tent used as a human dwelling, includes thousands of mud or bamboo huts, with nothing but a grass, or mat door—wholly insecure and unprotected. I think a distinction should be drawn between such dwellings, and others of greater solidity, and duly secured."

"Theft in the one by two or more persons, ought not to be subjected to long and severe imprisonment, unless the thieves are old offenders. I have known several criminal cases where two persons have committed theft of some trifling article in one of these insecure huts, where I should consider rigorous imprisonment uncalled for, especially in the case of females; and even a month's imprisonment ample for a first offence, in consequence of the manner in which the property has been left unguarded, tempting to the commission of the crime."

"I should limit the Clause to buildings used as human dwellings and for the custody of property, *well* and *properly* secured, and add an illustration, pointing out, that an open shed, or hut, with a grass or bamboo mat for a door, is not a building properly secured."

507. The Sudder Court, North Western Provinces, observe that as "tents or vessels" may be used for the custody of property, it does not appear why they are omitted after "building," in the second branch of this definition. They recommend that those words be inserted.

508. We observe that in the Draft of the Code first printed, the words were "any enclosed or covered place used as a human dwelling, or as a place for the custody of property," and in an "Explanation" of "enclosed and covered space" in a manuscript copy of the Draft in the office, and also written in pencil by the Secretary on the said printed copy, it is notified that "a tent, that part of a ship which lies under deck, and the cabins of a boat, are within the description." We have not found any note of the reason for the alteration in the revised Draft. We are inclined to think it would be better to insert "tent or vessel" after "building," in the second branch of the Clause as well as in the first, as suggested by the Sudder Court.

Bengal, 4 of 1820, Sec. 4.
Madras, 1 of 1825, Sec. 9.
Bombay, 14 of 1827, Sec. 37, Clause 4.*

Sir H. Seton also questions the propriety of "the separation of house trespasses from theft, which in so large a majority of cases is the sole object of them."

509. With regard to the observations of Mr. J. F. Thomas, it is worthy of note that he does not object to "tent" being included in the definition; now the mat or bamboo huts he describes are not of less "solidity" nor less firmly "secured" than tents; and it seems that it would scarcely be consistent to exclude the former for an objection common to both, without excluding the latter also, which no one has recommended. If any distinction were to be made between the huts described by Mr. Thomas and buildings of more solid construction, it would seem that Clause 420 which defines "house trespass" is the proper place for it. In the Clause under consideration, the gravamen of the offence is the conspiracy of a person residing within the building, &c. with another person without, and this does not seem to be affected by any consideration touching the solidity of the building, &c.

510. In Clause 367, the aggravation is having made preparation for causing *death*, or hurt, or restraint, &c. In the analogous provision in Clauses 430, 434, and 438, it is preparation for causing not death but hurt, or restraint, &c. We think that Clause 367 is right, and we do not perceive why it should not be followed in the other Clauses above-mentioned. We observe that in the Draft first printed "death" was omitted in the Clause corresponding with 367. We are inclined to think it should have been added on revision in the other Clauses as well as in this.

511. It is pertinently asked by Mr. Pelly, why *rigorous* imprisonment is prescribed positively for "theft" while "extortion" is punishable under Clause 369 by imprisonment of *either* description, as is "criminal misappropriation of property not in possession," an offence which is distinguished from theft merely for the sake of accuracy of definition.

512. As extortion always involves "putting in fear of injury," while theft may be committed, and very often, indeed generally, is committed without any aggravating circumstances, we do not see reason for limiting the discretion of the Court as to the description of imprisonment in the one case more than in the other. In Clause 364 therefore we would substitute "imprisonment of either description" for "rigorous imprisonment." In the case of aggravated theft to which the other Clauses apply, it seems to be proper to prescribe "rigorous imprisonment" absolutely. In the aggravated cases of "extortion" described in Clauses 371 and 373, we think that "rigorous imprisonment" should be likewise prescribed.

EXTORTION.
Clause 368. 513. The definition of "extortion" in the Code does not differ substantially from the general description of the class of offences brought

under this head in the Digest of the English law, which is given by the Commissioners in their 4th Report, signifying that their distinguishing feature is "the obtaining of property by means of such threats of injury as do not amount to robbery." But the 1st Article in the Chapter under this head does not agree with that general description, inasmuch as the offence therein provided for may be committed by merely sending a threatening letter to a person, with intent to obtain property from him, *although the object may not be effected*. By the Code in every case the person must be "put in fear of injury," and the object must be accomplished, to bring the offence within the definition of "extortion."

Chapter XVIII., Sec. 3,
Art. 1. Sec. 7 and 8, Geo.
IV., C. 29, Sec. 8, and for
India 9, Geo. IV., C. 74,
Sec. 82.

514. Mr. Hudleston says of the definition of extortion in the Code, that "the first part appears to describe robbery." Mr. Norton observes, "I believe it will be in vain to seek the distinction intended between "extortion" and "robbery," each offence consisting (at "least in many instances) in the putting in fear of personal injury and thereby accomplishing a theft." The authors of the Code remark, that "There can be no case of robbery, which does not fall within the definition either of theft or extortion. But in practice it will perpetually be matter of doubt whether a particular act of robbery was a theft or an extortion." Here Clause 61 will be found of use. In practice in doubtful cases the offence will be charged in the alternative as "extortion" or "robbery," and the Judge, if the party is convicted, will proceed to pass judgment as directed in the said Clause.

Note p. 79.

515. According to the Digest it is extortion where property is obtained by one person from another "by threat of violence to the person of any other," "where such offence shall not amount to robbery." According to the Code it is extortion when the object is effected "by putting any person in fear, for that person or for any other, of death or of grievous hurt" unless the offence shall amount to robbery; and it does amount to robbery "when the offender at the time of committing the extortion is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death," &c. "to that person or some other person present at the time," &c.

Page 254, Art. 6.

Clause 371.

Clause 375.

516. It is an offence, but not "extortion," when a person puts another in fear in order to extortion, and specific provisions are made for the punishment of it.

Clauses 370-372 and 374.

517. Mr. H. C. Tucker observes upon the definition of extortion in Clause 368, that the putting in *fear* must be clear, the injury sufficient to compel the act with reference to the age, sex and situation of the person threatened, otherwise complaints of extortion will be continually

brought forward. He thinks the cases in illustrations (c) and (d) not sufficient. Extortion he conceives should be confined to threats of personal injury for which no subsequent civil proceedings would afford an adequate remedy. Mr. Sharkey is of opinion that there should be a qualification, that the party had no alternative but to comply with the demand, or suffer the threatened consequence. We conceive that it will be a question for the Court whether the injury threatened was such as was likely to produce the effect intended, and whether under the circumstances the party was really put in fear, believing the injury to be inevitable if he did not comply.

518. Colonel Sleeman proposes an additional Clause as follows
 “—Whoever puts any person in fear of any annoyance to that person or to any member of his family, by obscenity in language, gesture, or dress, or by inflicting disgusting wounds on his own person with a design to extort money, food, or clothing, is said to commit extortion.”
 If it be thought proper to introduce any such provision in the Code, it appears to us that it would come more properly into the Chapter “of Criminal intimidation, insult, and annoyance.”

Chapter XXVI.

Article 1, Sec. 3.
Chapter XVIII.

Articles 5 and 6.

519. It is remarkable that by the law of England, as represented in the Digest, the punishment for an attempt at extortion by sending a threatening letter is punishable with transportation, which may be for life, while the punishment for extortion actually effected by threat, is imprisonment for any term not exceeding three years.

Clause 371.

Clause 373.

520. By the Code the highest punishment for aggravated extortion actually effected by putting in fear of death, &c. and by putting in fear of false accusation of an infamous character, is imprisonment of either description for a term which may extend to fourteen years. We have suggested above that the imprisonment should be “rigorous” in these cases.

521. The punishment for the attempt to commit extortion by putting in fear is imprisonment, which may extend to seven years.

522. The punishment for “extortion” is the same as in the law of England, namely, imprisonment not exceeding three years.

523. The definition of robbery is contained in Clause 375. If “theft” aggravated by actual violence, or by causing fear of *instant* death, &c. or “extortion” aggravated by putting in fear of *instant* death, &c.

524. Mr. Hudleston says he thinks the definition in the law of England preferable, quoting that given by Blackstone. His Colleague Mr. Campbell, expresses his dissent from this opinion.

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525. The definition recommended by Mr. Hudleston has not been thought worthy of adoption by the English Criminal Law Commissioners. Their definition is more comprehensive in its terms, but still they have found it necessary to add several explanatory articles.

Chapter XVIII.
Section 2, Art. 1.

526. As the law is exhibited in the Digest it agrees in substance pretty nearly with the first part of the definition in the Code “regarding robbery as an aggravation of theft.” The Commissioners observe that “the limits of the offence of robbery have been rendered indefinite by constructive extensions.” They propose to render it more definite “by limiting the crime of robbery to a taking by personal violence, or threats of personal violence to the party robbed, or some other person; and by making the existing law respecting extortion more extensive.” We conceive that the arrangement adopted in the Indian Code is preferable.

4th Report p. 67.

527. Mr. Giberne a Judge of the Sudder Court at Bombay, advertent to the definition of robbery in Clause 375, submits that under its terms a gang carrying away property to any amount from a house, if the family have quitted the house on their approach, or have remained quiet within it, so as to render violence unnecessary, would be punishable only under 365, the gang not having caused or attempted to cause death, or hurt, &c. or fear of instant death, &c. But in the case supposed it is to be presumed that the family quitted the house, or remained passive, from fear of the gang, knowing their purpose, and apprehending violence if they remained, or, if remaining, they did not rest quiet, and such fear, doubtless, falls within the definition, as caused by the gang.

Mr. Pyne, another Judge of the Sudder Court at Bombay, makes remarks nearly to the same effect.

528. The Indian Law Commissioners observe that they have provided punishment of exemplary severity for that atrocious crime which is designated in the Regulations of Bengal and Madras by the name of “dacoity.” This name they say they have thought it convenient to retain for the purpose of denoting not only gang robbery, but the attempting to rob when such an attempt is made or aided by a gang. The definition of this crime is contained in Clause 376 as follows: “Where six or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to six or more, every person so committing, attempting, or aiding, is said to commit ‘dacoity.’”

Note N. p. 79.

529. Several of the Bombay Officers object to the use of the term dacoity as being little known in that Presidency. It is not in common

use in the Madras Presidency, where, as in that of Bombay, gang robbery is the designation ordinarily applied, and we are inclined to prefer it.

530. The Judges of the Sudder Court North Western Provinces, and Mr. Hudleston and Mr. Campbell, Judges of the Sudder Court at Madras, object to the definition of a gang as consisting of "six or more." Mr. Hudleston suggests three or more. He prefers the definition of robbery by open violence in the Regulations.

531. Mr. Giberne thinks the number of four which constitutes a gang by the law of Bombay is preferable to that here proposed; he observes that the offence is more frequently committed by five than any other number.

