

NOTE (H).

ON OFFENCES RELATING TO THE REVENUE.

IN order to frame this chapter, we took a course similar to that which we took with the chapter relating to contempts of the lawful authority of public servants. We went carefully through the revenue laws of the three presidencies, extracted the penal clauses, analyzed them, and reduced them to a small number of general heads.

His Lordship in Council will perceive that we have not thought it proper to insert in the code any provision for the confiscation of property on the ground of a breach of the revenue laws, and that we leave the existing rules on that subject untouched. We have done so, because it does not appear to us that such confiscation is in strictness a punishment. It has, indeed, much in common with punishment; but it appears to us that there is a marked distinction, and that confiscation of the sort which is authorized in many parts of the regulations of the three presidencies would, considered in the light of a punishment, be anomalous and indefensible. It is a proceeding directed, not against the person who has broken the law, but against the thing with respect to which the law has been broken. It is not necessary that any misconduct should be proved, that any accusation should be brought, that any particular individual should be in the contemplation of the authority which directs the confiscation. Nay, the revenue laws authorize confiscation, not only in cases where misconduct is not proved, but in cases where it is proved that there has been no misconduct in any quarter; and, where there has been misconduct, those laws authorize the confiscation of the property of a person who is proved to have had no share in the misconduct.

To give a single example: If tobacco be found in the island of Bombay after the time at which it ought to be exported thence, it is confiscated, together with the receptacles which

contain it, the substances in which it is packed, and the carriages and animals which are employed to convey it. This, which is a fair specimen of revenue laws respecting confiscation, is evidently objectionable, considered as a penal law. The carriages, the animals, the vessels, the tobacco itself, may all be the property of persons who are not in the least to blame. Indeed, we know that under this law the boxes of gentlemen have repeatedly been seized, because the servants who packed them had concealed tobacco in the baggage. Such a law, put into the form of a penal provision, would be too grotesque to be a subject of serious argument. It would, in the phraseology of our code, run thus: "If any person places contraband tobacco in the baggage of any other person, the person in whose baggage such contraband tobacco is placed shall be punished with the confiscation of such baggage." And the following illustration would make the law, if possible, still more ridiculous: "Contraband tobacco is hidden in A's baggage, by A's servant, without A's knowledge, and contrary to A's express command. A has committed the offence defined in this clause."

It is evident, therefore, that this law, and many other laws of the same kind, must be defended on principles quite different from those on which penal legislation ought to be conducted. They must be defended, not as being penal laws directed against the guilty, but rather as being sharp and stringent laws of civil procedure which are intended to enable the government to obtain its due with speed and certainty, at the cost whether of the guilty or of the innocent. Viewing them in this light, and knowing as we know that they are greatly mitigated in practice by the lenity of the executive government, we consider them as justifiable; but we are decidedly of opinion that they would be out of place in a penal code.

NOTE (I).

ON THE CHAPTER OF OFFENCES RELATING TO COIN.

Most of the provisions in this chapter appear sufficiently intelligible without any explanation.

We have proposed that the government of India should follow the general practice of governments in punishing more severely the counterfeiting of its own coin than the counterfeiting of foreign coin. It appears to us peculiarly advisable, under the present circumstances of India, to make this distinction. It is much to be wished that the Company's currency may supersede the numerous coinages which are issued from a crowd of mints in the dominions of the petty princes of India. It has appeared to us that this object may be in some degree promoted by the law as we have framed it. That coinage, the purity of which is guarded by the most rigorous penalties, is likely to be the most pure; and that coinage which is likely to be the most pure will be the most readily taken in the course of business.

It is not very probable that any person in this country will employ himself in making counterfeit sovereigns or shillings; but should so improbable an event occur, we think that the King's coin should have the same protection which is given to the coin of the local government. It may, perhaps, be thought that in proposing laws for the protection of the King's coin, we have departed from the principle which we laid down in our note on the law of offences against the State, and that we should have acted more consistently in leaving the British currency to the care of the British legislature. It appears to us, however, that the offence of coining, though, in an arbitrary classification, it may be called by the technical name of treason, is in substance an offence against property and trade, that it is an offence of very nearly the same kind with the forging of a bank-note, and that it would be an offence of exactly the same kind if the bank-

note, like the notes of the Bank of England formerly, were in all cases legal tender, or if the coin, like the Company's gold mohur at present, were not legal tender. We do not, therefore, conceive that in proposing a law for punishing the counterfeiting of the King's coin, we are proposing a law which can reasonably be said to affect any of the royal prerogatives.

The distinction which we propose to make (see Clauses 241 and 242) between two different classes of utterers is marked in the French code; and it is so obviously agreeable to reason and justice that we are surprised that, having been marked in that code, it should not have been adopted by Mr. Livingston. We are glad to perceive that the code of Bombay makes this distinction.

An utterer by profession, an utterer who is the agent employed by the coiner to bring counterfeit coin into circulation, is guilty of a very high offence. Such an utterer stands to the coiner in a relation not very different from that in which an habitual receiver of stolen goods stands to a thief. He makes coining a far less perilous and a far more lucrative pursuit than it would otherwise be. He passes his life in the systematic violation of the law, and in the systematic practice of fraud in one of its most pernicious forms. He is one of the most mischievous, and is likely to be one of the most depraved, of criminals. But a casual utterer, an utterer who is not an agent for bringing counterfeit coin into circulation, but who, having heedlessly received a bad rupee in the course of his business, takes advantage of the heedlessness of the next person with whom he deals to pay that bad rupee away, is an offender of a very different class. He is undoubtedly guilty of a dishonest act, but of one of the most venial of dishonest acts. It is an act which proceeds not from greediness for unlawful gain, but from a wish to avoid, by unlawful means, it is true, what to a poor man may be a severe loss. It is an act which has no tendency to facilitate or encourage the operations of the coiner. It is an occasional act, an act which does not imply that the person who commits it is a person of lawless habits. We think, therefore,

that the offence of a casual utterer is perhaps the least heinous of all the offences into which fraud enters.

We consider whether it would be advisable to make it an offence in a person to have in his possession at one time a certain number of counterfeit coins, without being able to explain satisfactorily how he came by them. It did not, after much discussion, appear to us advisable to recommend this or any similar provision. We entertain strong objections to the practice of making circumstances which are in truth only evidence of an offence part of the definition of an offence; nor do we see any reason for departing in this case from our general rule.

Whether a person who is possessed of bad money knows the money to be bad, and whether, knowing it to be bad, he intends to put it in circulation, are questions to be decided by the tribunals according to the circumstances of the case—circumstances of which the mere number of the pieces is only one, and may be one of the least important. A few bad rupees which should evidently be fresh from the stamp would be stronger evidence than a greater number of bad rupees which appeared to have been in circulation for years. A few bad rupees, all obviously coined with the same die, would be stronger evidence than a greater number obviously coined with different dies. A few bad rupees placed by themselves, and unmixed with good ones, would be far stronger evidence than a much larger number which might be detected in a large mass of treasure.

NOTE (J).

ON THE CHAPTER OF OFFENCES RELATING TO RELIGION AND CASTE.

THE principle on which this chapter has been framed is a principle on which it would be desirable that all governments should act, but from which the British government in India cannot depart without risking the dissolution of society; it is

this, that every man should be suffered to profess his own religion, and that no man should be suffered to insult the religion of another.

The question whether insults offered to a religion ought to be visited with punishment does not appear to us at all to depend on the question whether that religion be true or false. The religion may be false, but the pain which such insults give to the professors of that religion is real. It is often, as the most superficial observation may convince us, as real a pain and as acute a pain as is caused by almost any offence against the person, against property, or against character. Nor is there any compensating good whatsoever to be set off against this pain. Discussion, indeed, tends to elicit truth. But insults have no such tendency. They can be employed just as easily against the purest faith as against the most monstrous superstition. It is easier to argue against falsehood than against truth. But it is as easy to pull down or defile the temples of truth as those of falsehood. It is as easy to molest with ribaldry and clamor men assembled for purposes of pious and rational worship, as men engaged in the most absurd ceremonies. Such insults, when directed against erroneous opinions, seldom have any other effect than to fix those opinions deeper, and to give a character of peculiar ferocity to theological dissension. Instead of eliciting truth, they only inflame fanaticism.

All these considerations apply with peculiar force to India. There is, perhaps, no country in which the government has so much to apprehend from religious excitement among the people. The Christians are numerically a very small minority of the population, and in possession of all the highest posts in the government, in the tribunals, and in the army. Under their rule are placed millions of Mahometans, of differing sects, but all strongly attached to the fundamental articles of the Mahometan creed, and tens of millions of Hindoos, strongly attached to doctrines and rites which Christians and Mahometans join in reprobating. Such a state of things is pregnant with dangers which can only be averted by a firm adherence to the true principles of toleration. On those

principles the British government has hitherto acted with eminent judgment, and with no less eminent success; and on those principles we propose to frame this part of the penal code.

We have provided a punishment of great severity for the intentional destroying or defiling of places of worship, or of objects held sacred by any class of persons. No offence in the whole code is so likely to lead to tumult, to sanguinary outrage, and even to armed insurrection. The slaughter of a cow in a sacred place at Benares in 1809 caused violent tumult, attended with considerable loss of life. The pollution of a mosque at Bangalore was attended with consequences still more lamentable and alarming. We have therefore empowered the courts, in cases of this description, to pass a very severe sentence on the offender.

The provisions which we have made for the purpose of protecting assemblies held for religious worship, and of guarding from intentional insult the rites of sepulture and the remains of the dead, do not appear to require any explanation or defence.

The intentional depriving a Hindoo of his caste by assault or by deception, is not at present an offence in any part of India, though it may be a ground for a civil action. It appears to us, however, that an injury so wanton, an injury which indicates so bad a feeling in the person who causes it, and which gives so much pain and excites so much resentment in the sufferer, is as proper a subject for penal legislation as most of the acts which are made punishable by this code. We have, therefore, made it an offence. The rendering the food of a Hindoo useless to him by causing it to be in what he considers as a polluted state is an injury of the same kind, though comparatively venial. We propose to make it an offence, but not to deal with it severely, unless it should be repeatedly committed by the same person.

In framing Clause 282, we had two objects in view. We wish to allow all fair latitude to religious discussion, and at the same time to prevent the professors of any religion from offering, under the pretext of such discussion, intentional in-

sults to what is held sacred by others. We do not conceive that any person can be justified in wounding with deliberate intention the religious feelings of his neighbors by words, gesture, or exhibitions. A warm expression dropped in the heat of controversy, or an argument urged by a person, not for the purpose of insulting and annoying the professors of a different creed, but in good faith for the purpose of vindicating his own, will not fall under the definition contained in this clause.

Clause 283 is intended to prevent such practices as those known among the natives by the names of *Dhurna* and *Traga*. Such acts are now punishable by law, and it is unnecessary to adduce any argument for the purpose of showing that they ought to be so.

NOTE (K).

ON THE CHAPTER OF ILLICIT ENTRANCE INTO AND ILLICIT RESIDENCE IN THE TERRITORIES OF THE EAST INDIA COMPANY.

THE Indian legislature is required by the Act of Parliament 3 and 4 William IV. cap 85, section 84, "as soon as conveniently may be, to make laws or regulations providing for the prevention or punishment of the illicit entrance into or residence in the said territories of persons not authorized to enter or reside therein."

We have, therefore, thought it our duty to insert in the penal code provisions for the purpose of carrying the intentions of Parliament into effect.

NOTE (L).

ON OFFENCES RELATING TO THE PRESS.

THE penal provisions contained in this chapter are taken from the Act of the Governor-General of India in Council, No. 11, of 1835.

Sufficient provision appears to us to have been made in

other parts of the code, particularly by Clause 195, for the punishment of the offence mentioned in the last section of the Act to which we have referred.

NOTE (M).

ON OFFENCES AGAINST THE BODY.

THE first class of offences against the body consists of those offences which affect human life; and highest in this first class stand those offences which fall under the definition of voluntary culpable homicide.

This important part of the law appears to us to require fuller explanation than almost any other.

The first point to which we wish to call the attention of his Lordship in Council is the expression "omits what he is legally bound to do" in the definition of voluntary culpable homicide. These words, or other words tantamount in effect, frequently recur in the code. We think this the most convenient place for explaining the reason which has led us so often to employ them; for if that reason shall appear to be sufficient in cases in which human life is concerned, it will, *a fortiori*, be sufficient in other cases.

Early in the progress of the code it became necessary for us to consider the following question: When acts are made punishable on the ground that those acts produce, or are intended to produce, or are known to be likely to produce, certain evil effects, to what extent ought omissions which produce, which are intended to produce, or which are known to be likely to produce, the same evil effects to be made punishable?

Two things we take to be evident; first, that some of these omissions ought to be punished in exactly the same manner in which acts are punished; secondly, that all these omissions ought not to be punished. It will hardly be disputed that a jailer who voluntarily causes the death of a prisoner by omitting to supply that prisoner with food, or a nurse who volun-

tarily causes the death of an infant intrusted to her care by omitting to take it out of a tub of water into which it has fallen, ought to be treated as guilty of murder. On the other hand, it will hardly be maintained that a man should be punished as a murderer because he omitted to relieve a beggar, even though there might be the clearest proof that the death of the beggar was the effect of this omission, and that the man who omitted to give the alms knew that the death of the beggar was likely to be the effect of the omission. It will hardly be maintained that a surgeon ought to be treated as a murderer for refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that if it were not performed the person who required it would die. It is difficult to say whether a penal code which should put no omissions on the same footing with acts, or a penal code which should put all omissions on the same footing with acts, would produce consequences more absurd and revolting. There is no country in which either of these principles is adopted. Indeed, it is hard to conceive how, if either were adopted, society could be held together.

It is plain, therefore, that a middle course must be taken; but it is not easy to determine what that middle course ought to be. The absurdity of the two extremes is obvious. But there are innumerable intermediate points; and wherever the line of demarcation may be drawn, it will, we fear, include some cases which we might wish to exempt, and will exempt some which we might wish to include.

Mr. Livingston's code provides that a person shall be considered as guilty of homicide who omits to save life, which he could save "without personal danger or pecuniary loss." This rule appears to us to be open to serious objection. There may be extreme inconvenience without the smallest personal danger, or the smallest risk of pecuniary loss, as in the case which we lately put of a surgeon summoned from Calcutta to Meerut to perform an operation. He may be offered such a fee that he would be a gainer by going. He may

have no ground to apprehend that he should run any greater personal risk by journeying to the Upper Provinces than by continuing to reside in Bengal. But he is about to proceed to Europe immediately, or he expects some members of his family by the next ship, and wishes to be at the presidency to receive them. He therefore refuses to go. Surely, he ought not, for so refusing, to be treated as a murderer. It would be somewhat inconsistent to punish one man for not staying three months in India to save the life of another, and to leave wholly unpunished a man who, enjoying ample wealth, should refuse to disburse an anna to save the life of another. Again, it appears to us that it may be fit to punish a person as a murderer for causing death by omitting an act which cannot be performed without personal danger or pecuniary loss. A parent may be unable to procure food for an infant without money. Yet the parent, if he has the means, is bound to furnish the infant with food, and if, by omitting to do so, he voluntarily causes its death, he may with propriety be treated as a murderer. A nurse hired to attend a person suffering from an infectious disease cannot perform her duty without running some risk of infection. Yet if she deserts the sick person, and thus voluntarily causes his death, we should be disposed to treat her as a murderer.

We pronounce with confidence, therefore, that the line ought not to be drawn where Mr. Livingston has drawn it. But it is with great diffidence that we bring forward our own proposition. It is open to objections: cases may be put in which it will operate too severely, and cases in which it will operate too leniently; but we are unable to devise a better.

*What we propose 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, 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. An omission is illegal (see Clause 28) if it

be an offence, if it be a breach of some direction of law, or if it be such a wrong as would be a good ground for a civil action.

We cannot defend this rule better than by giving a few illustrations of the way in which it will operate. A omits to give Z food, and by that omission voluntarily causes Z's death. Is this murder? Under our rule it is murder if A was Z's jailer, directed by the law to furnish Z with food. It is murder if Z was the infant child of A, and had, therefore, a legal right to sustenance, which right a civil court would enforce against A. It is murder if Z was a bedridden invalid, and A a nurse hired to feed Z. It is murder if A was detaining Z in unlawful confinement, and had thus contracted (see Clause 338) a legal obligation to furnish Z, during the continuance of the confinement, with necessaries. It is not murder if Z is a beggar, who has no other claim on A than that of humanity.

A omits to tell Z that a river is swollen so high that Z cannot safely attempt to ford it, and by this omission voluntarily causes Z's death. This is murder, if A is a peon stationed by authority to warn travellers from attempting to ford the river. It is murder if A is a guide who had contracted to conduct Z. It is not murder if A is a person on whom Z has no other claim than that of humanity.

A savage dog fastens on Z. A omits to call off the dog, knowing that if the dog be not called off, it is likely that Z will be killed. Z is killed. This is murder in A, if the dog belonged to A, inasmuch as his omission to take proper order with the dog is illegal. (Clause 273.) But if A be a mere passer-by, it is not murder.

We are sensible that in some of the cases which we have put, our rule may appear too lenient; but we do not think that it can be made more severe without disturbing the whole order of society. It is true that the man who, having abundance of wealth, suffers a fellow-creature to die of hunger at his feet is a bad man—a worse man, probably, than many of those for whom we have provided very severe punishment. But we are unable to see where, if we make such

a man legally punishable, we can draw the line. If the rich man who refuses to save a beggar's life at the cost of a little copper is a murderer, is the poor man just one degree above beggary also to be a murderer if he omits to invite the beggar to partake his hard-earned rice? Again, if the rich man is a murderer for refusing to save the beggar's life at the cost of a little copper, is he also to be a murderer if he refuses to save the beggar's life at the cost of a thousand rupees? Suppose A to be fully convinced that nothing can save Z's life unless Z leave Bengal and reside a year at the Cape; is A, however wealthy he may be, to be punished as a murderer because he will not, at his own expense, send Z to the Cape? Surely not. Yet it will be difficult to say on what principle we can punish A for not spending an anna to save Z's life, and leave him unpunished for not spending a thousand rupees to save Z's life. The distinction between a legal and an illegal omission is perfectly plain and intelligible; but the distinction between a large and a small sum of money is very far from being so, not to say that a sum which is small to one man is large to another.

The same argument holds good in the case of the ford. It is true that none but a very depraved man would suffer another to be drowned when he might prevent it by a word. But if we punish such a man, where are we to stop? How much exertion are we to require? Is a person to be a murderer if he does not go fifty yards through the sun of Bengal at noon in May in order to caution a traveller against a swollen river? Is he to be a murderer if he does not go a hundred yards?—if he does not go a mile?—if he does not go ten? What is the precise amount of trouble and inconvenience which he is to endure? The distinction between the guide who is bound to conduct the traveller as safely as he can, and a mere stranger, is a clear distinction. But the distinction between a stranger who will not give a halloo to save a man's life, and a stranger who will not run a mile to save a man's life, is very far from being equally clear.

It is, indeed, most highly desirable that men should not merely abstain from doing harm to their neighbors, but

should render active services to their neighbors. In general, however, the penal law must content itself with keeping men from doing positive harm, and must leave to public opinion, and to the teachers of morality and religion, the office of furnishing men with motives for doing positive good. It is evident that to attempt to punish men by law for not rendering to others all the service which it is their duty to render to others would be preposterous. We must grant impunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible, and must content ourselves with punishing such omissions only when they are distinguished from the rest by some circumstance which marks them out as peculiarly fit objects of penal legislation. Now, no circumstance appears to us so well fitted to be the mark as the circumstance which we have selected. It will generally be found in the most atrocious cases of omission; it will scarcely ever be found in a venial case of omission; and it is more clear and certain than any other mark that has occurred to us. That there are objections to the line which we propose to draw, we have admitted. But there are objections to every line which can be drawn, and some line must be drawn.

The next point to which we wish to call the attention of his Lordship in Council is the unqualified use of the words "to cause death" in the definition of voluntary culpable homicide.

We long considered 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.

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.

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.

Mr. Livingston, we observe, excepts from the definition of homicide cases in which death is produced by the effect of words on the imagination or the passions. The reasoning of that distinguished jurist has by no means convinced us that the distinction which he makes is well founded. Indeed, there are few parts of his code which appear to us to have been less happily executed than this. His words are these: "The destruction must be by the act of another; therefore self-destruction is excluded from the definition. It must be operated by some act; therefore death, although produced by the operation of words on the imagination or the passions, is not homicide. But if words are used which are calculated to produce and do produce some act which is the immediate cause of death, it is homicide. A blind man or a stranger in the dark, directed by words only to a precipice, where he falls and is killed; a direction verbally given to take a drug that it is known will prove fatal, and which has that effect, are instances of this modification of the rule."

This appears to us altogether incoherent. A verbally directs Z to swallow a poisonous drug; Z swallows it, and dies; and this, says Mr. Livingston, is homicide in A. It certainly ought to be so considered. But how, on Mr. Livingston's principles, it can be so considered we do not understand. "Homicide," he says, "must be operated by an act." Where then is the act in this case? Is it the speaking of A? Clearly not, for Mr. Livingston lays down the doctrine that speaking is not an act. Is it the swallowing by Z? Clearly not, for the destruction of life, according to Mr. Livingston, is not

homicide unless it be by the act of another, and this swallowing is an act performed by Z himself.

The reasonable course, in our opinion, is to consider speaking as an act, and to treat A as guilty of voluntary culpable homicide, if by speaking he has voluntarily caused Z's death, whether his words operated circuitously by inducing Z to swallow poison or directly by throwing Z into convulsions.

There will, indeed, be few homicides of this latter sort. It appears to us that a conviction, or even a trial, in such a case would be an event of extremely rare occurrence. There would probably not be one such trial in a century. 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 very 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 very 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.

Again, Mr. Livingston excepts from the definition of homi-

cide the case of a person who dies of a slight wound which, from neglect or from the application of improper remedies, has proved mortal. We see no reason for excepting such cases from the simple general rule which we propose. It will, indeed, be in general more difficult to prove that death has been caused by a scratch than by a stab which has reached the heart; and it will, in a still greater degree, be more difficult to prove that a scratch was intended to cause death than that a stab was intended to cause death; yet both these points might be fully established. Suppose such a case as the following: It is proved that 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. It is proved 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 had charge of Z, and boasts that he always foresaw that they would turn the slightest incision into a mortal wound. It appears to us that if such evidence were produced, A ought to be punished as a murderer.

Again, suppose that A makes a deliberate attempt to commit assassination. In the presence of numbers he aims a knife at the heart of Z. But the knife glances aside, and inflicts only a slight wound. This happened in the case of Jean Chatel, of Damien, of Guiscard, and of many other assassins of the most desperate character. In such cases there is no doubt whatever as to the intention. Suppose that the person who received the wound is under the necessity of exposing himself to a moist atmosphere immediately afterwards, and that, in consequence, he is attacked with tetanus and dies. Here again, however slight the wound may have been, we are unable to perceive any good reason for not punishing A as a murderer.

We will only add that this provision of the Code of Louis-

iana appears to us peculiarly ill-suited to a country in which, we have reason to fear, neglect and bad treatment are far more common than good medical treatment.

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.

We propose that all voluntary culpable homicide shall be designated as murder, unless it fall under one of three heads. We are desirous to call the particular attention of his Lordship in Council to the law respecting the three mitigated forms of voluntary culpable homicide; and first to the law of manslaughter.

We agree with the great mass of mankind, and with the majority of jurists, ancient and modern, in thinking that homicide committed in the sudden heat of passion, on great provocation, ought to be punished; but that in general it ought not to be punished so severely as murder. It ought to be punished in order to teach men to entertain a peculiar respect for human life; it ought to be punished in order to give men a motive for accustoming themselves to govern their passions; and in some few cases for which we have made provision, we conceive that it ought to be punished with the utmost rigor.

In general, however, we would not visit homicide committed in violent passion, which had been suddenly provoked, with the highest penalties of the law. We think that to treat a person guilty of such homicide as we should treat a murderer would be a highly inexpedient course—a course which would shock the universal feeling of mankind, and would engage the public sympathy on the side of the delinquent against the law.

His Lordship in Council will remark one important distinction between the law as we have framed it and some other systems. Neither the English law nor the French code extends any indulgence to homicide which is the effect of anger excited by words alone. Mr. Livingston goes still

further. "No words whatever," says the code of Louisiana, "are an adequate cause, no gestures merely showing derision or contempt, no assault or battery so slight as to show 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. On the contrary, the circumstance that a man resents an insult more than a wound is anything but a proof that he is a man of a peculiarly bad heart. It would be a fortunate thing for mankind if every person felt an outrage which left a stain upon his honor more acutely than an outrage which had fractured one of his limbs. If so, why should we treat an offence produced by the blamable excess of a feeling which all wise legislators desire to encourage, more severely than we treat the blamable excess of feelings certainly not more respectable?

One outrage which wounds only the honor and the affections is admitted by Mr. Livingston to be an adequate provocation. "A discovery of the wife of the accused in the act of adultery with the person killed is an adequate cause." The law of France, the law of England, and the Mahometan law are also indulgent to homicide committed under such circumstances. We must own that we can see no reason for making a distinction between this provocation and many other provocations of the same kind. We cannot consent to lay it down as a universal rule that in all cases this provocation shall be considered as an adequate provocation. Circumstances may easily be conceived which would satisfy a court that a husband had in such a case acted from no feeling of wounded honor or affection, but from mere brutality of nature, or from disappointed cupidity. On the other hand, we conceive that there are many cases in which as much indulgence is due to the excited feelings of a father or a brother as to those of a husband. That a worthless, unfaithful, and

tyrannical husband should be guilty only of manslaughter for killing the paramour of his wife, and that an affectionate and high-spirited brother should be guilty of murder for killing, in a paroxysm of rage, the seducer of his sister, appears to us inconsistent and unreasonable.

There is another class of provocations which Mr. Livingston does not allow to be adequate in law, but which have been, and while human nature remains unaltered, will be, adequate in fact to produce the most tremendous effects. Suppose a person to take indecent liberties with a modest female, in the presence of her father, her brother, her husband, or her lover. Such an assault might have no tendency to cause pain or danger; yet history tells us what effects have followed from such assaults. Such an assault produced the Sicilian Vespers. Such an assault called forth the memorable blow of Wat Tyler. It is difficult to conceive any class of cases in which the intemperance of anger ought to be treated with greater lenity. 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.

We think it right to add that, though in our remarks on this part of the law we have used illustrations drawn from the history and manners of Europe, the arguments which we have employed apply as strongly to the state of society in India as to the state of society in any part of the globe. There is, perhaps, no country in which more cruel suffering is inflicted, and more deadly resentment called forth, by injuries which affect only the mental feelings.

A person who should offer a gross insult to the Mahometan religion in the presence of a zealous professor of that religion; who should deprive some high-born Rajpoot of his caste; who should rudely thrust his head into the covered palanquin of a woman of rank, would probably move those whom he insulted to more violent anger than if he had caused them some severe bodily hurt. That on these subjects our notions and usages differ from theirs is nothing to the pur-

pose. We are legislating for them, and though we may wish that their opinions and feelings may undergo a considerable change, it is our duty, while their opinions and feelings remain unchanged, to pay as much respect to those opinions and feelings as if we partook of them. We are legislating for a country where many men, and those by no means the worst men, prefer death to the loss of caste; where many women, and those by no means the worst women, would consider themselves as dishonored by exposure to the gaze of strangers: and to legislate for such a country, as if the loss of caste or the exposure of a female face were not provocations of the highest order, would, in our opinion, be unjust and unreasonable.