532. Mr. R. N. C. Hamilton referring to the definition of dacoity in Clause 376, observes, "there can be no reason why the union of six persons for illegal acts when proved should not be punished as severely as requisite, but that *that* number assembled unattended with aggravating circumstances should constitute the crime of dacoity does seem unnecessary." This remark as applied to Clause 376 seems to be founded on some misapprehension, for the six persons according to the definition must conjointly *commit*, or *attempt* a robbery; the offence of robbery must be complete, or there must have been overt acts committed plainly manifesting the intention of robbery, and the union of six persons for the commission of the crime is "the aggravating circumstance" which raises the offence to dacoity. The remark is more applicable to Clause 381, which provides for the punishment of persons assembled for the purpose of committing dacoity, a provision which answers to that contained in Clause 4, Section 4, Regulation LIII. of 1803 of Bengal, and the corresponding Regulation of the Madras Code.

533. Mr. J. F. Thomas offers the following observations—"It is, I conceive, an omission in the enactments on this head, that a distinction is not drawn between the leaders, those also who are regular members of an organized gang, and take the active part in dacoities, and the low tools who are hired for a quarter of a rupee or a few annas for the night, to swell the numbers of the gang. I was credibly informed, that in several instances of gang robbery, or dacoity, brought before the Criminal Tribunals in Tanjore, the majority of the prisoners were low cultivating serfs, got together at a day's notice, unarmed, who would receive no share of the plunder or but some refuse articles and a few annas."

"In lieu of the provisions in the Code, I would propose, and I would not leave it discretionary with the Courts, transportation, or imprisonment for life, or fourteen years, in the case of every leader, every regular member of the gang, every person armed with a weapon capable of inflicting death, and all who use personal violence in a dacoity, but, for the great body of the gang, who, in some of our provinces are often mere Coolies, six or twelve months rigorous imprisonment, and security from the head of their village on release. The dacoities of Southern India are not ordinarily like those in Northern India. For instance, the robbery of guards with treasure, or of treasuries, and similar daring outrages, are not known. If an accurate comparison is made between the dacoities which come before the Nizamut Adawlut in Calcutta, and the Foujdarry Adawlut in Madras, the distinction between the offence in the two Presidencies will be clearly seen. The only exception I am aware of, is in the case of the Hill gangs in the Northern Circars; for it is rarely in other Districts, and only in the special case of leaders (as Appoo and Canten) that dacoities assume in this Presidency the same character as in Bengal, and become the scourge of the country."

"I would also not only recommend a distinction as to the persons who commit dacoity, but proportion the penalties to the nature of the dacoity itself. A dacoity in Tanjore was often effected by a body of men, of whom even the leaders had only sticks in their hands, the others nothing."

"I would draw a distinction between gang robberies by such means, when the offenders are not prepared to offer resistance to any armed person, nor to the Police, and those atrocious cases in which a gang came well armed, prepared for murder and every violence, and both purpose, and do resist any force brought at the moment against them."

"Again, I would exclude from dacoity all robberies of grain by gangs exceeding six, in periods of great scarcity or famine, and treat such cases as theft, unless committed by an organized gang, and not by a body congregated on the spur of the occasion in the hope of obtaining food."

"I would not, further, treat such cases as dacoity, although other property than grain was taken, if it was clear, that the *main* object of the great body of plunderers, or of the gang was grain though they might be led on to take other things."

534. Mr. A. D. Campbell says, "I agree with Mr. J. F. Thomas that leaders, or heads of gangs, should be liable to punishment higher than inflicted on the mere members of the gang."

535. Mr. Giberne would make the heads of gangs of dacoits liable to the punishment of death. He describes the proceedings of such a gang committing a succession of atrocities, and terrifying the population of a whole District:—"At length (he says) the gang is caught, tried and convicted and punished by the new Code with transportation for life. Surely in all such cases death is desirable as an example to the country."

536. Colonel Sleeman proposes an additional Clause, as follows: "Whoever shall be convicted of having been habitually a leader or leading member of a gang of dacoits, shall be liable to a sentence of imprisonment for life, or for such limited period as the Court may deem proper."

537. Lately the law has been altered, and made more stringent even than Colonel Sleeman proposed. By Act XXIV. of 1843—"Whoever shall be proved to have belonged to any gang of dacoits shall be punished with transportation for life, or with imprisonment for any less term with hard labour."

538. The intention was to apply to dacoity the law in force for the prevention of Thuggee, but it differs in the punishment, as transportation for life is not authorized in cases of Thuggee.

539. If this very stringent law be continued,—and it may be presumed that the grounds upon which it was so recently deemed to be necessary are such as will justify its continuance for the present, though it may be hoped that eventually it may be mitigated,—we would suggest, with reference particularly to the observations of Mr. Thomas as to the constitution of these gangs, that some definition be given of what is meant by a person belonging to a gang of dacoits. The preamble to Act XXIV. of 1843 shews that the phrase is intended to designate, not a person who ordinarily lives by honest labour and who on some occasion has been tempted to join himself to a gang and to take a subordinate part in a robbery committed by such gang in the manner described by Mr. Thomas, but one who has habitually associated with a gang of "professional dacoits," "systematically employed in carrying on their lawless pursuits in different parts of the country," accompanying them in their expeditions, and actively participating in their operations.

540. According to the definition of dacoity in the Regulations of Bengal and Madras, which are identical in this point, it seems that the offence may be committed by a single person going forth *with an offensive weapon* with intent to rob, and actually perpetrating or attempting to perpetrate a robbery, or by a gang with or *without offensive weapons* doing the same. In practice, we apprehend, it is only gang robbery that is accounted dacoity. What number of persons constitutes a gang is not determined. By the law of Bombay robbery "committed by a number of persons greater than four is gang robbery." By the Code, under the definition of dacoity, and for the purposes thereof, six persons constitute a gang, including any persons present and aiding. In other respects, the definition appears to contain all that is essential in that of the Bengal and Madras Regulations.

541. The punishment of dacoity without murder, by those Regulations, is transportation for life; but "leaders of gangs or other heinous offenders convicted of a repetition of the crime, or without such repetition of a degree of cruelty, violence, or other aggravating criminality, which under the discretion allowed by the Mahomedan Law may be punishable with death, and which may appear to the Nizamut Adawlut to render such heinous offenders liable to capital punishment, shall be liable to a sentence of death." By the Bombay Regulation, gang robbery accompanied with force is punishable "in any of the modes specified in Section 3" thereof, which includes death.

542. By Clause 380 of the Code, if murder is committed by any one of a gang of dacoits, every-one of the gang is liable to be punished with death. It does not appear to us to be advisable to extend the punishment of death to any other case. We agree with Mr. Thomas, that there ought to be a great distinction in adjudging punishment between persons proved to be leaders, or regular or habitual members of a gang of dacoits, following the practice of robbery as a profession, and poor coolies enticed to swell the number of the gang occasionally; but we do not think that such persons ought to escape with so slight a punishment as he suggests. We are of opinion that the minimum term of imprisonment may be properly reduced from three years to two years to meet such cases. At the same time we would recommend that the minimum be raised in the case of leaders and persons proved to be habitual members of a gang, and perhaps all who are armed with deadly weapons, from three to seven years.

543. It does not appear to us advisable to exclude from the class of offences designated by the term dacoity, the gang robberies of grain

Bengal Reg. LIII. of 1803
Sec. 3.
Madras Reg. XV. of 1803,
Sec. 3.

Reg. XIV. of 1827, Sec.
36.

Reg. XIV. of 1827, Sec.
37.

to which Mr. Thomas refers. Certainly the term dacoity is not very apt as applied to them, but they clearly fall within the definition, and though the higher punishments would be excessive, yet there is a wide enough discretion, especially if the minimum be reduced to two years, to admit of the Judge generally adapting the penalty suitably to the circumstances.

544. It is not a light offence the plunder of grain by mobs, though sometimes there may be circumstances which dictate a lenient dealing with it. Such cases we think ought to be reported, after sentence passed according to the law, for the consideration of those whose prerogative it is to temper the ordinances of the law with mercy.

545. We are disposed to prefer the provision of the Bombay Regulation, by which four or more persons are held to constitute a gang, to that of the Code, by which there must be six or more persons present at a robbery to make it amount to dacoity. We observe that four was the number stated in the Draft of the Code first printed. We do not know why it was altered, but it appears by a Note of the President that the alteration first proposed, was to reduce the number four to three.

546. Mr. B. Hutt observes that assisting in murder in dacoity, may be visited, under Clause 380, with less punishment than where simple murder is committed, the *minimum* in the former case being rigorous imprisonment for seven years, in the latter imprisonment for life.

Clause 97. 547. By the provisions under the head of "abetment" any one aiding the commission of an offence is liable, if that offence be committed, to the punishment provided for that offence; and if in an attempt to commit any offence, a different offence is committed, any person aiding the commission of the offence first mentioned, is liable to the punishment of the offence actually committed, if he knew it to be likely that such offence would be committed. Under these rules a person aiding a dacoity, if murder were committed by one of the gang of dacoits in committing the dacoity, would be liable to imprisonment for life, at the least; and we see no reason why any one, under the circumstances described in Clause 380, should escape with imprisonment for seven years. We think the penalties should be the same as in Clause 300.

548. It has been observed that Clause 382 will be nugatory in cases of dacoity when the sentence for that offence is transportation or imprisonment for life. It appears to us that it is not required at all as regards dacoity, as the Clause relating to that offence sufficiently

provides for the aggravation contemplated in Clause 382. In determining whether the offence shall be visited with transportation for life, or imprisonment for life, or for any shorter term down to the minimum prescribed by Clause 380, the Judge will of course take into consideration whether any person has been hurt or not, or whether there has been any other aggravation, and will pass sentence accordingly. We would suggest therefore, that the words "or in committing dacoity" be struck out of Clause 382 and that the Clause itself be transposed, so as to follow immediately after Clause 378.

549. We have already* noticed the reasons for separating the offence under this head from theft, and the remarks of Mr. Norton upon "the provision of Clause 383." Mr. Sharkey contends that the offence "is clearly theft," and considers the reasons given in the note for not so designating it as "more fanciful than substantial." It does not appear to us that his objections are well founded.

550. Mr. Greenhill appears to us to be right in thinking that a person appropriating part of a wreck, or goods washed ashore, would commit an offence under these Clauses.

551. Sir H. Seton questions "the expediency of multiplying offences to the extent that they would be created by this Clause." (386) "The effect of it," he observes, "would be to convert a large portion of what has hitherto been equitable jurisdiction into criminal." "It was the mixture of equitable and criminal jurisdiction," he adds, "that led to the abolition of the Star Chamber."

552. The principle of the provisions under this head appears to be approved, on the other hand, by the Sudder Court for the North Western Provinces, and by those Judges of the Sudder Court of Bombay who have noticed it, and is not objected to by any of the Judicial Officers of the Company.

553. The title of "criminal breach of trust" in this Code takes the place of "embezzlement" in the Digest of the English Criminal Law Commissioners.

554. We have mentioned above the reasons of the English Commissioners for "embracing at once by a direct substantive law, offenders who having lawful possession of property are guilty of fraudulent embezzlement."

CRIMINAL MISAPPROPRIATION OF PROPERTY NOT IN POSSESSION.

Clauses 383 to 385.

CRIMINAL BREACH OF TRUST.

Clauses 386 to 388.

Messrs. Giberne and Greenhill.

Par. 478.