The second mitigated form of voluntary culpable homicide is that to which we have given the name of voluntary culpable homicide by consent. It appears to us that this description of homicide ought to be punished, but that it ought not to be punished so severely as murder. We have elsewhere given our reasons for thinking that this description of homicide ought to be punished.*

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 the effect of a strong sense of religious duty, sometimes of 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.

* See Note (B).

Again, this crime is by no means productive of so much evil to the community as murder. One evil ingredient of the utmost importance is altogether wanting to the offence of voluntary culpable homicide 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 constant 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 assassinations 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 neglected 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 tribunals popularly composed. It may be proper to observe 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.

The third mitigated form of voluntary culpable homicide is that which we have designated as voluntary culpable homicide in defence.

We have been forced to leave the law on the subject of private defence, as we have elsewhere said, in an unsatisfactory state; and, though we hope and believe that it may be greatly improved, we fear that it must always continue to be one of the least precise parts of every system of jurisprudence. That portion of the law of homicide which we are now considering is closely connected with the law of private defence, and must necessarily partake of the imperfections of the law of private defence. But wherever the limits of the right of private defence may be placed, and with whatever degree of accuracy they may be marked, we are inclined to think that it will always be expedient to make a separation between murder and what we have designated as voluntary culpable homicide in defence.

The chief reason for making this separation is that the law itself invites men to the very verge of the crime which we have 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, we think, greatly mitigates the guilt of such homicide.

That a man who deliberately kills another in order to prevent that other from pulling his nose should be allowed to go absolutely unpunished, would be most dangerous. The law punishes, and ought to punish, such killing. But we cannot think that the law ought to punish such killing as murder. For the law itself has encouraged the slayer to inflict on the assailant any harm short of death which may be necessary for the purpose of repelling the outrage—to give the assailant a cut with a knife across the fingers which may render his right hand useless to him for life, or to hurl him down-stairs with such force as to break his leg; and it seems difficult 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. That a man should be merely exercising a right by fracturing the skull and knocking

out the eye of an assailant, and should be guilty of the highest crime in the code if he kills the same assailant; that there should be only a single step between perfect innocence and murder, between perfect impunity and liability to capital punishment, seems unreasonable. In a case in which the law itself empowers an individual to inflict any harm short of death, it ought hardly, we think, to visit him with the highest punishment if he inflicts death.

It is to be considered, also, 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 our code, and must be in every code, to a great extent an arbitrary line, and that many individual cases will fall on one side of that line which, if we had framed the law with a view to those cases alone, we should place on the other. Thus we allow a man to kill if he has no other means of preventing an incendiary from burning a house; and we do not allow him to kill for the purpose of preventing the commission of a simple theft. But a house may be a wretched heap of mats and thatch, propped by a few bamboos, and not worth altogether twenty rupees. A simple theft may deprive a man of a pocket-book which contains bills to a great amount, the savings of a long and laborious life, the sole dependence of a large family. That in these cases the man who kills the incendiary should be pronounced guiltless of any offence, and that the man who kills the thief should be sentenced to the gallows, or, if he is treated with the utmost lenity which the courts can show, to perpetual transportation or imprisonment, would be generally condemned as a shocking injustice. We are, therefore, clearly of opinion that the offence which we have designated as voluntary culpable homicide in defence ought to be distinguished from murder in such a manner 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 that law.

We have hitherto been considering the law of voluntary culpable homicide. But homicide may be culpable, yet not

voluntary. 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.

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 of 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.

It may be proper for us to offer some arguments in defence of this part of the code.

It will be admitted that when an act is in itself innocent, to punish the person who does it because bad consequences, which no human wisdom could have foreseen, have followed

from it, would be in the highest degree barbarous and absurd.

A pilot is navigating the Hoogly with the utmost care and skill: he directs the vessel against a sand-bank which has been recently formed, and of which the existence was altogether unknown till this disaster. Several of his passengers are consequently drowned. To hang the pilot as a murderer on account of this misfortune would be universally allowed to be an act of atrocious injustice. But if the voyage of the pilot be itself a high offence, ought that circumstance alone to turn his misfortune into a murder? Suppose that he is engaged in conveying an offender beyond the reach of justice; that he has kidnapped some natives, and is carrying them to a ship which is to convey them to some foreign slave-colony; that he is violating the laws of quarantine at a time when it is of the highest importance that those laws should be strictly observed; that he is carrying supplies, deserters, and intelligence to the enemies of the state. The offence of such a pilot ought, undoubtedly, to be severely punished. But to pronounce him guilty of one offence because a misfortune befel him while he was committing another offence—to pronounce him the murderer of people whose lives he never meant to endanger, whom he was doing his best to carry safe to their destination, and whose death has been purely accidental—is surely to confound all the boundaries of crime.

Again, A heaps fuel on a fire, not in an imprudent manner, but in such a manner that the chance of harm is not worth considering. Unhappily the flame bursts out more violently than there was reason to expect. At the same moment a sudden puff of wind blows Z's light dress towards the hearth. The dress catches fire, and Z is burned to death. To punish A as a murderer on account of such an unhappy event would be senseless cruelty. But suppose that the fuel which caused the flame to burst forth was a will, which A was fraudulently destroying: ought this circumstance to make A the murderer of Z? We think not. For the fraudulent destroying of wills, we have provided, in other parts of

the code, punishments which we think sufficient. If not sufficient, they ought to be made so. But we cannot admit that Z's death has, in the smallest degree, aggravated A's offence, or ought to be considered in apportioning A's punishment.

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. No man can so conduct himself as to make it absolutely certain that he shall not be so unfortunate as to cause the death of a fellow-creature. The utmost that he can do is to abstain from everything which is at all likely to cause death. No fear of punishment can make him do more than this; and, therefore, to punish a man who has done this can add 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. For example, hundreds of persons in some great cities are in the habit of picking pockets. They know that they are guilty of a great offence; but it has never occurred to one of them, nor would it occur to any rational man, that they are guilty of an offence which endangers life. Unhappily one of these hundreds attempts to take the purse of a gentleman who has a loaded pistol in his pocket. The thief touches the trigger, the pistol goes off, the gentleman is shot dead. To treat the case of this pickpocket differently from that of the numerous pickpockets who steal under exactly the same circumstances, with exactly the same intentions, with no less risk of causing death, with no greater care to avoid causing death; to send them to the house of correction as thieves, and him to the gallows as a murderer, appears to us an unreasonable course. If the punishment for stealing from the person be too light, let it be increased, and let the increase fall alike on all the offenders. Surely the worst mode of increasing the punishment of an offence is to provide that, besides the ordinary punishment, every offender shall run an exceedingly small

risk of being hanged. The more nearly the amount of punishment can be reduced to a certainty, the better; but if chance is to be admitted, there are better ways of admitting it. It would be a less capricious, and therefore a more salutary course, to provide that every fiftieth or every hundredth thief selected by lot should be hanged, than to provide that every thief should be hanged who, while engaged in stealing, should meet with an unforeseen misfortune, such as might have befallen the most virtuous man while performing the most virtuous action.

We trust that his Lordship in Council will think that we have judged correctly in proposing that when a person engaged in the commission of an offence causes death by pure accident, he shall suffer only the punishment of his offence, without any addition on account of such accidental death.

When a person engaged in the commission of an offence causes death by rashness or negligence, but without either intending to cause death, or thinking it likely that he shall cause death, we propose that he shall be liable to the punishment of the offence which he was engaged in committing, superadded to the ordinary punishment of involuntary culpable homicide.

The arguments and illustrations which we have employed for the purpose of showing that the involuntary causing of death, without either rashness or negligence, ought, under no circumstances, to be punished at all, will, with some modifications, which will readily suggest themselves, serve to show that the involuntary causing of death by rashness or negligence, though always punishable, ought under no circumstances to be punished as murder.

It gives us great pleasure to observe that Mr. Livingston's provisions on this subject, though in details they differ widely from ours, are framed on the principles which we have here defended.

We wish next to call the attention of his Lordship in Council to Clauses 308 and 309.

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 assault, 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 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.

Again, A sets poisoned food before Z. Here A may have committed no trespass, for the food may be his own; and if so, he violates no right of property by mixing arsenic with it. He commits no assault, for he means the taking of the food to be Z's voluntary act. If Z does not swallow enough of the poisoned food to disorder him, A causes no bodily hurt. Yet it is plain that A has been guilty of a crime of a most atrocious description.

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.

With respect to the law on the subject of abortion, we think it necessary to say only that we entertain strong apprehensions that this or any other law on that subject may, in this country, be abused to the vilest purposes. The charge of abortion is one which, even where it is not substantiated, often leaves a stain on the honor of families. The power of

bringing a false accusation of this description is, therefore, a formidable engine in the hands of unprincipled men. This part of the law will, unless great care be taken, produce few convictions, but much misery and terror to respectable families, and a large harvest of profit to the vilest pests of society. We trust that it may be in our power in the code of procedure to lay down rules which may prevent such an abuse. Should we not be able to do so, we are inclined to think that it would be our duty to advise his Lordship in Council rather to suffer abortion, where the mother is a party to the offence, to remain wholly unpunished, than to repress it by provisions which would occasion more suffering to the innocent than to the guilty.

Every one of those offences against the human body which remain to be considered falls under some one or more of the following heads: Hurt, Restraint, Assault, Kidnapping, Rape, Unnatural crimes.

Many of the offences which fall under the head of hurt will also fall under the head of assault. A stab, a blow which fractures a limb, the flinging of boiling water over a person, are assaults, and are also acts which cause bodily hurt. But bodily hurt may be caused by many acts which are not assaults. A person, for example, who mixes a deleterious potion, and places it on the table of another; a person who conceals a scythe in the grass on which another is in the habit of walking; a person who digs a pit in a public path, intending that another may fall into it, may cause serious hurt, and may be justly punished for causing such hurt; but they cannot, without extreme violence to language, be said to have committed assaults.

We propose to designate all pain, disease and infirmity by the name of hurt.

We have found it 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.

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 loss of the perfect use of any member or joint—to the permanent disfiguration of the head or face—to the fracture and to the dislocation of bones. Thus far we proceed on sure ground. But a more difficult task remains. Some hurts which are not, like those kinds of hurt which we have just mentioned, distinguished by a broad and obvious line from slight hurts, may nevertheless be most serious. A wound, for example, which neither emasculates the sufferer, nor blinds him, nor destroys his hearing, nor deprives him of a member or a joint, nor permanently deprives him of the use of a member or a joint, nor disfigures his countenance, nor breaks his bones, nor dislocates them, may yet cause intense pain, prolonged disease, lasting injury to the constitution. It is evidently desirable that the law should make a distinction between such a wound, and a scratch which is healed with a little sticking-plaster. A beating, again, which does not maim the sufferer or break his bones, may be so cruel as to bring him to the point of death. Such a beating, it is clear, ought not to be confounded with a bruise which requires only to be bathed with vinegar, and of which the traces disappear in a day.

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 twenty days.

This provision was suggested to us by article 309 of the French Penal Code. That article runs thus: "Sera puni de la peine de la réclusion, tout individu qui aura fait des blessures ou porté des coups, s'il est résulté de ces actes de violence une maladie ou incapacité de travail personnel pendant plus de vingt jours." *Réclusion*, it is to be observed, signi-

fies imprisonment and hard labor for a term of not less than five nor more than ten years.

This law appears, from the *procès verbal* of Napoleon's council of state, to have been adopted without calling forth a single* observation; but it has since been severely criticised by French jurists, and has been mitigated by the French legislature. Indeed, it ought to have been completely recast, for it is undoubtedly one of the most exceptionable laws in the code.

A man who means only to inflict a slight hurt may, without intending or expecting to do so, cause a hurt which is exceedingly serious. A push which to a man in health is a trifle may, if it happens to be directed against a diseased part of an infirm person, occasion consequences which the offender never contemplated as possible. A blow designed to inflict only the pain of a moment may cause the person struck to lose his footing, to fall from a considerable height, and to break a limb. In such cases, to punish the assailant with five years of strict imprisonment would be in the highest degree unjust and cruel. It is said, and we can easily believe it,† that, in such cases, the French juries have frequently refused, in spite of the clearest evidence, to pronounce a decision which would have subjected the accused to a punishment so obviously disproportioned to his offence.

We have attempted to preserve and to extend what is good in this article of the French code, and to avoid the evils which we have noticed. It appears to us that the length of time during which a sufferer is in pain, diseased, or incapacitated from pursuing his ordinary avocations, though a defective criterion of the severity of a hurt, is still the best criterion that has ever been devised. It is a criterion which may, we think, with propriety be employed not merely in cases where violence has been used, but in cases where hurt has been caused without any assault, as by the administration

* Loaré, *Legislation de France*. Vol. 30, page 362.

† Paillet, *Manuel de Droit Français*. Noté on Clause 309 of the Penal Code.

of drugs, the setting of traps, the digging of pit-falls, the placing of ropes across a road. But though we have borrowed from the French code this test of the severity of bodily injuries, we have framed our penal provisions on a principle quite different from that by which the authors of the French code appear to have been guided. In apportioning the punishment, we take into consideration both the extent of the hurt and the intention of the offender.

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.

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

Where bodily hurt is voluntarily inflicted in an attempt to murder the person hurt, we propose to punish the offender with transportation for life, or with imprisonment for a term which may extend to life, and cannot be less than seven years. It does not appear to us 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. It is undoubtedly a circumstance which will be important as evidence. A court will generally be more easily satisfied of the murderous intention of an assailant who has fractured a man's skull, than of one who has only caused a slight contusion. But the proof might be complete. To take examples which are universally known: Harley was laid up more than twenty days by the wound which he received from Guiscard; the scratch which Damien gave to Louis the Fifteenth was so slight that it was followed by no feverish symptoms. Yet it will be allowed that it would be absurd to make a distinction between the two assassins on this ground.

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. We propose that in such cases, if the hurt inflicted be what we have designated as *grievous*, the offender shall be punished with transportation for life, or with imprisonment for a term which may extend to life, and which shall not be less than seven years. Where the hurt is not *grievous*, we propose that the imprisonment shall be for a term of not more than fourteen years, nor less than one year.

Bodily hurt may be inflicted by means the use of which generally indicates great malignity. A blow with the fist may cause as much pain, and produce as lasting injury, as laceration with a knife, or branding with a hot iron. But it will scarcely be disputed that, in the vast majority of cases, the offender who has used a knife or a hot iron for the purpose of wreaking his hatred is a far worse and more dangerous member of society than he who has only used his fist. It appears to us that many hurts which would not, according to our classification, be designated as *grievous*, ought yet, on account of the mode in which they are inflicted, to be punished more severely than many *grievous* hurts. We propose, therefore, that where bodily hurt is voluntarily caused by means of any sharp instrument, of fire, of any heated substance, of any corrosive substance, of any explosive substance, of any poison internal or external, or of any animal, the maximum of imprisonment may be increased, in cases of *grievous* bodily hurt, to fourteen years, in other cases to three years.

In cases where bodily hurt is voluntarily caused on grave and sudden provocation, we propose to mitigate the punishment. This mitigation is common to cases of hurt and of *grievous* hurt. But the voluntary causing of *grievous* hurt on great and sudden provocation will still be punishable more severely than the voluntary causing of hurt not *grievous* on grave and sudden provocation. The provisions which we propose on this subject are framed on the same principles

on which we have framed the law of manslaughter, and may be defended by the same arguments by which the law of manslaughter is defended.

Hitherto we have been considering cases in which hurt has been caused voluntarily. But hurt may be caused involuntarily, yet culpably. There may have been no design to cause hurt, no expectation that hurt would be caused. Yet there may have been a want of due care not to cause hurt. For these cases of the involuntary yet culpable infliction of bodily hurt, we have provided rules which bear a close analogy to those which we have provided for cases of involuntary culpable homicide.

The provision contained in Clause 329 bears, it will be seen, a close analogy to those contained in Clauses 308 and 309. We have provided, under the head of assault, for cases in which an assault is committed in an attempt to cause grievous bodily hurt. But there may be most malignant and atrocious attempts to cause grievous bodily hurt without any assault. For example, Z is directed to use a lotion for his eyes. A substitutes for that lotion a corrosive substance, intending that it may destroy Z's eyesight. Again; A makes up a letter addressed to Z, and sends it to the post-office, having placed a strongly explosive substance under the seal, intending that the explosion may seriously injure Z. These are not assaults; yet they are evidently acts which deserve severe punishment, and that punishment is provided by Clause 329.

By wrongful restraint we mean the keeping a man out of a place where he wishes to be, and has a right to be. Wrongful confinement, which is a form of wrongful restraint, is the keeping a man within limits out of which he wishes to go, and has a right to go.

The offence of wrongful restraint, when it does not amount to wrongful confinement, and when it is not accompanied with violence, or with the causing of bodily hurt, is seldom a serious offence, and we propose, therefore, to visit it with a light punishment.

The offence of wrongful confinement may be also a slight

offence; but, when attended by aggravating circumstances, it may be one of the most serious that can be committed.

One aggravating circumstance is the duration of the confinement. Confinement for a quarter of an hour may sometimes be a mere frolic, which would deserve only a nominal punishment; which, indeed, might be so harmless as not to amount to an offence. (See Clause 73.) But wrongful confinement continued during many days will always be a most serious offence. We have attempted to frame the law on this subject in such a manner as to give the offender a strong motive for abridging the detention of his prisoner. Another aggravating circumstance is the circumstance that the offender persists in wrongfully confining a person, notwithstanding an order issued by a competent authority for the liberation or production of that person. The mode in which these orders are to be issued will be set forth in the code of procedure. A third aggravating circumstance is the circumstance that the offender uses criminal confinement for purposes of extortion. For all these aggravated forms of wrongful confinement we have provided severe punishments.

We have also provided a separate punishment for a person who, while detaining another in wrongful confinement, omits to supply his prisoner with everything necessary to health, ease, and comfort. 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 prisoner.

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 that the illustrations will render every part of it intelligible to an attentive reader.

A large proportion of the acts which we have designated as assaults will be offences falling under the heads of hurt and

restraint. Thus, a stab with a knife is an offence falling under the head of hurt, and it is also an assault. The seizing a man by the collar, and thus preventing him from proceeding on his way, is unlawful restraint, and is also an assault. But there will be many assaults which it is absolutely necessary to punish, yet which cause neither bodily hurt nor unlawful restraint. A man who impertinently puts his arm round a lady's waist, who aims a severe stroke at a person with a horsewhip, who maliciously throws a stone at a person, squirts dirty water over a person, or sets a dog at a person, may cause no hurt and no restraint, yet it is evident that such acts ought to be prevented.

The ordinary punishment which we propose for assault is slight. But we propose to punish assaults which are committed in attempting murder with transportation for life; or with imprisonment for a term which may extend to life, and which cannot be less than seven years. We have also provided severe punishments for assault, when it is committed in an attempt to commit any grave offence against the person, when it is committed with the intention of dishonoring the sufferer, or when it is an outrage offered to female modesty.

The offence of kidnapping is sometimes committed by means of assault, and is sometimes attended with restraint. But this will not always be the case. A child, for example, who is decoyed from its guardians, who soon forgets its home, and who consents to remain with the kidnapper, cannot be said to have been assaulted or restrained. A laborer who has been induced to embark on board of a ship by false assurances that he shall be taken to a country where he shall have good wages, but whom the captain of the ship intends to sell for a slave, has not, as yet, been either assaulted or restrained.

The crime of kidnapping 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.

The carrying of a grown-up person by force from one place within the Company's territories to another, and the enslaving him within the Company's territories, are offences sufficiently provided for under the heads of restraint and confinement.

The enticing a grown-up person by false promises to go from one place in the Company's territories to another place also within those territories, may be a subject for a civil action, and, under certain circumstances, for a criminal prosecution; but it does not appear to us to come properly under the head of kidnapping.

We propose to make the punishment of kidnapping peculiarly severe when it is committed with murderous intentions, as in the case of those subjects of the Company who were lately carried into the Jynteah country for purposes of human sacrifice.

We also propose to enhance the punishment of kidnapping in cases in which it is committed with the intention of inflicting grievous bodily harm on the person kidnapped, or of reducing that person to slavery, and when it is committed for purposes of rape or of unnatural lust.

We have placed under this head a provision for punishing persons who export laborers by sea from the Company's territories, in contravention of the Act recently passed by government on that subject.

The provisions which we propose on the subject of rape do not appear to require any remark.

Clauses 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said. We leave, without comment, to the judgment of his Lordship in Council the two clauses which we have provided for these offences. We are unwilling to insert, either in the text or in the notes, anything which could give rise to public

discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision.

NOTE (N).

ON THE CHAPTER OF OFFENCES AGAINST PROPERTY.

THERE is such a mutual relation between the different parts of the law that those parts must all attain perfection together. That portion, be it what it may, which is selected to be first put into the form of a code, with whatever clearness and precision it may be expressed and arranged, must necessarily partake, to a considerable extent, of the uncertainty and obscurity in which other portions are still left.

This observation applies with peculiar force to that important portion of the penal code which we now propose to consider. The offences defined in this chapter 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 or 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 subjects 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.

For example, A, without Z's permission, shoots snipes on Z's ground, and carries them away: here, if the law of civil rights grants the property in such birds to any person who can catch them, A has not, by killing them and carrying them away, invaded Z's right of property. If, on the other hand, the law of civil right declares such birds the property of the person on whose lands they are, A has invaded Z's right of property. If it be matter of doubt what the state of the civil law on the subject actually is, it must also be matter of doubt whether A has wronged Z or not.

By the English law,* pigeons, while they frequent a dove-cote, are the property of the owner of the dove-cote. By the Roman law† they were not so. By the French law‡ they are his property at one time of the year, and not his property at another. Here it is evident that the taking of such a pigeon, which would in England be a violation of the right of property, would be none in a country governed by the Roman law, and that, in France, it would depend on the time of the year whether it were so or not.

A lends a horse to B. B sells the horse to Z, who buys it, believing in good faith that B has a right to sell it. A sees the horse feeding. He mounts it and rides away with it. Here, if the law of civil rights provides that a thing sold by one who has no right to sell it shall nevertheless be the property of a *bona fide* purchaser, A has invaded Z's right of property. If, on the other hand, A's right is not affected by what has passed between B and Z, A does not commit an infraction of Z's right of property. If it be doubtful whether the right to the horse be in A or in Z, it must also be doubtful whether A has or has not committed an infraction of Z's right.

A path running across a field which belongs to Z has, dur-

* Blackstone, Book II. Chap. 25.

† Columbarum fera natura est, nec ad rem pertinet, quod ex consuetudine evolare et revolare solent.—Inst. lib. ii. tit. i.

‡ Paillet, Manuel de Droit Français.

ing three years, been used as a public way. A, in spite of a prohibition from Z, uses it as such. Here, if, by the civil law, a usage of three years is sufficient to create a right of way, A has committed no infraction of Z's right. But if a prescription of more than three years, or an express grant, be necessary to create a right of way, A has committed an infraction of Z's right of property.

A discovers a mine on land occupied by him. Here, if the civil law assigns all minerals to the occupier of the land, A violates no right of property by appropriating the minerals. But if the civil law assigns all minerals to the government, A violates the right of property by such appropriation.

The sea recedes, and leaves dry land in the immediate neighborhood of Z's property. Z cultivates the land. A turns cattle on the land, and destroys Z's crops. Here, if the civil law assigns alluvial additions to the occupier of the nearest land, A is a wrong-doer. If it declares alluvial additions common, A is not a wrong-doer. If it assigns alluvial additions to the government, both A and Z are wrong-doers. If it be uncertain to whom the law assigns alluvial additions, it must be also uncertain who is the wrong-doer, and whether there be any wrong-doer.

The substantive civil law, in the instances which we have given, is different in different countries, and in the same country at different times. As the substantive civil law varies, the penal law, which is added as a guard to the substantive civil law, must vary also. And while many important questions of substantive civil right are undetermined, the courts must occasionally feel doubtful whether the provisions of the penal code do or do not apply to a particular case.

It would evidently 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 respect-

ing 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 punishments 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 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 the rights of property which we propose to make punishable by this chapter 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.

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.

The first great line which divides these offences may be easily traced. Some of them merely prevent or disturb the enjoyment of property by one who has a right to it. Others transfer property to one who has no right to it. Some merely cause injury to the sufferer. Others, by means of wrongful loss to the sufferer, cause wrongful gain to some other party. The latter class of offences are designated in this code as fraudulent. (See Clause 16.)

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.

Theft, the criminal misappropriation of property not in possession, and criminal breach of trust, are, in the great majority of cases, easily distinguishable. But the distinction becomes fainter and fainter as we approach the line of demarcation, and at length the offences fade imperceptibly into each other. This indistinctness may be greatly increased by unskilful legislation; but it has its origin in the nature of things, and in the imperfection of language, and must still remain in spite of all that legislation can effect.

We believe it to be impossible to mark with precision, by any words, the circumstances which constitute possession. It is easy to put cases about which no doubt whatever exists, and about which the language of lawyers and of the multitude would be the same. It will hardly be doubted, for example, that a gentleman's watch lying on a table in his room is in his possession, though it is not in his hand, and though he may not know whether it is on his writing-table or on his dressing-table. As little will it be doubted that a watch which a gentleman lost a year ago on a journey, and which he has never heard of since, is not in his possession. It will not be doubted that when a person gives a dinner, his silver forks, while in the hands of his guests, are still in his possession; and it will be as little doubted that his silver forks are not in his possession when he has deposited them with a pawnbroker as a pledge. But between these extreme cases lie many cases in which it is difficult to pronounce, with confidence, either that property is or that it is not in a person's possession.

This difficulty, sufficiently great in itself, would, we conceive, be increased by laws which should pronounce that in a set of cases arbitrarily selected from the mass, property is in

the possession of some party in whose possession, according to the understanding of all mankind, it is not. The rule of English law respecting what is called breaking bulk is an instance of what we mean. A person who has intrusted a hamper of wine to another to carry to a great distance is not in possession of that hamper of wine. But if the person in trust opens the hamper and takes out a bottle, the possession, according to the English law-books, forthwith flies back to the distant owner. Mr. Livingston has laid down a rule of a similar kind, the effect of which, if we understand it rightly, is to annul the whole law of theft as he has framed it, and, indeed, to render it impossible that theft can be committed in Louisiana. Theft is defined by him to be "the fraudulently taking of corporal personal property having some assignable value, and belonging to another, from his possession and without his assent." But in a subsequent clause he says that "neither the ownership nor the legal possession of property is changed by theft alone, without the circumstances required in such case by the civil code, in order to produce a change of property; therefore, stolen goods, if fraudulently taken from the thief, are stolen from the original proprietor." But if stolen by the second thief from the original proprietor, they must, according to Mr. Livingston's definition of theft, be taken by the second thief out of the possession of the original proprietor; therefore, the first thief has left them in the possession of the original proprietor; that is to say, the first thief has not committed theft.

It will not be imagined that we refer to this inconsistency in the code of Louisiana for the purpose of throwing any censure on the distinguished author of that code. To do so would be unjust, and in us especially most ungrateful, and also most imprudent; for we are by no means confident that inconsistencies quite as remarkable will not be detected in the code which we now submit to government. We note this error of Mr. Livingston for the purpose of showing how dangerous it is for a legislator to attempt to escape from a difficulty by giving a technical sense to an expression which he nevertheless continues to use in a popular sense.

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.

Much uncertainty will still remain. This we cannot prevent. But we can, as it appears to us, prevent the uncertainty from producing any practical evil. The provision contained in Clause 61 will, we think, obviate all the inconveniences which might arise from doubts as to the exact limits which separate theft from misappropriation and from breach of trust.