* Supra, par. 499 and 500.

555. According to the Digest—"Whosoever being intrusted with the possession of any moveable property or fixture, being of the property of any other person, on any contract of hiring, or as deposit, pledge or security, or for the purpose of keeping, carrying, or repairing, or other purpose whatsoever, under an obligation to return, deliver up, or specifically apply the same, shall, with intent to defraud the owner, and in violation of such trust, embezzle such property or fixture," shall be liable to the punishment for embezzlement. The term "embezzle" is explained "to comprehend any actual appropriation by the offender of the property to his own use, or otherwise, to the despoiling, and in fraud of the owner."

Art. 2.

556. By the Code, "criminal breach of trust" is committed by a person who "intending fraudulently to cause wrongful loss or risk of wrongful loss to any party for whom he is in trust, disobeys any direction of law prescribing the mode in which such trust is to be discharged, or violates any legal contract express or implied which he has made touching the discharge of such trust with any party from whom such trust was derived."

Arts. 1 to 13.

557. There would not be a material difference between the law of "embezzlement" in the Digest, and that relating to "criminal breach of trust" in the Code, but for a special provision in the former which declares that it shall "not affect any trustee in and under any instrument whatever." This provision is taken from the Statute 7 and 8, Geo. IV. Chapter 29, Section 50, corresponding with 9 Geo. IV. Chapter 74, Section 103, for India, which Sir H. Seton probably had in view in making the observation above quoted.

Art. 11.

558. We are unable to perceive any good reason for exempting trustees, so called technically, from penal responsibility for acts done by them fraudulently for their own gain to the despoiling of the party for whom they are in trust, or, in the phraseology of the Code, with the intention of causing wrongful gain to themselves by means of wrongful loss to the party for whom they are in trust, more than such parties as are described in Article 13 of the Section of Embezzlement in the Digest, and Section 49 of the Statute above mentioned, (also 9 Geo. IV., Chapter 74, Section 102) who being intrusted with property as agents, convert such property to their own use or benefit.

559. With reference to Sir H. Seton's remark that "it was the mixture of equitable and criminal jurisdiction that led to the abolition

"of the Star Chamber," we may notice what Hallam says of the origin of this part of the jurisdiction of the Star Chamber. "Every misdemeanor" he states "came within the proper scope of its enquiry, those especially of public importance, and for which the law, as then understood, had provided no sufficient punishment. For the Judges interpreted the law in early times with too great narrowness and timidity; defects which, on the one hand, raised up the over-ruling authority of the Court of Chancery as the necessary means of redress to the civil suitor who found the gates of justice barred against him by technical pedantry; and on the other, brought this usurpation and tyranny of the Star Chamber upon the kingdom by an absurd scrupulosity about punishing manifest offences against the public good. Thus corruption, *breach of trust*, and malfeasance in public affairs, or attempts to commit felony, seem to have been reckoned not indictable at common law, and came in consequence under the cognizance of the Star Chamber."

560. Blackstone observes that "into the Court of King's Bench hath reverted all that was good and salutary of the jurisdiction of the Court of Star Chamber." But it seems that the observation requires to be qualified, since from a "*scrupulosity*" touching matters which civilly belong to the domain of equity, "offences manifestly against the public good" have been suffered to go unpunished, that beneficial part of the Criminal Jurisdiction of the Star Chamber relating to breaches of trust not having been assumed by, or vested in the Court of King's Bench. There is no reason for such scrupulosity in India, where except within the limited sphere of the Queen's Courts the distinction between equitable and legal rights is unknown.

561. It is strange that Mr. Greenhill objects to the introduction of the term "fraudulently," which is intended to stamp the character of the transactions embraced by the Clause in question, as "weakening the whole." Another Officer, Mr. T. Blane, proposes to "include the malicious intention of causing loss as well as the *fraudulent* intention, as where a servant to injure his master suffers his property to be spoilt although he gains nothing by it."

562. We need hardly say that neither the omission nor the addition proposed appears to us advisable.

563. Mr. Giberne observes that hitherto the offence defined in Clause 386 has been punishable by imprisonment for seven years, and that the proposed penalty of imprisonment which may extend to three years,

appears to him insufficient. The punishment is that prescribed for simple theft, except that for the latter the imprisonment is ordered to be rigorous. We have suggested that it be left to the discretion of the judge to determine whether the imprisonment should be simple or rigorous in cases of theft, as it is with regard to this offence. By the Digest the punishment for embezzlement, where the property is worth less than 1£, is imprisonment not exceeding two years, where the value amounts to 1£ the offender may be sentenced to transportation of seven years, or imprisonment not exceeding three years.

564. The Sudder Court for the North Western Provinces suggest that provision should be made for a severer punishment in certain instances of common occurrence in the Mofussil, such as that of confidential persons employed by bankers to convey remittances in specie, appropriating the money to their own use, and alleging that it has been taken from them by robbers. This mode of sending remittances, they observe, is very general, and the offence is of so serious a complexion as to demand a heavier penalty than that contemplated. We incline to the same opinion, and would advise that the maximum term of imprisonment be not reduced below that which may be inflicted under the existing laws of the Company's Courts, namely, seven years.

565. Mr. Bacon referring to Clauses 366 and 388, observes that any person stealing a letter from the Post Office, and a Clerk of the Post Office misappropriating the contents of a letter in his charge, are made liable to the same punishment, though there is no comparison between the degrees of criminality. The punishment awarded in Clause 388, he says, "must be allowed to be quite inadequate." We observe that by the Digest servants of the Post Office are made liable to transportation for seven years, or imprisonment not exceeding three years, for stealing a letter, and to transportation for life, or for a term not less than seven years, or imprisonment not exceeding three years, for stealing money out of such letter. And that the latter punishment may be inflicted on any person stealing money out of a post letter, or stealing a post letter from a post letter bag or a Post Office. It seems to us proper that there should be a distinction, as suggested by Mr. Bacon, between persons stealing post letters, not being servants of the Post Office, and persons being servants of the Post Office, misappropriating letters, &c., entrusted to their keeping.

566. For the latter offence the term of imprisonment might be extended to seven years.

567. Upon Clauses 389 and 390 Mr. J. F. Thomas makes the following observations:

OF THE RECEIVING OF
STOLEN PROPERTY.
Clauses 389 to 391.

"These provisions I consider to be wholly inadequate to the offence, when it has been committed by an habitual or professional receiver, by an Officer of Police, by a servant of the party robbed, by persons who keep houses of ill fame, or for the sale of spirituous liquors, when the amount is large, or by a party who is known to organize and originate plans for robbery, and habitually lives on plunder. In such cases the interests of society require heavier penalties than those provided, and they should be made imperative."

568. Mr. W. Hudleston and Mr. A. D. Campbell, Judges of the Madras Sudder Court, concur in opinion that the aggravations of *receiving* recognized in Regulation VI. of 1822 of the Madras Code are proper, and should be provided for. Mr. Campbell particularly refers to habitual and professional receivers.

569. Upon Clause 390 the Sudder Court, North Western Provinces, observe, that the punishment does not appear sufficient to meet cases in which the stolen property may have been obtained by highway robbery, or theft attended with murder or poisoning, in respect to which the Court are of opinion that a higher measure of punishment is required.

570. Mr. Giberne and Mr. Pyne, Judges of the Bombay Sudder Court, think the proposed punishments too lenient.

571. Mr. Greenhill, another Judge of that Court, suggests that in Clause 391 "Thuggee" should be introduced before or after "Dacoity." Mr. A. Bell thinks the punishments too lenient, and suggests that the receiver should be punished equally with the thief.

572. The principle which Mr. Bell recommends appears to have been followed in Clause 391 in regard to dacoity, the punishment for "receiving property stolen in the commission of dacoity" being the same as for dacoity, and we think the application of it may properly be extended to robbery.

573. It seems to us advisable also to make a special provision for the punishment of common receivers of stolen property, upon a second conviction of receiving specific property known to have been stolen, &c., with imprisonment to seven years.

Chapter XVIII, Sec. 7,
Art. 1.

By the Statute for India,
Sec. 107, fourteen years.
Art. 2.

Stat. for India, Sec. 108,
seven years.

OF CHEATING.
Note N. page 79 to 84.

574. The punishment proposed in the Digest for receiving property known to have been fraudulently taken, when the fraudulent taking is punishable as theft, or with transportation, is transportation for a term not exceeding fifteen years, nor less than seven years, or imprisonment not exceeding three years, with whipping (if a male); and for receiving property fraudulently taken, but where the original offence is not punishable as theft, transportation for seven years, or imprisonment not exceeding three years, with whipping (if a male.)

575. The authors of the Code have explained at large their views regarding the offences which are brought under this head.

576. They shew that while there are many deceptions committed for the sake of gain which ought to be punished, there are many such deceptions which however immoral are not offences within the scope of this Chapter. The line they have drawn is "to make it cheating to obtain property by deception in all cases where the property is fraudulently obtained, that is to say, in all cases where the intention of the person who has by deceit obtained the property was to cause a distribution of property which the law pronounces to be a wrongful distribution, and in no other case whatever." "It appears to us," they say, "that the line which we have drawn is correct in theory, and that it is not more inconvenient in practice than any other line which can be drawn while the Civil Law of India remains in its present state, and that it will be unexceptionable whenever the Civil Law of India shall be ascertained, digested, and corrected."

577. "Whether the principle on which this part of the law is framed be a sound principle," they proceed to remark, "is a question which will be best determined by examining, first, whether our definition excludes any thing that ought to be included, and, secondly, whether it includes any thing which ought to be excluded." They think "it can scarcely be contended that their definition excludes any thing that ought to be included." And we do not find any objection to the definition on that ground. But they anticipate objections on the ground that the definition includes much that ought to be excluded. "It certainly includes," they observe, "many acts which are not punishable by the law of England, or of France," for instance, they say, "we propose to punish as guilty of cheating a man who, by false representations, obtains a loan of money not meaning to repay it; a man who, by false representations, obtains an advance of money, not meaning to perform the service, or to deliver the article for which the money is given; a man who, by falsely pretending to have performed work for

which he was hired, obtains pay to which he is not entitled." "In all these cases," they observe, "there is deception. In all the deceiver's object is fraudulent. He intends in all these cases to acquire or retain wrongful possession of that to which some other person has a better claim, and which that other person is entitled to recover by law. In all these cases therefore the object has been wrongful gain, attended with wrongful loss. In all therefore there has, according to our definition, been cheating. We cannot see why such acts as these should be treated as mere civil injuries, why they should be classed with the mere non-payment of a debt, and the mere non-performance of a contract."

578. The above observations have reference particularly to the illustrations (g) (h) (i) subjoined to Clause 392, upon which Sir J. Seton has a note questioning the propriety of "the conversion of so many civil injuries into criminal offences, and this without any reservation of the civil remedy."

579. The observations we have quoted shew good cause, in our opinion, for bringing the cases in question within the scope of the Penal Law. Although the civil remedy is not in express terms reserved, there is nothing which appears to us to imply that it is taken away, and we do not understand that this was intended.

580. Mr. Norton is one of those who think that the definition in Clause 392 includes too much. "A host of trivial illegal acts," he conceives, "may be brought within the vortex of this text, and many in no sense criminal."