The effect of that clause will be to prevent the judges from wasting their time and ingenuity in devising nice distinctions. If a case which is plainly theft comes before them, the offender will be punished as a thief. If a case which is plainly breach of trust comes before them, the offender will be punished as guilty of breach of trust. If they have to try a case which lies on the frontier, one of those thefts which are hardly distinguishable from breaches of trust, or one of those breaches of trust which are hardly distinguishable from theft, they will not trouble themselves with subtle distinctions, but, leaving it undetermined by which name the offence should be called, will proceed to determine what is infinitely of greater importance, what shall be the punishment.

In theft, as we have defined it, the object of the offender always is to take property which is in the possession of a person out of that person's possession; nor have we admitted a single exception to this rule. In the great majority of cases, our classification will coincide with the popular classification. But there are a few aggravated cases of what we designate as misappropriation and breach of trust, which bear such an affinity to theft that it may seem idle to distinguish them from thefts; and it certainly would be idle to distinguish such cases from thefts if the distinction were made with a view to those cases alone. But, as we have a line of distinction which

we think it desirable to maintain in the great majority of cases, we think it desirable also to maintain that line in a few cases in which it may separate things which are of a very similar description.

One offence which it may be thought that we ought to have placed among thefts is the pillaging of property during the interval which elapses between the time when the possessor of the property dies, and the time when it comes into the possession of some person authorized to take charge of it. This crime, in our classification, falls under the head, not of theft, but of misappropriation of property not in possession.

The ancient Roman jurists viewed it in the same light. The property taken under such circumstances, they argued, being in no person's possession, could not be taken out of any person's possession. The taking, therefore, was not *furtum*, but belonged to a separate head, called the *crimen expilatae hereditatis*.^{*} The French lawyers, however, long ago found out a legal fiction by means of which this offence was treated as theft in those parts of France where the Roman law was in force.[†] Mr. Livingston's definition of theft appears to us to exclude this species of offence; nor indeed do we think that it could be reached by any provision of his code. That it ought to be punished with severity under some name or other is indisputable. By what name it should be designated may admit of some dispute. If we call it theft, 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 convenient. On the whole, we are inclined to maintain this line.

Again, a carrier who opens a letter intrusted to his charge, and takes thence a bank-note, would be commonly called a thief. It is certain that his offence is not morally distinguishable from theft. Here, however, as before, we think it expedient to maintain our general rule; and we therefore

^{*} Justinian, Dig. lib. xlvii. tit. 19.

[†] Domat. Sup. iii.

designate the offence of the carrier not as theft, but as criminal breach of trust.

The illustrations which we have appended to the provisions respecting theft, the misappropriation of property not in possession, and breach of trust, will, we hope, sufficiently explain to his Lordship in Council the reasons for most of those provisions.

It may possibly be remarked, that we have not, like Mr. Livingston, made it part of our definition of theft, that the property should be of some assignable value. We would, therefore, observe that we have not done so only because we conceive that the law, as framed by us, obtains the same end by a different road. By one of the general exceptions which we have proposed (Clause 73), it is provided, that nothing shall be an offence by reason of any harm which it may cause, or be intended to cause, or be known to be likely to cause, if the whole of that harm is so slight that no person of ordinary sense and temper would complain of such harm. This provision will prevent the law of theft from being abused for the purpose of punishing those venial violations of the right of property which the common-sense of mankind readily distinguishes from crimes, such as the act of a traveller who tears a twig from a hedge, of a boy who takes stones from another person's ground to throw at birds, of a servant who dips his pen in his master's ink. It does not appear to us that any further rule on this subject is necessary.

The offence of extortion is distinguished from the three offences which we have been considering by this obvious circumstance, that it is committed by the wrongful obtaining of a consent. In one single class of cases, theft and extortion are in practice confounded together so inextricably, that no judge, however sagacious, could discriminate between them. This class of cases, therefore, has, in all systems of jurisprudence with which we are acquainted, been treated as a perfectly distinct class; and we think that this arrangement, though somewhat anomalous, is strongly recommended by convenience. We have therefore made robbery a separate crime.

There can be no case of robbery which does not fall within the definition either of theft or of extortion; but in practice it will perpetually be matter of doubt whether a particular act of robbery was a theft or an extortion. A large proportion of robberies will be half theft, half extortion. A seizes Z, threatens to murder him, unless he delivers all his property, and begins to pull off Z's ornaments. Z in terror begs that A will take all he has, and spare his life; assists in taking off his ornaments, and delivers them to A. Here such ornaments as A took without Z's consent are taken by theft. Those which Z delivered up from fear of death are acquired by extortion. It is by no means improbable that Z's right-arm bracelet may have been obtained by theft, and left-arm bracelet by extortion; that the rupees in Z's girdle may have been obtained by theft, and those in his turban by extortion. Probably in nine-tenths of the robberies which are committed something like this actually takes place, and it is probable that a few minutes later neither the robber nor the person robbed would be able to recollect in what proportions theft and extortion were mixed in the crime; nor is it at all necessary for the ends of justice that this should be ascertained. For though, in general, the consent of a sufferer is a circumstance which very materially modifies the character of the offence, and which ought, therefore, to be made known to the courts, yet the consent which a person gives to the taking of his property by a ruffian who holds a pistol to his breast is a circumstance altogether immaterial.

His Lordship in Council will perceive that we 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 we have thought it convenient to retain, for the purpose of denoting, not only actual gang-robbery, but the attempting to rob when such an attempt is made or aided by a gang.

The law relating to the offence of receiving stolen goods appears to require no comment.

The offence of cheating must, like that of extortion, be committed by the wrongful obtaining of a consent. The

difference is, that the extortioner obtains the consent by intimidation, and a cheat by deception. There is no offence in the code with which we have found it so difficult to deal as that of cheating. It is evident that the practising of intentional deceit for purposes of gain ought sometimes to be punished. It is equally evident that it ought not always to be punished. It will hardly be disputed that a person who defrauds a banker by presenting a forged check, or who sells ornaments of paste as diamonds, may with propriety be made liable to severe penalties. On the other hand, to punish every defendant who obtains pecuniary favors by false professions of attachment to a patron; every legacy hunter who obtains a bequest by cajoling a rich testator; every debtor who moves the compassion of his creditors by overcharged pictures of his misery; every petitioner who, in his appeals to the charitable, represents his distresses as wholly unmerited, when he knows that he has brought them on himself by intemperance and profusion, would be highly inexpedient. In fact, if all the misrepresentations and exaggerations in which men indulge for the purpose of gaining at the expense of others were made crimes, not a day would pass in which many thousands of buyers and sellers would not incur the penalties of the law. It happens hourly that an article which is worth ten rupees is affirmed by the seller to be cheap at twelve rupees, and by the buyer to be dear at eight rupees. The seller comes down to eleven rupees, and declares that to be his last word; the buyer rises to nine, and says that he will go no higher; the seller falsely pretends that the article is unusually good of its kind, the buyer that it is unusually bad of its kind; the seller that the price is likely soon to rise, the buyer that it is likely soon to fall. Here we have deceptions practised for the sake of gain, yet no judicious legislator would punish these deceptions. A very large part of the ordinary business of life is conducted all over the world, and nowhere more than in India, by means of a conflict of skill, in the course of which deception to a certain extent perpetually takes place. The moralist may regret this; but the legislator sees that the result of the attempts

of the buyer and seller to gain an unfair advantage over each other is that, in the vast majority of cases, articles are sold for the prices which it is desirable that they should fetch; and therefore he does not think it necessary to interfere. It is enough for him to know that all this great mass of falsehood practically produces the same effect which would be produced by truth; and that any law directed against such falsehood would in all probability be a dead letter, and would, if carried into rigorous execution, do more mischief in a month than all the lies which are told in the making of bargains throughout all the bazaars of India produce in a century.

If, then, it be admitted that many deceptions committed for the sake of gain ought to be punished, and that many such deceptions ought not to be punished, where ought the line to run?

It appears to us that the line which we have drawn is correct in theory; that it is not more inconvenient in practice than any other line must be 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.

We propose 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. However immoral a deception may be, we do not consider it as an offence against the rights of property if its object is only to cause a distribution of property which the law recognizes as rightful. A few examples will show the way in which this principle will operate.

A intentionally deceives Z into a belief that he is strongly attached to Z. A thus induces Z to make a will, by which a large legacy is left to A. Here A's conduct is immoral and scandalous. But still A has a legal right, on Z's death, to receive the legacy. Even if the clearest proofs of A's insincer-

ity are laid before a tribunal, even if A in open court avows his insincerity, the will cannot, on that account, be set aside. The gain, therefore, which A obtains under Z's will is not, in the legal sense of the expression, wrongful gain. He has practised deception. He has thus caused gain to himself and loss to others. But that gain is a gain to which the civil law declares him entitled, and which the civil law will assist him to recover if it be withheld from him. That loss is a loss with which the civil law declares that the losers must put up. A therefore has not committed the offence of cheating under our definition.

But suppose that the civil law should contain, as we think that it ought to contain, a provision declaring null a will made in favor of strangers by a testator who erroneously believed his children to be dead; and suppose that A intentionally deceives Z into a belief that Z's only son has been lost at sea, and by this deception induces Z to make a will by which everything is left to A. Here the case will be different. The will being null, any property which A could obtain under that will would be property which he had no legal right so to obtain, and to which another person had a legal right. The object of A has, therefore, been wrongful gain to himself, attended with wrongful loss to another party. A has, therefore, under our definition, been guilty of cheating.

Again, take the case which we before put, of a buyer and a seller. They have told each other many untruths, but none of those untruths was such as, after the article had been delivered and the price paid, would be held by a civil court to be a ground for pronouncing that either of them possessed what he had no right to possess. Though the buyer has falsely depreciated the article, yet when he takes it and pays for it, the legal right to it is transferred to him, as well as the possession. Though the seller has falsely extolled the article, yet when he receives the price and delivers the article, the legal right to the price passes with the possession. However censurable, in a moral point of view, the deceptions practised by both may have been, yet those deceptions were intended to produce a distribution of property strictly legal. Neither

the buyer nor the seller, therefore, has been guilty of cheating. But if the seller has produced a sample of the article, and has falsely assured the buyer that the article corresponds to that sample, the case is different. If the article does not correspond to the sample, the buyer is entitled to have the purchase-money back. The seller has taken and kept the purchase-money without having a legal right to take or keep it, and it may be recovered from him by a legal proceeding. His gain is, therefore, wrongful, and is attended with wrongful loss to the buyer. He is, therefore, guilty of cheating under the definition.

So, if the seller passes off ornaments of paste on the buyer for diamonds, the price which the seller receives is a price to which he has no right, and which the buyer may recover from him by an action. Here, therefore, the object of the seller has been wrongful gain, attended with wrongful loss to the buyer. The seller is, therefore, guilty of cheating.

So, if the buyer, intending to acquire possession of the goods without paying for them, induces the seller, by deception, to take a note which the buyer knows will be dishonored, the buyer is guilty of cheating. His object is to retain in his own possession money which he is legally bound to pay to the seller. The gain which he makes by retaining the money is wrongful gain, and is attended with wrongful loss to the seller. He is, therefore, within the definition.

Whether the principle on which this part of the law is framed be a sound principle, is a question which will be best determined by examining, first, whether our definition excludes anything that ought to be included; and, secondly, whether it includes anything that ought to be excluded.

It can scarcely, we think, be contended that our definition excludes anything that ought to be included. For surely it would be unreasonable to punish, as an offence against the right of property, an act which has caused, and was intended to cause, a distribution of property which the law declares to be right, and refuses to disturb. If such an act be an offence, it must be an offence on some ground distinct from the effect which it produces on the state of property. Thus, if a person

to whom a debt is due, thinking that he shall obtain payment more easily if he assumes the appearance of being in the public service, wears a badge of office which he has no right to wear when he goes to make his demand, he is guilty of the offence defined in Clause 150; but if he gains only what he has a legal right to possess, if he deprives the debtor only of that which the debtor has no legal right to retain, he is not a wrong-doer as respects property, inasmuch as he has only rectified a wrong distribution of property.

Indeed, it appears to us that there is the strongest objection to punishing a man for a deception, and yet allowing him to retain what he has gained by that deception. What the civil law ought to say may be doubtful. But there can be no doubt that the civil and criminal law ought to say the same thing; that the one ought not to invite while the other repels; that the code ought not to be divided against itself. To send a person to prison for obtaining a sum of money, and yet to suffer him to keep that sum of money, is to hold out at once motives to deter and motives to incite. Humanity requires that punishment should be the last resource, a resource only employed when no other means can be found of producing the desired effect. Penal laws clearly ought not to be made for the preventing of deception, if deception could be prevented by means of the civil code. To tempt men, therefore, to deceive by means of the civil code, and then to punish them for deceiving, is contrary to every sound principle.

We are, therefore, not apprehensive that we shall be thought to have granted impunity to any deception which ought to be punished as cheating.

But it is possible that our definition may be thought to include much that ought to be excluded. It certainly includes many acts which are not punishable by the law of England or of France. 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 advance 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 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. They are infractions of a legal right effected by deliberate dishonesty. They are more pernicious than most of the acts which will be punishable under our code. They indicate more depravity, more want of principle, more want of shame, than most of the acts which will be punishable under our code. We punish the man who gives another an angry push. We punish the man who locks another up for a morning. We punish the man who makes a sarcastic epigram on another. We punish the man who merely threatens another with outrage. And surely the man who, by premeditated deceit, enriches himself to the wrongful loss, perhaps to the utter ruin, of another is not less deserving of punishment.

That some deceptions of this sort ought to be punished is admitted. But almost every argument which can be urged for punishing any is an argument for punishing all. The line between wilful fraudulent deception and good faith is a plain line. If there is any difficulty in applying it, that difficulty will arise, not from any defect in the line, but from the want of evidence in particular cases. But we are unable to find any reason for distinguishing one sort of fraudulent deception from another sort. The French courts apply a test which appears to us to be very objectionable. They have decided that it is not *escroquerie* to cheat by false promises, or by exciting chimerical hopes, unless the sufferer had rea-

sions of weight for believing that the promises were sincere, and the hopes well grounded.* This rule seems to us to be a license for deception granted to cunning against simplicity. A weak and credulous person is more easily imposed on than a judicious and discerning person. And just so an infant is poisoned with a dose of laudanum which would hardly put a grown person to sleep; yet the poisoner is a murderer: a pregnant woman is grievously hurt by a blow which would make no impression on a boxer; yet the person who gives such a blow is punished with exemplary severity. The law in such cases inquires only whether the harm has been voluntarily caused or no. And why should the violation by deceit of the right of property be treated differently? The deceiver proportions his artifices to the mental strength of those whom he has to deal with, just as the poisoner proportions his drugs to their bodily strength; and we see no more reason for exempting the deceiver from punishment, because he has effected his purpose by a gross fiction which could have duped only a weak person, than for exempting the poisoner from punishment because he has effected his purpose with a few drops of laudanum, which could have been fatal only to a young child.

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.

* Paillet, Manuel de Droit Français. Note on Clause 408 of the Penal Code.

For example: A and B both borrow money from Z. A obtains it by boasting falsely of his great means, of the large remittances which he looks for from England, of his expectations from rich relations, of the promises of preferment which he has received from the government. Having obtained it he secretly embarks on board of a ship, intending to abscond without repaying what he has borrowed. B, on the other hand, has obtained a loan without the smallest misrepresentation, and fully purposes to repay it. The failure of an agency house in which all his funds were placed renders it impossible for him to meet his engagements. Can it be doubted which of these two debtors ought rather to be sent to prison? Can it be doubted that A is a proper subject of punishment and that B is not so? Yet at present A, if he is arrested before the ship sails, and lays down the money, enjoys entire impunity, while B may pass years in a jail. 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. But while they are all put on the same footing, the law must be formed upon a rough calculation of the chances of dishonesty. All must be treated worse than honest debtors ought to be treated, because none are treated so severely as dishonest debtors ought to be treated. A respectable man must be imprisoned for a storm, a bad season, or a fire, because his dishonest neighbor is not liable to criminal proceedings for cheating. 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.

The provisions which we have framed on the subject of fraudulent bankruptcy are necessarily imperfect, and must remain so, until the whole of that important part of the law has undergone an entire revision.

The provisions which we propose on the subject of mischief do not appear to us to require any explanation.

We have given the name of trespass to every usurpation, however slight, of dominion over property. We do not propose to make trespass, as such, an offence, except when it is committed in order to the commission of some offence injurious to some person interested in the property on which the trespass is committed, or for the purpose of causing annoyance to such a person. Even then we propose to visit it with a light punishment, unless it be attended with aggravating circumstances.

These aggravating circumstances are of two sorts. Criminal trespass may be aggravated by the way in which it is committed. It may also be aggravated by the end for which it is committed.

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.

House-trespass, again, may be aggravated by being committed in a surreptitious or in 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, lurking house-trespass, house-breaking, lurking house-trespass by night, and house-breaking by night.

These are aggravations arising from the way in which the criminal trespass is committed. But criminal trespass may also be aggravated by the end for which it is committed. It may be committed for a frolic. It may be committed in order to a murder. It may also often happen that a criminal

trespass which is venial as respects the mode may be of the greatest enormity as respects the end, and that a criminal trespass committed in the most reprehensible mode may be committed for an end of no great atrocity. Thus A may commit house-breaking by night for the purpose of playing some idle trick on the inmates of a dwelling. B may commit simple criminal trespass by merely entering another field for the purpose of murder or gang-robbery. Here A commits trespass in the worst way. B commits trespass with the worst object. In our provisions we have endeavored to combine the aggravating circumstances in such a way that each may have its due effect in settling the punishment.

NOTE (O).

ON THE CHAPTER OF THE ILLEGAL PURSUIT OF LEGAL RIGHTS

THIS chapter is intended to prevent the enforcing of judgments by means which are so liable to be abused that, even when used for an honest end, they ought not to be tolerated. A creditor, for example, who has repeatedly in vain urged his debtor to pay him, finds that he has no chance of recovering his money without a troublesome and expensive lawsuit. He accordingly seizes on property belonging to the debtor, sells it, keeps only just as much as will satisfy the debt, and sends back the surplus to the debtor. This act is distinguished from theft by one of the broadest lines of demarcation which can be found in the code. It is not a fraudulent act. It is intended to correct a wrongful distribution of property, to do what the courts of law, if recourse were had to them, would order to be done. Public feeling would be shocked if such a creditor were called by the ignominious name of a thief.

At the same time, it cannot be doubted that it would be most dangerous to allow men to pronounce judgment, however honestly, in their own favor, and to proceed to take property in execution for the purpose of satisfying that judgment. A specific thing, indeed, which a man has a right to possess

it is no offence in him to take wherever he finds it. He may commit other offences in order to take it. But the mere taking is no crime at all. If Z has borrowed A's horse, and illegally refuses to return it, it is no offence at all in A to take the horse if he sees it feeding by the roadside. If A enters Z's stable in order to take it, he may commit house-trespass, but he commits no theft. If A knocks Z down in order to take it, he may be guilty of assault, or of voluntarily causing bodily hurt, but he commits no robbery. This license, as it appears to us, must be confined to cases in which specific things are taken. In such cases the chance of abuse is very small. But where one thing is due, and another is taken; where a man seizes on another's furniture in satisfaction of a promissory note, or drives away another's cattle by way of paying himself for a suit of clothes, the case is very different. Honest men so often think themselves entitled to more than a court of justice would award to them, that it will be difficult to say, in cases in which the taker really has a plausible claim, and in which the value of what has been taken is not out of all proportion to the value of what is claimed, that the taker has acted dishonestly. In such cases, therefore, we think it absolutely necessary to provide a punishment for the illegal pursuit of legal rights. We observe that the French courts have decided that the taking of property by a creditor in good faith, for the purpose of paying himself, is not theft; and this decision seems to us, as we have said, to be well grounded. But it does not appear to us that such an act is punishable under any clause of the French code; and this we consider as a serious omission.

NOTE (P).

ON THE CHAPTER OF THE CRIMINAL BREACH OF CONTRACTS OF SERVICE.

WE agree with the great body of jurists in thinking that in general a mere breach of contract ought not to be an offence but only to be the subject of a civil action.

To this general rule there are, however, some exceptions. Some breaches of contract are very likely to cause evil such as no damages or only very high damages can repair, and are also very likely to be committed by persons from whom it is exceedingly improbable that any damages can be obtained. Such breaches of contract are, we conceive, proper subject for penal legislation.

In England it would be unnecessary to provide a punishment for a stage-coachman who should, however maliciously or dishonestly, drive on, leaving behind a passenger whom he is bound to carry. The evil inflicted is seldom very serious. The country is everywhere well inhabited. The roads are secure. The means of conveyance can easily be obtained, and damages sufficient to compensate for any inconvenience or expense which may have been suffered can easily be recovered from the coach proprietors. But the mode of performing journeys and the state of society in this country are widely different. It is often necessary for travellers of the upper classes, even for English ladies, ignorant perhaps of the native languages, and with young children at their breasts, to perform journeys of many miles over uninhabited wastes, and through jungles in which it is dangerous to linger for a moment, in palanquins borne by persons of the lowest class. If, as sometimes happens, these persons should, in a solitary place, set down the palanquin and run away, it is difficult to conceive a more distressing situation than that in which the employer would be left. None but very high damages would be any reparation for such a wrong. But the class of people by whom alone such a wrong is at all likely to be committed

can pay no damages. The whole property of all the delinquents would probably not cover the expense of prosecuting them civilly. It therefore appears to us that breaches of contract of this description may, with strict propriety, be treated as crimes.

The law which we have framed on this subject applies, it will be perceived, only to cases in which the contract with the bearers is lawful. The traveller, therefore, who resorts to the highly culpable, though we fear too common, practice of unlawfully compelling persons against their will to carry his palanquin or his baggage will not be protected by it. If they quit him, it is what they have a legal right to do, nor will they be punishable, whatever may be the consequence of their desertion.

Another species of contract which ought, we conceive, to be guarded by a penal sanction is that by which seamen are bound to their employers. The insubordination of seamen during a voyage often produces fatal consequences. Their desertion in port may cause evils such as very large damages only could repair. But they are utterly unable to pay any damages for which it would be worth while to sue. If a ship in the Hoogly, at a critical time of the year, is compelled by the desertion of some of the crew to put off its voyage for a fortnight, it would be mere mockery to tell the owners that they may sue the runaways for damages in the supreme court.

We also think that persons who contract to take care of infants of the sick and of the helpless lay themselves under an obligation of a very peculiar kind, and may with propriety be punished if they omit to discharge their duty. The misery and distress which their neglect may cause is such as the largest pecuniary payment would not repair. They generally come from the lower ranks of life, and would be unable to pay anything. We therefore propose to add to this class of contracts the sanction of the penal law.

Here we are inclined to stop. We have, indeed, been urged to go farther, and to punish as a criminal every menial servant who, before the expiration of the term for which he is

hired, quits his employer. But it does not appear to us that in the existing state of the market for that description of labor in India, good masters are in much danger of being voluntarily deserted by their menial servants, or that the loss or inconvenience occasioned by the sudden departure of a cook, a groom, a hurkaru, or a khidmutgar, would often be of a very serious description. We are greatly apprehensive that by making these petty breaches of contracts offences, we should give no protection to good masters, but means of oppression to bad ones.

NOTE (Q).

ON THE CHAPTER OF OFFENCES RELATING TO MARRIAGE.

As this is a part of the law in which the English inhabitants of India are peculiarly interested, and which we have framed on principles widely different from those in which the English law on the same subject is framed, we think necessary to offer some explanations.

The act which in the English law is designated as bigamy is always an immoral act. But it may be one of the most serious crimes that can be committed. It may be attended with circumstances which may excuse, though they cannot justify it.

The married man who, by passing himself off as unmarried, induces a modest woman to become, as she thinks, his wife but in reality his concubine, and the mother of an illegitimate issue, is guilty of one of the most cruel frauds that can be conceived. Such a man we would punish with exemplary severity.

But suppose that a person arrives from England, and pays attentions to one of his countrywomen at Calcutta. She refuses to listen to him on any other terms than those of marriage. He candidly owns that he is already married. She still presses him to go through the ceremony with her. She represents to him that if they live together without being married she shall be an outcast from society, that nobody i

India knows that he has a wife, that he may very likely never fall in with his wife again, and that she is ready to take the risk. The lover accordingly agrees to go through the forms of marriage.

It cannot be disputed that there is an immense difference between these two cases. Indeed, in the second case the man can hardly be said to have injured any individual in such a manner as calls for legal punishment. For what individual has he injured? His second wife? He has acted by her consent, and at her solicitation. His first wife? He has certainly been unfaithful to his first wife. But we have no punishment for mere conjugal infidelity. He will often have injured his first wife no more than he would have done by keeping a mistress, calling that mistress by his own name, introducing her into every society as his wife, and procuring for her the consideration of a wife from all his acquaintance. The legal rights of the first wife and of her children remain unaltered. She is the wife; the second is the concubine. But suppose that the first wife has herself left her husband, and is living in adultery with another man. No individual can then be said to be injured by this second invalid marriage. The only party injured is society, which has undoubtedly a deep interest in the sacredness of the matrimonial contract, and which may therefore be justified in punishing those who go through the forms of that contract for the purpose of imposing on the public.

The law of England on the subject of bigamy appears to us to be, in some cases too severe, and in others too lenient. It seems to bear a close analogy to the law of perjury. The English law on these two subjects has been framed less for the purpose of preventing people from injuring each other, than for the purpose of preventing the profanation of a religious ceremony. It therefore makes no distinction between perjury which is intended to destroy the life of the innocent, and perjury which is intended to save the innocent; between bigamy which produces the most frightful suffering to individuals, and bigamy which produces no suffering to individuals at all. We have proceeded on a different principle.

While we admit that the profanation of a ceremony so important to society as that of marriage is a great evil, we can not but think that evil immensely aggravated when the profanation is made the means of tricking an innocent woman into the most miserable of all situations. We have therefore proposed that a man who deceives a woman into believing herself his lawful wife when he knows that she is not so and induces her, under that persuasion, to cohabit with him should be punished with great severity.

There are reasons similar, but not exactly the same, for punishing a woman who deceives a man into contracting with her a marriage which she knows to be invalid. For this offence we propose a punishment which, for reasons too obvious to require explanation, is much less severe than that which we have provided for a similar deception practised by a man on a woman.

We also propose to punish every person who, with what we have defined as a fraudulent intention, goes through the forms of a marriage which he knows to be invalid.

We do not at present propose any law for punishing a person who, without practising any deception, or intending any fraud, goes through the forms of a marriage which he knows to be invalid. The difficulty of framing such a law in this country is great. To make all classes subject to one law would, evidently, be impossible. If the law be made dependent on the race, birthplace, or religion of the offender, endless perplexity would arise. Races are mixed; religion may be changed or dissembled. An East Indian, half English, half Asiatic by blood, may call himself a Mahometan or Hindoo; and there exists no test by which he can be convicted of deception. We by no means intend to express an opinion that these difficulties may not be got over. But we are satisfied that this part of the penal law cannot be brought to perfection till the law of marriage and divorce has been thoroughly revised.

We leave it to his Lordship in Council to consider whether, during the interval which must elapse before the necessary inquiry can be made, it might not be, on the whole

better to retain the existing law applicable to Christians in India, objectionable as that law is, than to allow absolute impunity to bigamy.

We considered whether it would be advisable to provide a punishment for adultery, and, in order to enable ourselves to come to a right conclusion on the subject, we collected facts and opinions from all the three presidencies. The opinions differ widely. But as to the facts, there is a remarkable agreement.