"The illustrations in most instances," he observes, "are cases of deception in respect to the parties' *future intentions* which of course are incapable of proof, and are, many of them, of a quality so little allied to criminality as to excite ridicule, such as cheating by obtaining money under a *deceptive promise to repay it*."

581. Here, as in other places, Mr. Norton hazards general remarks which will not bear the test of examination. Every one who reads the illustrations will see that they are not in *most instances* "cases of deception in respect to the parties' *future intentions*." Strictly speaking there is not one such case, and out of ten illustrations of cheating there are only two in which *the deception is prospective*, relating to something which the party deceived is led to expect will be done in future by the party deceiving him. In these cases the offence turns upon its being the *present* intention of the latter not to do what he deceitfully leads the

other party to expect he will do. The cases referred to are the illustrations (g) (h), particularly adverted to in the remarks above quoted. Of these the illustration (g) is the one which Mr. Norton points out as an example of the "many" which he describes as "of a quality to excite "ridicule."

582. With regard to this illustration of the definition in Clause 392, the authors of the Code make the following further remarks:

"Some persons may be startled at our proposing to punish, as "a cheat, every man who obtains a loan by making promises of payment which he does not mean to keep. But let it be considered that "a debtor, though he may have contracted his debts honestly, though it "may be from absolute inability that he does not pay them, though his "misfortunes may be the effect of no want of industry, or caution, on "his part, is now actually liable to imprisonment. Surely it is unreasonable to detain in prison the man who, by mere misfortune, has "involuntarily violated the rights of property, and to leave unpunished "the man who has voluntarily, and by wilful deceit, attacked those "rights, if only he is lucky enough to have money to satisfy the demands "on him."

583. After giving an example to illustrate their views they proceed as follows:

"It would be improper for us here to discuss at length the "question of imprisonment for debt. But it seems clear that whether "it be or be not proper, that a debtor, as such, should be imprisoned, a "distinction ought to be made between the honest and dishonest debtor. "We are inclined to believe that the indiscriminate imprisonment of all "debtors would be found to be unnecessary if this distinction were made." In conclusion they say, "We are satisfied that the only way to get rid "of imprisonment for debt, as debt, is to extend the penal law on the "subject of cheating in a manner similar to that in which we propose to "extend it."

Page 43.

584. The sentiments here expressed by the Indian Law Commissioners are in accordance with the views of the Commissioners on the Courts of Common Law in England set forth in their 4th Report, relating to imprisonment for debt. "Whilst we recommend," they say, "that "alterations should be made in the law of arrest favorable to the personal "liberty of the honest debtor, we also think it essential that provision "should be made for the more effectual punishment of dishonest and

"fraudulent debtors." They observe that the power with which the Insolvent Court is invested of punishing such frauds is limited, and, constituted as that Court is, they think it ill calculated to act as a Court of Criminal jurisdiction. Their conclusion is that "a debtor ought to be "liable to a *criminal prosecution*" "in the following among other cases, "namely, where he has obtained credit by means of any false act, pretence, or representation, whatsoever."

585. This in effect is just what is proposed in the Indian Code as explained in the Note, and exemplified by the illustration which Mr. Norton deems ridiculous. Page 8.

586. The recommendations of the Common Law Commissioners were adopted by the Commissioners on Bankruptcy and Insolvency in a Report made by them in 1840; and the Chancellor, Lord Cottenham, in 1844, brought a Bill before the House of Lords to give effect thereto, in which, His Lordship stated in his speech, was a provision that persons guilty of fraud should be proceeded against criminally and tried by a Jury.

Newspaper report of
Speech of Lord Cottenham
in House of Lords, 30th
April 1844.

587. It appears from the report of the Debate on this occasion that the Bill was approved in principle by all the Law Lords, but it would seem that some impediment afterwards arose owing to which it has not yet passed into a law.

588. In the Digest of the English Criminal Law Commissioners the provisions on the subject matter are distributed under two distinct heads, viz:

1st. "Obtaining property by false pretences." 2d. "Cheats and "other like fraudulent practices," the latter including "false personation," which is defined as a mode of cheating in Clause 393 of the Code with a specification of the ways in which the offence may be committed.

Chapter XVIII., Sec. 5.

589. The definition under the 1st of these heads, viz. "Whosoever "shall by any false pretence obtain any moveable property from any "other person with intent to cheat or defraud any other person," differs little apparently from that contained in the first sentence of Clause 392 of the Code, viz. "Whosoever by intentionally deceiving "any person fraudulently induces the person so deceived to deliver any "property to any person."

Sec. 4, Art. 1.

590. Upon the illustration (h) to Clause 392, Sir H. Seton, observes—"Here the criminality of the act is made to depend upon the

" meaning of fraud; the meaning of fraud is made to depend upon the
 " meaning of wrong; and the meaning of wrong is made to depend on
 " the decision of a civil tribunal."

591. An explanation is subjoined to the illustration intimating that if the deception practised upon A were such that Z has a legal right to have back the price paid by him, there is wrongful loss and wrongful gain, (that is, according to the definition in Clauses 15 and 28, a loss which the loser may recover, and a gain which the gainer may be compelled to yield by a civil action,) and if A *intended* to cause such wrongful loss and wrongful gain he has acted fraudulently (Clause 16) and has cheated. It is to this explanation that Sir H. Seton alludes. But his remark is not strictly accurate that the meaning of wrong is made to depend on the decision of a civil tribunal; it rather depends upon the rule by which the civil tribunal must decide.

Clause 394.

592. The punishment of "cheating" is imprisonment of either description which may extend to one year, or fine, or both.

Clause 395.

593. It is properly treated as an aggravation of "cheating" when the person cheated is one whose interest the cheater was bound to protect, and the punishment is double.

594. "Cheating by personation" is also liable to double the punishment for "cheating."

595. We are not satisfied that "cheating by personation" is an offence of so much more importance than "cheating" committed in some of the ways indicated in the illustrations to Clause 392, for example in the manner described in the illustration (a), that it ought to be made liable to a degree of punishment so much greater.

596. In the Digest of the English criminal law cheating by personation* is liable to a less punishment than cheating by false pretences generally.† The punishment for both however exceeds the punishment for simple theft.‡ Whereas the Code makes the punishment of theft§ three-fold of that prescribed for cheating.

597. It appears to us that the punishment for "cheating" should be increased to two years at least, which is now proposed for "cheating by personation," and that the latter offence should not be distinguished from the former in the degree of punishment. We would leave the aggravation described in Clause 395 liable to double the punishment for

* Imprisonment not exceeding three years, Ch. 18, S. 5, Art. 1.

† Transportation for seven years, or imprisonment not exceeding three years, S. 4, Art. 1.

‡ Imprisonment not exceeding two years with whipping (if a male,) S. 1, Art. 54.

§ Imprisonment not exceeding three years, Cl. 364.

simple cheating, that is if our last suggestion should be adopted, to imprisonment which may extend to four years.

598. The authors of the Code remark that the provisions under this head "are necessarily imperfect and must remain so, until the whole
 " of this important part of the law has undergone an entire revision."

OF FRAUDULENT INSOLVENCY. Clause 398.

Note N. p. 84.

599. The offence defined in Clause 398* is provided for, among others, by Section 57 of the Insolvent Act for India, 9 Geo. IV. Clause 73, by which it is made punishable by protracted confinement, for such a period not to exceed three years in the whole, as the Insolvent Court shall direct, to be computed from the date of the Insolvent's petition for relief. The punishment proposed in the Code is imprisonment which may extend to seven years, and must not be less than one year, to which fine may be added.

* An Insolvent removing concealing, or otherwise disposing of property in order to prevent the distribution of that property according to law among his creditors.

600. It appears to us that the offence in question is properly made subject to the Penal Law on the principle advocated by the Common Law Commissioners in the Report to which we have already referred, and which has been actually adopted in the latest Act of Parliament on the subject in force in England.

7 and 8 Vict. C. 96, S. 3^d.

601. Of the other fraudulent acts described in the Section of the Indian Insolvent law we have referred to, some appear to be punishable under different heads of this Code. Thus the falsifying of books for the purpose therein mentioned seems to fall under Clause 189, which provides for "fabricating false evidence," and the withholding of the books, &c. under Clause 156. The fraudulent destroying of books, &c. by an Insolvent for the same purpose we conceive may be brought under "mischief" as defined in Clause 399.

602. We are not aware why the provision in this Clause of the Code is confined to traders, nor why the punishment is extended beyond what is authorized by the present law for the government of Her Majesty's Courts in India, and what, we observe, is authorized in the late Act of Parliament just adverted to. We would make Clause 398 applicable to all Insolvents, and limit the punishment to imprisonment for a term not exceeding three years, which is the punishment for stealing.

603. This title corresponds to that of "malicious injuries to property" in the Digest of the English Criminal law.

OF MISCHIEF. Clauses 399 to 417. Chapter XX.

604. In the 4th Report of the English Criminal Law Commissioners it is explained that "This class of offences is characterized by malice as

Art. 100, p. 84.

"contradistinguished from fraud." Again by Article 4, Section 3, Chapter I. of the Digest it is explained that "an act is maliciously done or omitted to be done, where being prohibited to be done it is wilfully done, or being commanded to be done it is wilfully omitted to be done" "without lawful justification or excuse." And by Art. 5 that "Malice in fact or express malice consists in some actual intention to cause hurt, damage, or injury."

605. It appears to us that the definition of "mischief" in Clause 399 agrees essentially with what is meant by the phrase "malicious injuries to property" according to the above explanations.

606. Mr. Norton however strongly objects to the definition in Clause 399 on account of the wide scope which it gives to the offence of doing mischief, so wide, he remarks, that "it includes arson and the scuttling of ships." So wide also, we observe, is the Chapter of "malicious injuries to property" in the Digest, the first article of which provides for the offence of "arson,"* and the fifth article "for the scuttling of ships," or damaging ships otherwise than by fire, with intent to destroy or render them useless.

607. Upon the illustrations of "mischief" in the instances (e) and (f) under Clause 399 of ships being cast away voluntarily, Sir H. Seton remarks that "by the English law these are capital offences *where life is endangered*." This is true, but then the offence with this aggravation falls under a different Chapter, that of "offences against the person." The arrangement is the same in the Code, and where death is caused by casting away a ship, the same having been done with the intention of causing death or with the knowledge that death was likely to be caused thereby, we apprehend that the offence is capital under Clause 294. It is not capital where death has not been caused, in which the Code differs from the English law. We conceive that if the circumstances were such that the offender would be liable to capital punishment under Clause 294 if the death of any person had been caused by the casting away of the ship, he would be liable at any rate to transportation for life under Clause 308. On the most lenient view of death caused by the wilful casting away of a ship, the offender would be liable under Clauses 304 and 305 and Clause 415 to imprisonment for a term extending to sixteen years.

608. In laying down the punishment for different degrees of the offence of mischief, the gradation observed refers to the amount of loss sustained, a mode of distinction not admitted in estimating the degrees of criminality in other offences against property. Clause 400 we

conceive applies to cases in which the loss is under five rupees,* cases in which the loss amounts to five rupees and upwards being provided for in Clause 402,† and cases in which the loss is rupees 100 or more in Clause 403.‡ We think there is no sufficient reason for the distinction between Clauses 400 and 402. We would modify the latter Clause so as to comprehend the cases for which the former was intended, and omit Clauses 400 and 401.