The following positions we consider as fully established; first, that the existing laws for the punishment of adultery are altogether inefficacious for the purpose of preventing injured husbands of the higher classes from taking the law into their own hands; secondly, that scarcely any native of the higher classes ever has recourse to the courts of law in a case of adultery for redress against either his wife or her gallant; thirdly, that the husbands who have recourse in cases of adultery to the courts of law are generally poor men whose wives have run away; that these husbands seldom have any delicate feelings about the intrigue, but think themselves injured by the elopement; that they consider their wives as useful members of their small households; that they generally complain, not of the wound given to their affections, not of the stain on their honor, but of the loss of a menial whom they cannot easily replace, and that, generally, their principal object is that the woman may be sent back. The fiction by which seduction is made the subject of an action in the English courts is, it seems, the real gist of most proceedings for adultery in the Mofussil. The essence of the injury is considered by the sufferer as lying in the "*per quod servitium amisit*." Where the complainant does not ask to have his wife again, he generally demands to be reimbursed for the expenses of his marriage.

These things being established, it seems to us that no advantage is to be expected from providing a punishment for adultery. The population seems to be divided into two classes—those whom neither the existing punishment, nor any punishment which we should feel ourselves justified in proposing,

will satisfy, and those who consider the injury produced by adultery as one for which a pecuniary compensation will sufficiently atone. Those whose feelings of honor are painfully affected by the infidelity of their wives will not apply to the tribunals at all. Those whose feelings are less delicate will be satisfied by a payment of money. Under such circumstances, we think it best to treat adultery merely as a civil injury.

Some who admit that the penal law now existing on this subject is in practice of little or no use, yet think that the code ought to contain a provision against adultery. They think that such a provision, though inefficacious for the repressing of vice, would be creditable to the Indian government, and that, by omitting such a provision, we should give a sanction to immorality. They say, and we believe with truth, that the higher class of natives consider the existing penal law on the subject as far too lenient, and are unable to understand on what principle adultery is treated with more tenderness than forgery or perjury.

These arguments have not satisfied us that adultery ought to be made punishable by law. We cannot admit that a penal code is by any means to be considered as a body of ethics that the legislature ought to punish acts merely because those acts are immoral, or that, because an act is not punished at all, it follows that the legislature considers that act as innocent. Many things which are not punishable are morally worse than many things which are punishable. The man who treats a generous benefactor with gross ingratitude and insolence deserves more severe reprehension than the man who aims a blow in a passion, or breaks a window in a frolic. Yet we have punishments for assault and mischief, and none for ingratitude. The rich man who refuses a mouthful of rice to save a fellow-creature from death may be a far worse man than the starving wretch who snatches and devours the rice. Yet we punish the latter for theft, and we do not punish the former for hard-heartedness.

That some classes of the natives of India disapprove of the lenity with which adultery is now punished we fully believe, but this, in our opinion, is a strong argument against

punishing adultery at all. There are only two courses which, in our opinion, can properly be followed with respect to this and other great immoralities. They ought to be punished very severely, or they ought not to be punished at all. The circumstance that they are left altogether unpunished does not prove that the legislature does not regard them with disapprobation. But when they are made punishable, the degree of severity of the punishment will always be considered as indicating the degree of disapprobation with which the legislature regards them. We have no doubt that the natives would be far less shocked by the total silence of the penal law touching adultery than by seeing an adulterer sent to prison for a few months while a coiner is imprisoned for fourteen years.

An example will illustrate our meaning. We have determined not to make it penal in a wealthy man to let a fellow-creature, whose life he could save by disbursing a few pice, die at his feet of hunger. No rational person, we are convinced, will suppose, because we have framed the law thus, that we do not hold such inhumanity in detestation. But if we had proposed to punish such inhumanity with a fine not exceeding fifty rupees, we should have offered a gross outrage to the feelings of mankind. That we do not think a certain act a proper subject for penal legislation, does not prove that we do not think that act a great crime. But that, thinking it a proper subject for penal legislation, we propose to visit it with a slight penalty, does seem to indicate that we do not think it a great crime.

Nobody proposes that adultery should be punished with a severity at all proportioned to the misery which it produces in cases where there is strong affection and a quick sensibility to family honor. We apprehend that among the higher classes in this country nothing short of death would be considered as an expiation for such a wrong. In such a state of society we think it far better that the law should inflict no punishment than that it should inflict a punishment which would be regarded as absurdly and immorally lenient.

There is yet another consideration which we cannot wholly

leave out of sight. Though we well know that the dearest interests of the human race are closely connected with the chastity of women and the sacredness of the nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of the women of this country is, unhappily, very different from that of the women of England and France. They are married while still children. They are often neglected for other wives while still young. They share the attentions of a husband with several rivals. To make laws for punishing the inconstancy of the wife, while the law admits the privilege of the husband to fill his zenana with women, is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking, by law, an evil so deeply-rooted in the manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain, operation of education and of time. But while it exists, while it continues to produce its never-failing effects on the happiness and respectability of women, we are not inclined to throw into a scale, already too much depressed, the additional weight of the penal law. We have given the reasons which lead us to believe that any enactment on this subject would be nugatory. And we are inclined to think that if not nugatory it would be oppressive. It would strengthen hands already too strong. It would weaken a class already too weak. It will be time enough to guard the matrimonial contract by penal sanctions when that contract becomes just, reasonable, and mutually beneficial.

NOTE (R).

ON THE CHAPTER OF DEFAMATION.

THE essence of the offence of defamation consists in its tendency to cause that description of pain which is felt by a person who knows himself to be the object of the unfavorable sentiments of his fellow-creatures, and those inconveniences to which a person who is the object of such unfavorable sentiments is exposed.

According to the theory of the criminal law of England, the essence of the crime of private libel consists in its tendency to provoke breach of the peace; and, though this doctrine has not, in practice, been followed out to all the startling consequences to which it would legitimately lead, it has not failed to produce considerable inconvenience.

It appears to us evident that between the offence of defaming and the offence of provoking to a breach of the peace there is a distinction as broad as that which separates theft and murder. Defamatory imputations of the worst kind may have no tendency to cause acts of violence. Words which convey no discreditable imputation whatever may have that tendency in the highest degree. Even in cases where defamation has a tendency to cause acts of violence, the heinousness of the defamation, considered as defamation, is by no means proportioned to its tendency to cause such acts; nay, circumstances which are great aggravations of the offence, considered as defamation, may be great mitigations of the same offence, considered as a provocation to a breach of the peace. A scurrilous satire against a friendless woman, published by a person who carefully conceals his name, would be defamation in one of its most odious forms. But it would be only by a legal fiction that the satirist could be said to provoke a breach of the peace. On the other hand, an imputation on the courage of an officer contained in a private letter, meant to be seen only by that officer and two or three other persons, might, considered as defamation, be a very venial

offence. But such an imputation would have an obvious tendency to cause a serious breach of the peace.

On these grounds we have determined to propose that defamation shall be made an offence, without any reference to its tendency to cause acts of illegal violence.

We considered whether it would be advisable to make a distinction between the different modes in which defamatory imputations may be conveyed; and we came to the conclusion that it would not be advisable to make any such distinction.

By the English law, defamation is a crime only when it is committed by writing, printing, engraving, or some similar process. Spoken words reflecting on private character, however atrocious may be the imputations which those words convey, however numerous may be the assembly before which such words are uttered, furnish ground only for a civil action. Herein the English law is scarcely consistent with itself. For if defamation be punished on account of its tendency to cause breach of the peace, spoken defamation ought to be punished even more severely than written defamation, as having the tendency in a higher degree. A person who reads in a pamphlet a calumnious reflection on himself, or on some one for whom he is interested, is less likely to take a violent revenge than a person who hears the same calumnious reflection uttered. Public men who have, by long habit, become callous to slander and abuse in a printed form, often show acute sensibility to imputations thrown on them to their faces. Indeed, defamatory words, spoken in the presence of the person who is the object of them, necessarily have more of the character of a personal affront, and are, therefore, more likely to cause breach of the peace than any printed libel.

The distinction which the English criminal law makes between written and spoken defamation is generally defended on the ground that written defamation is likely to be more widely spread, and to be more permanent, than spoken defamation. These considerations do not appear to us to be entitled to much weight. In the first place, it is by no means necessarily the fact that written defamation is more extensively circulated than spoken defamation. Written defamation may

be contained in a letter intended for a single eye. Spoken defamation may be heard by an assembly of many thousands. It seems to us most unreasonable that it should be penal to say, in a private letter, that a man is dissipated, and not penal to stand up at the town-hall, and there, before the whole society of Calcutta, falsely to accuse him of poisoning his father.

In the second place, it is not necessarily the fact that the harm caused by defamation is proportioned to the extent to which the defamation is circulated. Some slanders—and those slanders of a most malignant kind—can produce harm only while confined to a very small circle, and would be at once refuted if they were published. A malignant whisper addressed to a single hearer, and meant to go no farther, may indicate greater depravity, may cause more intense misery, and may deserve more severe punishment than a satire which has run through twenty editions. A person, for example, who in private conversation should infuse into the mind of a husband suspicions of the fidelity of a virtuous wife, might be a defamer of a far worse description than one who should insert the lady's name in a printed lampoon.

It must be allowed that, in general, a printed story is likely to live longer than a story which is only circulated in conversation. But, on the other hand, it is far easier for a calumniated person to clear his character, either by argument or by legal proceedings, from a charge fixed in a printed form, than from a shifting rumor, which nobody repeats exactly as he heard it. In general, we believe, a man would rather see in a newspaper a story discreditable to him which he had the means of refuting, than know that such a story, though not published, was current in society.

On the whole, we are so far from being able to discover any reason for exempting any mode of defamation from all punishment, that we have not even thought it right to provide different degrees of punishment for different modes of defamation. We do not conceive that on this subject any general rule can, with propriety, be laid down. We have, therefore, thought it best to leave to the courts the business

of apportioning punishment, with due regard to the circumstances of every case.

We have thought it necessary, under the peculiar circumstances of this country, to lay down for the guidance of the courts a rule which, if we were legislating for a population among whom there was a uniform standard of morality and honor, might appear superfluous. India is inhabited by races which differ widely from each other in manners, tastes, and religious opinions. Practices which are regarded as innocent by one large portion of society excite the horror of another large portion. A Hindoo would be driven to despair if he knew that he was believed by persons of his own race to have done something which a Christian or a Mussulman would consider as indifferent or as laudable. Where such diversities of opinion exist, that part of the law which is intended to prevent pain arising from opinion ought to be sufficiently flexible to suit those diversities. We have, therefore, directed the judge not to decide the question whether an imputation be or be not defamatory, by reference to any particular standard, however correct, of honor, of morality, or of taste, but to extend an impartial protection to opinions which he regards as erroneous, and to feelings with which he has no sympathy.

There are nine excepted cases (see Clauses from 470 to 478, inclusive) in which we propose to tolerate imputations prejudicial to character.

The exception which stands first in order will probably be thought by many persons objectionable. It is opposed to the rules of the English criminal law. It goes, we fear, beyond what even the boldest reformers of English law have proposed. It is at variance with the provisions of the French code, and with the sentiments of the most distinguished French jurists. It is at variance also with the provisions of the code of Louisiana. It is, therefore, with some diffidence that we venture to lay before the Governor-General in Council the results of a long and anxious consideration of this question.

The question is, whether the truth of an imputation preju-

dicial to character should, in all cases, exempt the author of that imputation from punishment as a defamer. We conceive that it ought to exempt him.

It will hardly be disputed, even by those who dissent from us on this point, that there is a marked distinction between true and false imputations, as respects both the degree of malignity which they indicate, and the degree of mischief which they produce. The accusing a man of what he has not done implies, in a vast majority of cases, greater depravity than the accusing him of what he has done. The pain which a false imputation gives to the person who is the object of it is clear, uncompensated evil. There is no set-off whatever. The pain which a true imputation gives to the person who is the object of it is in itself an evil, and, therefore, ought not to be wantonly inflicted. But there is often some counterbalancing good. A true imputation may produce a wholesome effect on the person who has, by his misconduct, exposed himself to it. It may deter others from imitating his example. It may set them on their guard against his bad designs.

Not only do true imputations generally produce some good to counterbalance the evil caused by them, but in many cases this counterbalancing good appears to us greatly to preponderate. However skilfully penal laws may be framed, however vigorously they may be carried into execution, many bad practices will always be out of reach of the tribunals. The state of society would be deplorable if public opinion did not repress much that legislators are compelled to tolerate. The wisest legislators have felt this, and have assigned it as a reason for not visiting certain acts with legal punishment, that those acts will be sufficiently punished by general disapprobation. It seems inconsistent and unwise to rely on the public opinion in certain cases as a valuable auxiliary to the law, and at the same time to treat the expression of that opinion in those very cases as a crime.

It is easy to put cases about which there could scarcely be any difference of opinion. A person who has been guilty of gross acts of swindling at the Cape comes to Calcutta, and

proposes to set up a house of agency. A person who has been forced to fly from England on account of his infamous vices repairs to India, opens a school, and exerts himself to obtain pupils. A captain of a ship induces natives to emigrate, by promising to convey them to a country where they will have large wages and little work. He takes them to a foreign colony, where they are treated like slaves, and returns to India to hold out similar temptations to others. A man introduces a common prostitute as his wife into the society of all the most respectable ladies of the presidency. A person in a high station is in the habit of encouraging ruinous play among young servants of the Company. In all these cases, and in many others which might be named, we conceive that a writer who publishes the truth renders a great service to the public, and cannot, without a violation of every sound principle, be treated as a criminal.

There are, undoubtedly, many cases in which the spreading of true reports, prejudicial to the character of an individual, would hurt the feelings of that individual, without producing compensating advantage in any other quarter. The proclaiming to the world that a man keeps a mistress, that he is too much addicted to wine, that he is penurious in his house-keeping, that he is slovenly in his person; the raking up of ridiculous and degrading stories about the youthful indiscretions of a man who has long lived irreproachably as a husband and a father, and who has attained some post which requires gravity and even sanctity of character, can seldom or never produce any good to the public sufficient to compensate for the pain given to the person attacked, and to those who are connected with him. Yet we greatly doubt whether, when the imputations are true, it be advisable to inflict on the propagators of such miserable scandal any legal punishment, in addition to that general aversion and contempt with which their calling and their persons are everywhere regarded. Even in such cases, the question whether the imputation be true or false is not an unimportant question. Those who would not allow truth to be in such cases a justification, would admit that it ought generally to be a mitigating circumstance.