609. Referring to Clause 404, Sir H. Seton puts the case of "A, a collector, having a duplicate specimen, and destroying it in order to enhance the value of the remaining one," and asks "is he to be punished?" We think not, for there is no "mischief" committed, since the collector does not destroy the duplicate specimen "intending thereby to cause wrongful loss to any party." Mr. Norton points to Clause 405 as exemplifying two objections taken by him to the provisions of the Code under this head—which he characterizes as "extending criminality to acts of mischief not involving other specific crimes,"—namely, that they "can only be defended on the principle of making every species of civil injury a public crime," and that "the punishments are out of all reason severe." This Clause, he observes, "enacts to the possible extent of rigorous imprisonment for two years for committing any 'mischief' (which may be by diminishing the value of any property intending to cause wrongful loss to any party) with the deliberate intention of annoying the person to whom the wrongful loss is intended."

610. He refers to Clause 408 as another example liable to the same objections. This Clause he describes as "enacting to the possible extent of like imprisonment for an attempt to commit mischief on any road intending to render it less easy to travel by it." It is surprising that Mr. Norton should cite this as an instance of a mere private civil injury converted into a public crime, it being obvious that the essence of the offence is the injury caused by it, not to an individual but to the public, and it surely is a public injury to do such mischief to a road as "to make it less safe or easy to travel, or to convey property by it." With respect to Clause 405 it is to be observed that the annoyance is an aggravation of mischief committed in some way within the definition in Clause 399. We have already remarked that this definition corresponds in essential points with the characteristics of "malicious injury to property" in the law of England.

611. The provision made by statute for the offence of destroying or damaging trees or shrubs in parks or pleasure grounds, is analogous to that in Clause 405 objected to by Mr. Norton. In both cases there

* See also Note p. 88, 7th Report.

Digest Chapter XV. Sec. 5, Art. 4.

By Clause 415, 14 years
304, 2
16

* Fine simply to 10 times the loss.

† Imprisonment to six months, or fine or both.

‡ Two years, or do. do.

is injury to property and wrongful loss thereby, but the gravamen is the annoyance to the individual, to which his *loss* is nothing in comparison.

612. It is objected to Clause 406, that by determining that the value of the animal or animals, the destruction or injuring of which constitutes the offence here provided for, must be 10 Rupees or upwards, there will be excluded a multitude of cases which ought to be included, as a large proportion of the animals belonging to the poor, and of importance to them, are of less value than 10 Rupees. The value ought to be 4 or 5 Rupees, says one Officer, for half the Tattoos and Cows, to say nothing of the Sheep and Goats in India, are not worth more than 5 to 10 Rupees each. Mr. J. F. Thomas, one of those who urge the objection here noticed, observes that the specification of Cattle in Clause 406, and the absence of all reference to animals in the illustrations to Clause 399, have given rise to a doubt in his mind whether poisoning Cattle is included in Clauses 400 and 401, and if not, the question arises, is the offence of poisoning Cattle under 5 Rupees value provided for at all?

613. We see no reason for the doubt entertained by Mr. Thomas, as the definition in Clause 399 is so general, that the destruction or injury of any animal, being property, by *any means* by which it was intended to cause wrongful loss to any party, and of course by means of poisoning, must by every rule of construction be held to fall within it. The offence being within the definition will be punishable as the Code stands, if the value of the animal is less than 5 Rupees under Clauses 400 and 401,—if it amount to 5 Rupees or upwards but less than 10 Rupees, under Clause 402,—if it be 10 Rupees or upwards under Clause 406.

614. Under Clauses 413 and 414 which provide for “mischief by fire” “to buildings,” Mr. J. F. Thomas observes as follows—“The grass or mat huts of the lowest classes are placed on a level with the substantial, secure, and valuable dwellings of the better classes. The penalty, considering the injury in the case of these frail dwellings, is altogether disproportionate, and if, as in Clause 415, a limitation is made to decked vessels, so I conceive a limitation similar in its character should be made in the case of houses.”

615. It is obviously proper that in the case of mischief by fire a distinction should be made between the huts described by Mr. Thomas and substantial houses, but there is sufficient room for such a distinction between the maximum of 14 years and the minimum of 1 year, and between rigorous and simple imprisonment, under Clause 413, and we think it best that the distinction should be left to the discretion of the Judge.

616. Upon Clause 414, which makes it an aggravation of mischief by fire to buildings, that the person committing the mischief “intended or knew it to be likely that buildings ordinarily used as human dwellings *to the number of not less than 5*, may be consumed,” Mr. G. W. Bacon says—“In the close-built and combustible villages of this country, fire rarely contents itself with the destruction of one house, and whatever may be the intention of an incendiary, and whatever he may know to be likely, the man who puts fire to one house will in all probability burn half the village, and his crime is the same whether he meant to stop at one house, or to go on to not less than 5. I would extend the punishment in Clause 414 to all malicious burning of dwellings, or out-houses, or vessels, and proportion the punishment to the probability of extensive mischief.”

617. It certainly appears to us unadvisable to make the conviction of the incendiary under Clause 414 depend upon his intending, or knowing it to be likely, that five houses at the least may be consumed in consequence of his act. As Clause 413 applies to mischief by fire committed with the intention of destroying a single house, Clause 414 might be worded so as to apply to mischief by fire committed by a person intending, or knowing it to be likely, that *more than one* house may be consumed.

618. The Sudder Court for the North Western Provinces observe, with regard to Clauses 413 and 414, that they do not see any notice of occasions in which death may be caused in the commission of mischief by fire, though the proper punishment is perhaps provided for by some other Clause in the Chapter of “offences against the human body.” This conjecture is right. The remarks we have made with respect to death caused by the casting away of a ship, or in the commission of any offence under Clause 415, apply equally to death caused in the commission of the offences defined in Clauses 413 and 414.

619. With reference to 415, Mr. G. W. Bacon observes that “A great proportion of the vessels in this country are not decked, and mischief may be as easily committed in these as in the others;” and Mr. Pyne, Judge of the Bombay Sudder Court, states that “the chief part of the coasting trade, also the Mocha trade, is carried on in vessels not decked.” This is an important fact, for we imagine that Clause 315 was intended to embrace all sea-going vessels. In the Bay of Bengal, the Dhonies or native coasting craft, we believe, are for the most part decked, but if, as appears from Mr. Pyne’s statement, the native craft of the Western Coast of India, and that which navigates the northern part of the Indian Ocean to the Red Sea do not come under that description,

it is fit that the definition should be enlarged so as to comprehend them as well as the larger river craft, to which probably Mr. Bacon's remark is meant to apply. In the corresponding article in the Digest of the English Criminal law the words are "any ship or vessel."

620. The Sudder Court for the North Western Provinces suggest that there should be a provision corresponding with Clause 414 in regard to vessels, but it does not appear to us to be required.

621. In Clause 416 the aggravation is the same as in Clause 367 relating to theft, namely, preparation to cause death, &c., but the punishment in the former is imprisonment of either description limited to three years, whereas by the latter the imprisonment is rigorous and may extend to seven years. We see no reason for this difference, and would suggest that Clause 416 be altered to agree with Clause 367, both as to the extent and the nature of the imprisonment.

622. We are not aware of the intended application of Clause 417. It seems to us, as far as we can see, unnecessary.

623. While Mr. Norton exclaims against the severity of the punishments for mischief as out of all reason, several of the Officers in the Mofussil object to them as inadequate from their leniency. We are not prepared to suggest any alteration except what we have just proposed, and that for the offences defined in Clause 410, and in Clauses 412, 413, and 415, the imprisonment be rigorous.

OF CRIMINAL TRESPASS.

624. Clause 418 contains a definition of "trespass," which, as explained in the Note N., "is the name given to every usurpation how-
"ever slight of dominion over property."

625. Exception is taken to the term "dominion" as it is used in this definition. Sir H. Seton questions "whether in any of the cases "put (by way of illustration) dominion can be properly said to be "exercised." Mr. Norton says "I know not what is meant by *dominion*"; "can dominion," he asks, "be exercised without any actual meddling "with, or personal ingress upon property, as by making sale of it for "instance?" Mr. Hudleston says "I think this is a bad definition; "with reference to the illustration (a) I think walking into a building is "ill described as exercising dominion over it."

626. To exercise dominion over any property, is to do in respect of that property what can only be lawfully done by the *dominus*, or by authority derived mediately or immediately from him. This we presume is what was

meant by the expression as it is employed in Clause 418, and it seems to us that the illustrations are all just examples of the "exercise of dominion" in this sense. But we must admit that these words go as far as Mr. Norton's question implies, and that to sell a house would be to exercise dominion over it, which is clearly beyond the intention.

627. It seems to us therefore that it will be better to abandon the term dominion in this place, and to modify the definition of trespass by specifying the sorts of acts which we understand to have been meant. We would propose that the definition should stand as follows:

Whoever enters or causes any animal or thing to enter upon or into any property, or who makes use of any property, not having a legal right independent of the consent of any other party, and not having the consent express or implied of any party legally entitled to give a consent, is said to "trespass."

628. "Trespass" is not an offence by the Code except when it is committed in order to the commission of some offence by which it is intended to injure, or in order to intimidate, insult, or annoy any possessor of the property on which the trespass is committed, or any person exercising any dominion over such property by permission of such possessor, which is designated in Clause 419 as "criminal trespass."

629. The aggravations of "criminal trespass" are "house trespass," (Clause 420) "lurking house trespass," (Clause 421) "lurking house trespass by night," (Clause 422) "house breaking," (Clause 423) "house breaking by night," (Clause 424.)

630. With respect to these aggravations the authors of the Code offer the following remarks:

"There is no sort of property which it is so desirable to guard against unlawful intrusion, as the habitations in which men reside, and the buildings in which they keep their goods. The offence of trespassing on these places, we designate as house trespass, and we treat it as an aggravated form of criminal trespass." Notes p. 85.

"House trespass again may be aggravated by being committed in a surreptitious or a violent manner. The former aggravated form of house trespass we designate as lurking house trespass, the latter we designate as house breaking. Again, house trespass in every form, may be aggravated by the time at which it is committed. Trespass of this sort has, for obvious reasons, always been considered as a more

"serious offence when committed by night than when committed by day. Thus we have four aggravated forms of that sort of criminal trespass which we designate as house trespass, house breaking, lurking house trespass by night, and house breaking by night."

Clauses 426, 431, 435.

631. These forms of Criminal trespass "aggravated by the way in which they are committed," are punishable as distinct substantive offences; they are punishable again with increased severity when they are committed in order to the commission of other offences, or are "aggravated by the end for which they are committed."

Clauses 427 to 430.
432 to 434.
436 to 438.

Supra, para. 505.

632. We have already noticed an objection taken under the head of "theft" to the separation of that offence from "house trespass" when the two actions appear to be parts of an integral crime, an arrangement which it is supposed will prove inconvenient in practice, from the references which will be necessary from one part of the Code to another. We have said that we do not think it likely that there will be any real inconvenience in the practical application of the law, owing to the arrangement in question, when the new way is once perfectly understood. In theory we are inclined to think the arrangement in the Code,* by which the trespass is treated as the primary and simple offence, and theft and other offences following upon the trespass as complications and aggravations superadded extrinsically, to be the more just and methodical. There is as much reason for treating "house trespass" as an aggravation of any other offence in order to which it is committed, as for treating it as an aggravation of theft; but if the principle were followed out generally, it is obvious that there would be a great deal of needless and unseemly repetition, and also, we apprehend, much practical inconvenience.

* The same arrangement obtains under the head of "hurt," "assault," &c.

633. We observe that the English Criminal Law Commissioners have expressed an opinion in favor of the same arrangement as that which has been adopted in the Code, intimating that it is the arrangement which, if their object had been to reconstruct the law instead of merely digesting it, they would have been disposed to follow. "The proper course as it appears to us," they say, "would be to consider breaking a dwelling house as in all cases the simple offence; and then to classify the circumstances of stealing or committing any other offence therein, of night time, and of alarm or injury to inmates, as so many aggravations, to each of which, when added to the crime of house breaking, an appropriate place in the scale of punishments should be assigned. We apprehend that an arrangement of the law upon this principle, would obviate many of the most embarrassing difficulties by which the subject is at present attended."

5th Report, p. 9.

634. For "house trespass," "lurking house trespass" and "house breaking," and "lurking house trespass" and "house breaking by night," in order to the committing of any other offence, which offence is actually committed, the offender is liable to both the punishment for "house trespass" (or as the case may be) and the punishment of the offence actually committed in addition.

Clauses 427, 432, 436.

635. For "house trespass" in order to the committing of an offence punishable with death or transportation for life, but which offence is not committed, the offender is liable to transportation for life as the maximum punishment.

Clause 428.

636. There is no corresponding provision for "lurking house trespass" or "house breaking" by day, or by night, with the same object.

637. When the object is the committing of an offence punishable with imprisonment, the maximum punishment is imprisonment not exceeding $\frac{1}{3}$, $\frac{1}{2}$, or $\frac{2}{3}$, of the longest term of imprisonment for such offence, in addition to one year, two years, or three years, as the primary offence may be "house trespass," "lurking house trespass," or "house breaking," or lurking house trespass or "house breaking by night."

Clauses 429, 433 and 437.

638. We have remarked above in commenting upon Clause 367, that there is no provision under the head of "criminal trespass" similar to that contained in the said Clause, for cases in which the offender has made preparation for causing death to any person, and we have suggested that such a provision be inserted in Clauses 430, 434, and 438. The maximum punishment should be proportionately increased in each Clause.

Para. 50.

639. Clause 423 defines "house breaking" to be "house trespass" committed in any of six ways therein described. The essence of the offence of "house breaking" (which becomes "house breaking by night" when it is committed "after sunset and before sunrise") therefore consists in effecting an entrance into "any building, tent, or vessel, used as a human dwelling, or any building used as a place for worship, or as a place for the custody of property"—1st, by a passage made for the purpose; 2d, by a passage not intended for human entrance; 3d, by a passage opened for the purpose by means not intended to be used for opening it; 4th, by opening a lock with a key not found in it, or with a key left in the lock for the purpose; 5th, by committing assault, or shew, or threat of assault; 6th, by a passage known to have been fastened against such entrance, unfastened from within for the purpose.

Chapter XVII.
5th Report, p. 10.

640. These ways of entry all appear to be recognized in the definition of burglary in the Digest of the English Criminal Law Commissioners. In framing this definition the Commissioners have pursued the same course as was taken in the Code. "According to the common law definition," they observe, "an *actual breaking* as well as an entry "was essential to the offence, but the Courts had found it necessary to "construe breaking to include invasions of the dwelling house effected "by stratagem, or fraud, or by intimidation, as well as by actual force." To avoid giving occasion for such constructions, "instead of defining "the offence to be a *breaking* and entering, &c. we have," they say, "described it as consisting in an entry by any of the means which either "in popular language, or by construction of law, have been held to "amount to a breaking."

Chapter XVII. Art. 6.
Page 11.

641. The definition in the Code appears to fall short of that in the Digest by not including an entry effected "by means of any stratagem, "trick, or device fraudulently practised for the purpose of obtaining "admission," of which instances are given in the Note to Article 6 under the head of Burglary in the 5th Report of the English Criminal Law Commissioners. It does however provide for entrance obtained by collusion "with other persons unlawfully affording or facilitating such "entry," which is provided for in the same article of the Digest.

642. It is explained in the Code in agreement with the Digest that the introduction of any part of the body is a sufficient entering to satisfy the definition, but there is no provision to correspond with that of Article 10 in the Digest, by which the introduction of any engine, or instrument, or the discharge of any missile into a dwelling house is to be deemed such entering.

643. The offence of burglary in the Digest can only be committed in a *dwelling house*, whereas "house breaking" by the Code can be committed wherever "house trespass" can be committed, that is in a tent, or vessel, as well as in a building, and in a building used as a place of worship, or for the custody of property, as well as for a "dwelling."

Para. 509.

644. In noticing above the suggestion of Mr. J. F. Thomas that in providing for offences against property a distinction ought to be made between mat and bamboo huts and such like fragile dwelling places incapable of being secured against intrusion, and substantial houses sufficiently protected from invasion, we observed that if any such distinction were required the proper place for it would be where provision is made for the offence of "house trespass," &c. Upon further consideration of

the subject on this occasion it appears to us that the provisions regarding that aggravation of the offence of "house trespass" which is designated as "house breaking," ought not to be applied to any buildings but such as are of a construction to admit of their being firmly secured against invasion, that is to say, buildings with substantial walls and roofs, and furnished with doors and windows having locks and bolts, or other means by which they can be effectually closed. Other buildings we would except from Clause 423. We would likewise except "tents" from the dwellings to which the provisions of Clause 423 are to be applicable. It does not appear to us to be necessary or expedient to make like exceptions from the other provisions touching "house trespass" and the aggravations thereof.

Chapter XVII. Art. 13.
p. 11.

645. According to the definition given in the Digest of the English Criminal Law, a dwelling house must be a "*fixed and permanent building*." The Commissioners observe, in a Note on this definition in their 5th Report, that "Although the authorities do not supply "any precise description of the building which, if inhabited, may be the "subject of burglary, they exclude by instances and illustrations enclosed grounds and all erections of a merely moveable and temporary "nature, such as booths or tents."

646. The definition of burglary in the Digest includes expressly an entry made into some *inner part* of a dwelling house as well as an entry into a dwelling house, but taking the definitions of "house trespass" and "house breaking" in the Code together, it seems to us that only the first entry into the house by any of the ways indicated in Clause 423 is provided for. We are inclined to think that a person entering as a house trespasser (420), remaining as a lurking house trespasser until night (421 and 422), and then breaking or making an entrance into a closed and fastened inner chamber by any of the ways described in Clause 423, ought to be regarded as a house breaker equally with the man that makes an entry into the house from without by any such way. This is immaterial, however, as the punishment is the same for "lurking house trespass" and for "house breaking."

Clause 431.

647. Referring to Clause 440 which provides for the offence of fraudulently opening a closed receptacle by a person intrusted with the keeping of it by law or in pursuance of a contract, Mr. J. F. Thomas suggests that it would perhaps avoid difficulties if the words express or implied were inserted after the word "contract." These words, we observe, are introduced in the manner proposed, to qualify the term "contract"

in Clause 386 relating to criminal breach of trust, and it appears to us equally proper that they should be introduced in this place.

648. Some objections have been made by one or two Officers to the punishments for the more serious offences falling under the general head of criminal trespass, but it does not appear to us that they are of sufficient importance to call for any modification thereof.

CONCLUSION.

649. Recurring now, on the conclusion of our review of the Chapters which principally form the subject of this Report, to the statement made in the preliminary part of it, of what we conceive to be the practical questions regarding the Code upon which the Government desire to be advised, we think it proper to say, that it is our deliberate opinion with respect to the portion to which we have given our more particular attention in detail, that it is sufficiently complete, and, with such slight modifications as we have suggested, fit to be acted upon, and that if it be brought into operation it may be reasonably expected to work an important improvement in the administration of Criminal Justice. We think it might be brought into operation in the Company's Courts with little if any alteration of procedure with the help of a few plain and simple directions as to the manner of laying the charges, and some rules to define the offences falling to the jurisdiction of the several Courts, with reference to the punishments they are respectively authorized to inflict. It does not appear to us, as at present advised, that there would be any great difficulty in adapting the procedure of Her Majesty's Courts to the new system. Of the two Judges of Her Majesty's Courts who have expressed opinions on this point, one it will be seen has declared that he could act upon the Code immediately, while the other thinks it could not be acted upon without some change in the system of Criminal pleadings.

650. In submitting this our first Report on the Indian Penal Code, we have only further to state that, pending the orders of your Honor in Council, we shall proceed with the examination of the remaining Chapters of the work in the same manner as we have examined those upon which our observations are now submitted for the consideration of Government.

C. H. CAMERON,
D. ELIOTT.

INDIAN LAW COMMISSION,
The 23d July, 1846.

POSTSCRIPT.

651. After the foregoing Report was finished the 2d Report of Her Majesty's Commissioners for revising and consolidating the Criminal Law came into our hands, and finding that in some important points modifications of the existing law are proposed, in order to render the Penal Code of England "suitable to the present state of society, and conformable to the enlightened principles of jurisprudence," which if adopted will bring the law of England into a closer correspondence with that proposed in the Indian Penal Code, we deem it proper to add a brief notice of some of the proposed modifications affecting matters treated of in the Chapters of the Indian Code which we have reviewed.

652. First we have to point out that in the Chapter of Preliminary Declarations and Enactments in the Schedule prepared by the Commissioners, the first article of the section treating of incapacity to commit crimes, in agreement with Clause 66 of the Indian Penal Code, recognizes the state of Idiocy distinctly, as excepting a person from criminal responsibility. The agreement on this head stops here, for while the Indian Code declares simply, in separate Clauses, that nothing is an offence which is done by a child under seven years of age, or by one above seven but under twelve years of age, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct, or by a person mad or delirious at the time of doing the thing, the Schedule has an article declaring generally that no person shall be criminally responsible for any act or omission who "by reason of unripeness or weakness of mind, or of any unsoundness, disease or delusion of mind, wants the capacity" "of discerning that such act or omission is contrary to the law of the land." This definition, which is quite new, is strongly objected to by one of the Commissioners, Mr. Starkie.

653. We conceive that the Indian Law Commissioners meant to include "weakness of mind" under the general term "idiocy." This word is not in Johnson's Dictionary, but the equivalent term "idiotism" is interpreted by him as signifying "natural imbecility of mind."

654. The simple enunciation in Clause 67 of the Indian Code that "nothing is an offence which a person does in consequence of being mad, or delirious at the time of doing it," is in accordance with Mr. Livingstone's Code and with the Code Penal of France on the same point. In

Chapter I.

Sec. 1. Art. 1., p. 9.

64.

65.

67.

Chapter I. Sec. 1. Art. 2.
p. 9.

Art. 64. Article 35 of the former it is declared that "no act done by a person in a state of insanity can be punished as an offence." The following is the declaration of the French law—"Ié n'y a ni crime ni délit lorsque le prévenu était en état de démence au tems de l' action."

Art. 3, p. 11. 655. The next article in this section of the Schedule, providing that "no person shall be exempted from criminal responsibility by reason of any temporary incapacity which he shall have wilfully incurred by intoxication or other means," agrees substantially with Clause 63 of the Indian Code. We would refer here to the remarks we have made in para. 119 of the foregoing Report on the distinction between delirium in Clause 67, and the temporary incapacity of mind arising from intoxication by the use of narcotic drugs, &c.

p. 12. 656. The article relating to Duress in the Schedule differs from that in the Digest cited in para. 104 of our Report, by the omission of the words "of grievous bodily harm," thereby limiting the excuse on this ground to cases in which the party acted under a present fear of death as proposed by us in para. 169.

See note to Art. 9, p. 12. 657. The Schedule agrees with the Code in excluding the excuse of marital coercion in the case of a woman charged with the commission of a criminal act, adverted to in paras. 173 and 174 of our Report.

Sec. 2, Art. 2, p. 14. 658. In Article 2 of the 2d Section of the same Chapter of the Schedule there is an explanation of the term "unlawful," which will be found to agree with the explanation of the term "illegal" in Clause 28 of the Code, noticed by us in para. 91 of our Report in reference to an objection which had been made to the application of it "to every thing which furnishes ground for a civil action." According to the above article "an omission shall be deemed to be unlawful whensoever it gives cause for civil action." In explaining their reasons for rendering persons criminally liable for the consequences of omissions which they were bound by contract to have avoided, Her Majesty's Commissioners quote the remarks of the Indian Law Commissioners on the subject, in which they express a general concurrence.

659. The word "injury" is used in the Schedule as a general term, in the same way as it is used in the Code, and the definition of it agrees with that given in Clause 29 of the latter.

660. Article 6 of the same Section lays down that "an injury shall be deemed to be accidentally caused whensoever it is neither

"wilfully nor negligently caused," and that "accidental injuries do not subject the persons causing them to punishment," except as elsewhere mentioned in the Act.

661. The Commissioners explain that they intend here to depart from the principle of the present law, and following the principle advocated by the Indian Law Commissioners, whose arguments they quote at length, as having their general concurrence, to make it the general rule that "where a person does an unlawful act, and a consequence follows which has no probable connexion with it, and can neither be imputed to wilfulness or want of caution, the agent should be dispunishable, except for the unlawful act in which he was engaged." We beg to refer to the observations on this head in our Report.

2d Report p. 17 and 18.

Paras. 310 to 312.

662. With reference to our observations in paras. 176 to 185, upon the provisions of the Code compared with the English law of Principal and Accessory, we have now to point out that in the Schedule under consideration Her Majesty's Commissioners propose to abolish the difference of punishment between principals in the first and second degree and accessories, and the technical distinction between principals in the first and second degrees, and to make the offence of being an accessory a substantive offence. By the change proposed the law of England will correspond with the Indian Code on these points.

Chapter I., Sect. 3, Art. 1
Note (a) p. 19.

663. In para. 327 of our Report it is remarked that there is no limitation of time in the Indian Code, corresponding with that of the English law in respect to the cognizance of homicide. This limitation of time "confining prosecutions for murder to cases where the party injured dies within a year and a day after the cause of death," Her Majesty's Commissioners have not inserted in their Schedule.

Note (a) Art. 1, Sect.
Chap. II, p. 21.

664. Referring to the observations in our Report (paras. 242 to 249) upon the definition of "voluntary culpable homicide" in the Code, as including cases in which death is caused by an influence on the mind, and the exception of such cases in the Digest contained in the seventh Report of the English Criminal Law Commissioners, we have to note that this exception is maintained in the Schedule under consideration, the Commissioners observing that they "do not feel justified in abandoning a principle which has been sanctioned by long usage and high authorities," though they "conceive that there is great weight in the reasoning urged by the Indian Law Commissioners in support of their adoption of a different course."

Chap. II., Sect. 1, Art. 4
Note (d) p. 22.

Chap. II., Sect. 2, Art. 2.

665. The Commissioners have given a new definition of "murder" agreeing in principle with that suggested by Mr. Livingstone, and to explain the advantages of it they submit the observations by which Mr. Livingstone recommended his definition to the Legislature of Louisiana. The definition is as follows: "Homicide is murder whensoever the killing is wilful, and is neither extenuated within the provisions of Section 3, nor justifiable within the provisions of Section 5 of this Chapter." Under the explanation before given of the term "wilful," which agrees substantially with that quoted by us in para 103 from the Digest, the above definition corresponds very closely to that contained in Clauses 294 and 295 of the Code. "Extenuated homicide," it is to be observed, includes that which is termed "manslaughter" in the Code, and also that which is designated as "voluntary culpable homicide by consent." Under the head of "justifiable homicide" are contained some provisions similar to those which in the Code find place in the Chapter of "exceptions."

Chap. I., Sect. 2, Art. 3.

Chap. II. Sect. 3, Art. 2.
Sect. 3, Art. 3.

Paras. 258 to 266.

Chap. II., Sect. 2, Art. 3.
Note (b) p. 5.

666. With reference to our observations upon the question of treating a person who has caused the death of another by bearing false witness against him before a Court of Justice, as guilty of murder, and making him liable to capital punishment, as provided by the Code, we have to mention that the Commissioners have decided to except this offence from the definition of murder in their Schedule, though, they observe, "the act seems to be attended with many of the bad consequences, and to have the general features of a murder of the most malignant description," and though "there appear to be strong grounds for apprehending that it is murder by the law of England, as it is by several other Codes." They propose to provide for the crime in the Chapter relating to offences against the administration of justice, as we have advised in para. 266 in regard to the Indian Code. The terms of the definition of murder plainly embracing this offence, the Commissioners have thought it necessary to declare the exception expressly in a separate Article, and perhaps it will be proper to introduce an "explanation" after Clause 294 of the Code, to notify that this offence is to be dealt with under Clause 191 of the chapter of offences against public justice.

See Paras. 268 to 271.

Page 25. Note (b) Art. 2.
Sect. 3.

667. In para. 269 of our Report we have remarked that under the English law the plea of provocation is not available to reduce homicide from murder to manslaughter when the provocation has arisen from mere words or gestures, but that there is no such restriction in the Indian Code. Her Majesty's Commissioners in their present report observe that the rules of the existing law of England on this point "appear to be unreasonable, when the principle is considered upon which extenuation

"is admissible, viz., the want of self-control occasioned by means which, according to the constitution of human nature, ordinarily produce this effect." They quote at length the remarks of the Indian Law Commissioners on the subject, which, they say, "seem to be very deserving of attention." Their definition of "extenuated homicide" therefore is not restricted by any such exception as that which, following the existing law, their predecessors thought themselves obliged to introduce into their Digest. It does not however exactly agree with the Code on this point, in as much as the latter explains "grave provocation" to be "such as would be likely to move a person of ordinary temper to violent passion," whereas by the definition in the Schedule the gravity of the provocation is left to the judgment of the jury in each case. The Commissioners say, "It has been thought by some jurists that the criterion in these cases ought to be, what would take away the self-control of a person of ordinary temper. But we have thought it better to abide by the present law, according to which the circumstances of the individual accused are relevant to the question of extenuation."

Chap. II., Sect. 3, Art. 2,
page 25.Digest. Chap. XV., Sec. 12,
Art. 34.
Explan. to Cl. 297.

668. As in the Code the explanation subjoined to Clause 297, declaring what is meant by "grave provocation" such as will reduce "voluntary culpable homicide" to "manslaughter," has a proviso that such provocation was not given by any thing done in obedience to the law, or by any thing authorized by the law of civil or criminal procedure, or by any thing done by a public servant in the exercise of his lawful powers, so Her Majesty's Commissioners have introduced into their Schedule an article declaring that homicide is not extenuated on the plea of provocation where any Officer or other person lawfully executing any writ, &c., civil or criminal, or lawfully acting in obedience to the command of a magistrate, or otherwise lawfully acting under authority for the advancement of the law, is wilfully killed.

Chap. II. Sect. 3, Art. 6,
page 27.

669. Again, they have an article declaring that homicide is not extenuated in such a case although the writ, &c., be not sufficient in law, or the command be unlawful, or the officer have no authority, or the manner of executing the writ, &c., be unlawful, provided the officer believed himself to be acting lawfully as aforesaid, and provided the party killing had notice that the Officer proposed to act under such writ, &c.

Art. 7, page 28.

670. As we understand the last article it appears to us that the effect of it, for the declared object of protecting officers of justice in the execution of their duty, will be much the same as that of the proviso to Clause 297 of the Code just adverted to, construed with reference to the declaration in Clause 75, that there is no right of private defence against

an act done by a public servant who is legally competent as such public servant to do that act, though that act may be an offence in that public servant, &c. The reasons which induced Her Majesty's Commissioners to frame the article in question as it stands in their Schedule are stated in pages 27 and 28 of their Report.

671. After stating those reasons the Commissioners add that they "also think that where an officer believing that he is executing legal process "commits homicide, such homicide should, notwithstanding the process "is erroneous in the frame of it, be *extenuated*." "In such case," they observe, "he will still remain liable to severe punishment." A provision to this effect is inserted accordingly in Article 8.

Page 28.

Report paras. 115 and 116.

672. By Clause 62 of the Indian Code, as we have interpreted it, an officer committing homicide in executing what he believes in good faith to be legal process, but which is not so, being led to the belief of its legality by a *misconception of facts*, would be wholly excused. The words of the Clause indeed, as we have observed, admit of a wider construction, and have been understood to *excuse* an officer acting under an erroneous impression of his duty arising from a misconception of the *law*, under such circumstances as would *extenuate* the offence under the article of the Schedule which we are now considering; as for example an officer acting for the advancement of the law, erroneously believing himself to have authority by law so to act, and in that belief and in prosecution of that object committing homicide. We have advised that qualifying words be introduced into Clause 62, to prevent the wide construction here adverted to, of which some have thought it susceptible.

673. Though we are not prepared to agree to such a latitude of indulgence to officers acting *bona fide* for the advancement of the law, as to *excuse* them entirely from penal responsibility for homicide committed, under such circumstances as are described in Article 8 of the Schedule, when they have erred from a misconception of the *law*; yet we think that such circumstances ought to be regarded as *extenuating* the homicide. Sometimes the incidents of the case may bring homicide so committed under the provision for "voluntary culpable homicide in defence" in Clause 299 of the Code. But this will not be generally applicable, and we are inclined to recommend the introduction of a new provision to correspond with the said article.

674. It appears to us to be advisable to add to Clause 75, and to the explanation annexed to Clause 297 of the Code, a proviso corresponding with that contained in the articles of the Schedule we have just been

considering, requiring it to be notified that the Officer is acting under a writ, or in obedience to command, or otherwise, for the advancement of the law.

675. We have observed that under the head of "extenuated homicide" in the Schedule is included what is designated in the Code as "voluntary culpable homicide by consent." In support of the provision which distinguishes such homicide from murder, the Commissioners cite the observations of the Indian Law Commissioners on the subject, which, they say, "appear to them to have great weight." Further, they distinctly provide for homicide in duelling as "extenuated homicide," and vindicate the provision upon grounds similar to those upon which we have advocated the dealing with this offence as "voluntary culpable homicide by consent" under Clause 298 of the Code, as we believe was intended by its authors. In the Schedule is a separate article declaring that homicide in duelling is not extenuated when the death of the person killed is caused by unfair means. We do not think such a proviso necessary in the Code, as the terms of Clause 298, we conceive, exclude any case of death caused by other means than those to which the person killed gave his "intelligent consent." The punishment for homicide in duelling by the Schedule is transportation for life or for any term not less than seven years; by the Code it is imprisonment of either description for a term not exceeding fourteen years, nor less than two years, to which may be added fine at discretion.

Art. 14, page 29.

Art. 16, page 30.

Report para. 290.

Art. 17.

676. The Schedule provides specially for "negligent homicide," the definition of which in Article 2, Section 4, Chapter II, together with that in Article 5, Section 2, Chapter I, therein referred to, agrees essentially with Clause 304 of the Code. The punishment is imprisonment not exceeding three years by the former, not exceeding two years by the latter.

677. The Schedule in many cases treats as "justifiable homicide" what under the Chapter of Exceptions in the Code is held to be no offence, as when the homicide is committed by a person acting lawfully under a lawful authority, in various ways, for the advancement of the law, and giving notice of the authority under which he acts. We think it advisable to add the proviso regarding notice to Clauses 62 and 63 of the Code, as well as to Clause 75, and to the explanation annexed to Clause 297, as above recommended. Particulars, it is to be observed, are given in the articles of the Schedules here referred to, which the framers of the Code left to be specified under the head of procedure, to which they appear more properly to belong. Her Majesty's

Chapter II. Sec. 5.

Compare Art. 1 to 11 with Clauses 62 and 63 of the Code.

2d Report, page 7.

Commissioners, it appears, contemplate a revision of their work when the whole Digest is completed, with a view to generalization and the systematic adjustment of the several portions, and probably there will then be a more distinct separation of the provisions which belong to procedure

Chap. II. Sect. 5, Art. 12 to 18.

Cl. 74 to 84.

678. Again, homicide is treated as "justifiable" in the Schedule when it is committed in the lawful defence of person or property, the provisions not materially differing from those under the head of the "right of private defence," in the Chapter of Exceptions in the Code, which are however much more full and explicit.

Art. 19.

679. The last article in the Schedule under the head of "justifiable homicide," appears to correspond with Clauses 70 and 72 of the Code, except that the consent of the sufferer is not required by the former as it is by Clause 70, when the party is able to signify consent.

Page 36.

Vide paras. 165 to 168.

680. Her Majesty's Commissioners agreeing to the sentiments expressed by the Indian Law Commissioners in Note B. quoted in para. 166 of our Report, have resolved to omit any provision "justificatory of the homicide of an offending party committed in order to save the life of the accused, or rather because the accused reasonably thought that the homicide was indispensable for preserving his own life."

Chap. II., Sect. 6, Art. 2, page 37.

681. The offence of aiding in, or abetting the commission of self-murder, which by the present law of England is murder, the Commissioners propose to make punishable with transportation for life, or for not less than seven years, which is the punishment they provide for homicide by consent. By Clause 307 of the Code also, this offence is punishable with the penalty therein provided for homicide by consent, viz., imprisonment for fourteen years, or not less than two years, except (Clause 306) the person who commits suicide is a child, or of unsound mind, &c., when the punishment may be death, or transportation, or imprisonment for life.

Chap. II., Sect. 7, Art. 1.

682. The Schedule provides that attempts to commit murder by poisoning, or by any means causing bodily harm, or by setting fire to, or casting away a ship, &c., shall be punishable capitally, (the Commissioners however expressing a wish to reconsider their recommendation on this point when they present a general chapter on the subject of punishments) and that attempts to commit murder otherwise than by poisoning, although no bodily harm shall be caused, shall be punished with transportation for life, or for any term not less than 7 years, or with imprisonment not exceeding three years. Again, the maliciously putting

the life of any person in danger, by any means not before specified, is punishable with imprisonment not exceeding three years, or fine, or both.

683. Attempts to commit murder are by the Code liable to be punished with transportation for life; attempts to commit homicide which under the circumstances would be culpable homicide less than murder, with imprisonment which may extend to three years.

Clause 308.
309.

684. The term "grievous bodily harm" is used in the Schedule to designate "all the serious personal injuries, short of death, the commission of which and the attempting to commit which should be visited with severer punishment than other personal injuries." Upon the definition of this term the Commissioners say "they have endeavored to include within its meaning the more serious kinds of personal injury, without reference to pugnacity or other principle than the damage and suffering occasioned." They appear to have aimed at giving in a condensed form the substance of the detailed definition of the kinds of "hurt" designated as "grievous" in the Indian Code, which, with the remarks of the Indian Law Commissioners, they cite at length in their note. "The limitation of twenty days," in their definition, they observe, "is taken from the French Code, and was adopted from that Code by the Indian Law Commissioners." Upon this subject we would refer to the observations in our Report, and particularly to the observations in para. 374 on the point last mentioned. We observe that Mr. Starkie objects, as we do, to the limitation of twenty days in the definition of "grievous bodily harm" or "grievous hurt."

Chap. II. Sec. 7, Art. 6.
Page 39 Note (e)

Chap. III. Art. 1.

Clause 314.

Report Paras 356 to 386.

685. The punishment proposed for "grievous bodily harm" in the Schedule is transportation for life, or for a term not less than seven years, or imprisonment not exceeding three years, nor less than one year. By the Code the maximum punishment for "grievous hurt" simply is imprisonment for ten years, to which fine may be added; the minimum is imprisonment for six months. Attempts to cause "grievous bodily harm" are punishable by the Schedule in the same manner as the completed offence, except that there is no minimum limit to the imprisonment. The punishment for an attempt, by the Code, is half of that which may be inflicted for the completed offence.

Clause 319.

Chap. II. Sec. 7, Art. 7.

Clause 329.

686. A subsequent article of the Schedule in the same section, but separated from that relating to "grievous bodily harm," provides for other "bodily harm" (answering to simple "hurt" in the Code) or "violence," caused or done "maliciously or negligently." The punishment is the same as is prescribed by the Code for "hurt"—imprisonment

Chap. II. Sec. 7, Art. 7.
page 43.

not exceeding one year, or fine, or both, except that in the Code the fine is limited to Rupees 1,000.

Art. 40, page 45.

687. Article 40 of the same Section contains a provision corresponding to that of Clause 70 of the Code, justifying any harm arising from any thing not intended to cause death, which was done with the consent of the party suffering.

Art. 43, p. 45.

Para. 393.

688. The definition of assault in the Schedule differs from that contained in the Digest and quoted in our Report, by the addition of the words "or menace by gestures," by which it is made to comprehend what in the Code is designated as "shew of assault."

Clause 311.

689. The Statute Law* of England, which we apprehend is the only law upon this subject which is enforced, differs from the Indian Code on the subject of abortion, in that the former does not punish the woman who voluntarily causes herself to miscarry, whereas by the latter she is punishable. We find that it is now proposed that "every woman being "with child, who with intent to procure her own miscarriage, shall "maliciously administer to herself any poison or other noxious thing, or "use any instrument or other means whatsoever," shall be liable to transportation for life, or for any term not less than seven years, or imprisonment for a term not exceeding three years.

Chap. II. Sec. 7, Art. 15.

Clause 312.

690. The punishment proposed in the Code is imprisonment not exceeding three years, or fine, or both. By the Schedule of Her Majesty's Commissioners, and also by the Indian Code, a person causing, or using means to cause the miscarriage of a woman is liable to the same punishment as is prescribed for a woman causing her own miscarriage. By the Code a person causing a woman to miscarry without her consent is liable to additional punishment for any hurt that may ensue.

Clause 313.

691. The above article in the Schedule is followed by a proviso that the Act intended to procure miscarriage was not done in good faith with the view of saving the life of the woman, which corresponds with the terms of Clause 312 of the Code.

692. The article defining "rape" in the Schedule contains, in addition to the words used in the definition given in the Digest, the words following, "or whilst she is insensible," which correspond with the second description of "rape" in Clause 359 of the Code.

* Note.—By the old Common Law it seems that "if a woman be quick with child and by a potion or otherwise killeth it in her womb it is a great misprison." We ought to have noticed this at para. 347 of our Report.

693. The Code includes under "rape" sexual intercourse with a girl with or without her consent when she is under nine years of age. By the present law of England this offence is punishable as rape when the girl is under ten years of age. By the Schedule it is proposed to be so punishable when the girl is under twelve. By the Statute for India the age is eight years.

Report para. 446.

694. The punishment for rape by the present law of England is transportation for life absolutely. In the Schedule it is altered to transportation for life, or for not less than seven years. By the Statute for India it is death. By the Code the maximum punishment is imprisonment for fourteen years.

Ibid para. 447.

695. In the Schedule there is a new provision for the offence of administering drugs, &c., to a woman to render her insensible, or otherwise to affect her so as to facilitate the object of obtaining carnal knowledge of her. There is no similar provision in the Code, but it seems to be worthy of consideration whether this offence, which we apprehend is not uncommon in India, should not be included in it. The proposed punishment is imprisonment not exceeding two years.

Chap. II. Sec. 7, Art 24, page 43.

696. By Clause 296 of the Code it is provided that when a person intending to cause death kills a person whom he did not intend to kill, he shall be held guilty of the same degree of homicide as if he had caused the death which he intended. There are similar provisions in the Digest of the English law prepared by the late Commissioners. In the Schedule under consideration instead of those provisions limited to homicide, there are general provisions making a party liable to punishment for any injury caused by him to a person not intended to be injured, by means by which he intended to injure some person, in the same manner as if the person injured had been intended to be injured. In explanation the Commissioners say—"If these rules be applicable to homicide they "seem equally to apply to other severe personal injuries; as for example, "if A were attempting to put out B's eye, and by accident C intervened, "whose eye was put out by the thrust intended for B."

Chap. XV. Sec. 2, Art. and 5.

Chap. II. Sec. 7, Art. 45 and 46, page 46.

697. We have lastly to remark that the present Commissioners have abandoned the classification of crimes as "treasons," "felonies," and "misdemeanors" according to the Digest of their predecessors, in which a new signification was given to the two latter terms; the term "felonies" being used to denote crimes punishable with death or transportation, also the crime of self-murder, and the term "misdemeanor" all other crimes except "treasons." The present Commissioners.

Chap. IV. Of Penalties—
Transportation for seven
years, or imprisonment not
exceeding three years.

have avoided the use of these terms altogether in the Schedule. In the 7th Section of the Draft of the Act to which the Schedule is proposed to be annexed, it is prescribed that offences liable to the penalties of the 6th or any higher class shall be tried in the same manner and under the same procedure as if such offences were by the said Schedule declared to be felonies; and offences liable to lower penalties as misdemeanors.

C. H. CAMERON.
D. ELLIOTT.

INDIAN LAW COMMISSION,
The 5th November, 1846.