Indeed, we find it impossible to imagine any case in which we should punish a man who told no more than the truth respecting another, as severely as if what he told had been a lie invented to blast the reputation of that other.

These two propositions, then, we consider as established: first, that in some cases of prosecution for defamation, the truth of the imputations alleged to be defamatory ought to be a justification; secondly, that in the vast majority of such cases, if not in all, truth, if it be not a justification, ought to be a mitigation.

From these two propositions a third proposition necessarily follows: that in all cases of prosecution for defamation, if the defendant avers that the imputations complained of as defamatory are true, the court ought to go into the question of the truth of those imputations.

This ought to be done, not only in justice to the public and to the defendant, but in justice to the innocent complainant. It must not be forgotten that one of the most important ends which a person proposes to himself in prosecuting a slanderer is the refuting of the slander. He generally considers the punishment of the offender as a secondary object; and, when there is no circumstance of peculiar aggravation in the case, is often willing to stay proceedings after obtaining a retraction and apology. To clear his fame is his first object. It is, we conceive, an object for the attaining of which he is entitled to the assistance of the law. But it is an object which cannot be attained unless the courts go into the question of truth.

The effect of a rule excluding evidence of the truth is to put on a par descriptions of persons between whom it is desirable to make the widest distinction. The public-spirited man who warns the mercantile community against a notorious cheat, or advises families not to admit into their intimacy a practised seducer of innocence, is placed on the same footing with the slanderer who invents the most infamous falsehoods against persons of the purest character. On the other hand, a man who has, without the slightest reason, been held up to the world as a seducer or a swindler, is placed in exactly the same situation with one who well deserves those disgraceful

names. So defective is the investigation that it leaves a suspicion lying on the most innocent, and no more than a suspicion lying on the most guilty.

We therefore think that in all cases of prosecution for defamation, the courts ought to allow the question of truth to be gone into. But if in all cases the courts allow the question of truth to be gone into, we are satisfied that no respectable person will venture to institute a prosecution for defamation in a case in which he knows that the truth of the defamatory matter is likely to be proved. He will feel that, by prosecuting, he should injure his own character far more deeply than any libeller can do. However disagreeable it may be to his feelings that a discreditable story concerning him should be repeated in society, and should furnish paragraphs for the newspapers, it must be much more disagreeable that such a story should be proved in open court by legal evidence. By prosecuting, he turns what was at most a strong suspicion into an absolute certainty. While he forbears to prosecute, many people will probably disbelieve the scandalous report; many will doubt about its truth. The mere circumstance that he abstains from prosecuting is no proof of guilt. It is notorious that slanders are often passed by with silent contempt by those who are the objects of them. Indeed, in a country where the Press is free, a man whose station exposes him to remark would have nothing to do but to prosecute, if he should institute legal proceedings every time that he might be calumniated.

It seems to us, therefore, certain that a man on whose character imputations have been thrown, which can be proved to be true, will, if he possess ordinary prudence and ordinary sensibility, abstain from having recourse to a court of law which will fully investigate the truth of those imputations. By having recourse to a court of law, he would show that he belonged to a class of persons who are the last that a legislator would wish to favor; to that class of persons in whom the sense of shame is weak, and the malicious passions strong and who are content to incur dishonor for the chance of obtaining revenge.

Being, therefore, of opinion that, in all cases of prosecution for defamation, evidence of the truth of the imputations alleged to be defamatory ought to be received, and being of opinion that practically there is no difference between receiving evidence of truth and allowing truth to be a justification, we have thought it advisable to provide, expressly, that truth shall always be a justification. By framing the law thus, we have not in the smallest degree diminished the real security of private character, or the real risk of detraction. We have merely made the language of the code correspond with its virtual operation.

As we are satisfied that no practical mischief will be produced by the rule which we have proposed, we think that its perfect simplicity and certainty are strong reasons for adopting it.

If it be not adopted, it will be necessary to take one of two courses; either to provide that truth shall in no case be a justification, or to provide that truth shall be a justification in some cases and not in others. To the former course we feel, for reasons which we have already assigned, insurmountable objections. The effect of such a state of the law would be that eminent public services would often be treated as crimes. If the latter course be taken, we are convinced that it would be found impossible to draw any line approaching to accuracy. We are convinced that it would be necessary to leave to the judges an almost boundless discretion, a discretion which no two judges would exercise in the same manner.

It has been suggested to us, from quarters entitled to great respect, that it would be a preferable course to admit in every case the truth of matter alleged to be defamatory to be given in evidence, for the purpose of proving that the accused person had not acted maliciously; but not to allow the proof of the truth to be a justification if it should appear that reputation had been maliciously assailed.

If a provision of this kind were adopted, it would, for the reasons which we have already given, be in practice nugatory. For no respectable person would prosecute the author of an imputation which could be proved to be true. And we take

it for granted that the law of procedure will not be framed in so cruel and unreasonable a manner as to permit a prosecution for defamation to be instituted in opposition to the wishes of the person defamed. Such a power of prosecution would scarcely ever be used by a friend of the person defamed; it would never be used by a judicious friend; and it would be a most formidable weapon in the hands of a malignant enemy.

But if the provision which we are considering were not certain to be in practice nugatory, we should think it a highly objectionable provision. When an act is of such a description that it would be better that it should not be done, it is quite proper to look at the motives and intentions of the doer, for the purpose of deciding whether he shall be punished or not. But when an act which is really useful to society, an act of a sort which it is desirable to encourage, has been done, it is absurd to inquire into the motives of the doer, for the purpose of punishing him if it shall appear that his motives were bad.

If A kills Z, it is proper to inquire whether the killing was malicious; for killing is *prima facie* a bad act. But if A saves Z's life, no tribunal inquires whether A did so from good feeling, or from malice to some person who was bound to pay Z an annuity; for it is better that human life should be saved from malice than not at all. If A sets on fire a quantity of cotton belonging to Z, it is proper to inquire whether A acted maliciously; for the destruction of valuable property by fire is *prima facie* a bad act. But if Z's cotton is burning, and A puts it out, no tribunal inquires whether A did so from good feeling or from malice to some other dealer in cotton, who, if Z's stock had been destroyed, would have been a great gainer; for the saving of valuable property from destruction is an act which it is desirable to encourage and it is better that such property should be saved from bad motives than that it should be suffered to perish. Since then, no act ought to be made punishable on account of malicious intention, unless it be in itself an act of a kind which it is desirable to prevent, it follows that malice is not a test which can with propriety be used for the purpose of determining what true imputations on character ought to be put

ished, and what true imputations on character ought not to be punished; for the throwing of true imputations on character is not *prima facie* a pernicious act. It may, indeed, be a very pernicious act; but we are not prepared to say that in the majority of instances it is so. We are sure that it is often a great public service; and we are sure that it may be very pernicious when it is not done from malice, and that it may be a great public service when it is done from malice. It is perfectly conceivable that a person might, from no malicious feeling, but from an honest though austere and injudicious zeal for what he might consider as the interests of religion and morality, drag before the public frailties which it would be far better to leave in obscurity. It is also perfectly conceivable that a person who has been concerned in some odious league of villany and has quarrelled with his accomplices, may, from vindictive feelings, publish the history of their proceedings, and may, by doing so, render a great service to society. Suppose that a knot of sharpers lives by seducing young men to the gaming-table and pillaging them to their last rupee. Suppose that one of these knaves, thinking himself ill-used in the division of the plunder, should revenge himself by printing an account of the transactions in which he has been concerned. He is prosecuted by the rest of the gang for defamation. He proves that every word in his account is true. But it is admitted that his only motives for publishing it were rancorous hatred and disappointed rapacity. It would surely be most unreasonable in the court to say: "You have told the public a truth which it greatly concerned the public to know; you have been the saving of many promising youths; you have been the means of ridding society of a dreadful pest; you have done, in short, what it was most desirable that you should do; but as you have done this, not from public spirit, but from dislike of your old associates, we pronounce you guilty of an offence, and condemn you to fine and imprisonment."

It is evident that society cannot spare any portion of the services which it receives. Far from scrutinizing the motives which lead people to render such services, and punishing such

services when they proceed from bad motives, all societies are in the habit of offering motives addressed to the selfish passions of bad men for the purpose of inducing those men to do what is beneficial to the mass. We offer pardons and pecuniary rewards to the worst members of the community for the purpose of inducing them to betray their accomplices in guilt. That the quarrels of rogues are the security of honest men, is an important truth which has passed into a proverb; and of that security we should, to a certain extent, deprive honest men if we were to make it an offence in one rogue to speak the truth about another rogue under the influence of passions excited in the course of a quarrel.

We have hitherto argued this point on the supposition that by malice is meant real malice, and not a fictitious, a constructive malice. We have the strongest objections to introducing into the code such a kind of malice—a malice of which a person may be acquitted when it is clear that he has acted from the most deadly personal rancor, and found guilty when those who find him guilty are satisfied that he has acted only from the best feelings—a malice which may be only the technical name for benevolence.

On these grounds, we recommend to the Governor-General in Council that the first exception, as we have drawn it, be suffered to stand part of the code.

The remaining exceptions will not require so long a defence: by Clause 471 we allow the public conduct of public functionaries to be discussed, provided that such discussion be conducted in good faith. That the advantages arising from such discussion far more than compensate for the pain which it occasionally gives, will hardly be disputed by any English statesman.

But there are public men who are not public functionaries. Persons who hold no office may yet, in this country, take a very active part in urging or opposing the adoption of measures in which the community is deeply interested. It appears clear to us that every person ought to be allowed to comment, in good faith, on the proceedings of these volunteer servants of the public, with the same freedom with

which we allow him to comment on the proceedings of the official servants of the public. We have provided for this by Clause 472.

By Clause 473 we have allowed all persons freely to discuss in good faith the proceedings of courts of law, and the characters of parties, agents, and witnesses as connected with those proceedings. It is almost universally acknowledged that the courts of law ought to be thrown open to the public. But the advantage of throwing them open to the public will be small, indeed, if the few who are able to press their way into the court are forbidden to report what has passed there to the vast numbers who were absent, or if those who are allowed to know what has passed are not allowed to comment on what has passed. The only reason that the whole community is not admitted to hear every trial that takes place is that it is physically impossible that they should find room; and, by Clause 473, we do our best to counteract the effect of this physical impossibility.

Whether public writers ought to be allowed to publish comments on trials while those trials are still pending, is a question which, in the present state of India, it is hardly worth while to discuss. We have not thought it necessary to insert any provision on that subject in the chapter of offences against public justice; and such a provision, even if it were necessary, would evidently not belong to the head of defamation, for the harm done by such comments, as respects public justice, is exactly the same when the comments are laudatory as when they are abusive.

By Clause 474 we allow every person to criticise, in good faith, published books, works of art which are publicly exhibited, and other similar performances.

By Clause 475 we allow a person under whose authority others have been placed, either by their own consent or by the law, to censure, in good faith, those who are so placed under his authority, as far as regards matter to which that authority relates.

By Clause 476 we allow a person to prefer an accusation against another, in good faith, to any person who has lawful authority to restrain or punish the accused.

By Clause 477 we have excepted from the definition of defamation private communications which a person makes, in good faith, for the protection of his own interests; and by Clause 478 we have excepted private communications which a person makes in good faith for the benefit of others.

It will be observed that in the eight last exceptions we do not require that an imputation should be true. We require only that it should be made in good faith; for to require in these cases that the imputation should be true, would be to render these exceptions mere nullities. Whether a public functionary is or is not fit for his situation; whether a person who has bestirred himself to get up a petition in favor of a public measure ought to be considered as an enlightened and public-spirited citizen, or as a foolish meddler; whether a person who has been tried for an offence was or was not guilty; which of two witnesses who contradicted each other on a trial ought to be believed; whether a portrait is like; whether a song has been well sung; whether a book is well written;—these are questions about which honest and discerning men may hold opinions diametrically opposite; and to require a man to prove to the satisfaction of a court of law that the opinion which he has expressed on such a question is a right opinion is to prohibit all discussion on such questions. The same may be said of those private communications which we propose to allow. It is plainly desirable that a merchant should disclose to his partners his unfavorable opinion of the honesty of a person with whom the firm has dealings. It is desirable that a father should caution his son against marrying a woman of bad character. But if the merchant is permitted to say to his partners, if the father is permitted to say to his son, only what can be legally proved before a court, it is evident that the permission is worth nothing.

Whether an imputation be or be not made in good faith is a question for the courts of law. The burden of the proof will lie sometimes on the person who has made the imputation, and sometimes on the person on whom the imputation has been thrown. No general rule can be laid down. Yet scarcely any case could arise respecting which a sensible and

impartial judge would feel any doubt. If, for example, a public functionary were to prosecute for defamation a writer who had described him in general terms as incapable, the court would probably require the prosecutor to give some proof of bad faith. If the prosecutor had no such proof to offer, the defendant would be acquitted. If the prosecutor were to prove that the defendant had applied to him for money, had promised to write in his praise if the money were advanced, and had threatened to abuse him if the money were withheld, the court would, probably, be of opinion that the defendant had not written in good faith, and would convict him.

On the other hand, if the imputation were an imputation of some particular fact, or an imputation which, though general in form, yet implied the truth of some particular fact which, if true, might be proved, the court would probably hold that the burden of proving good faith lay on the defendant. Thus, if a person were to publish that a Collector was in the habit of receiving bribes from the zemindars of his district, and were unable to specify a single case, or to give any authority for his assertion, the courts would probably be of opinion that the imputation had not been made in good faith.

Again: if a critic described a writer as a plagiarist, the courts would not consider this as defamation without very strong proof of bad faith. But if it were proved that the critic had, like Lauder, interpolated passages in old books in order to bear out the charge of plagiarism, the court would doubtless be of opinion that he had not criticised in good faith, and would convict him of defamation.

It will be necessary to provide in the code of procedure rules for pleading in cases of defamation, which may give to an innocent man who has been calumniated the means of clearing his character. It will be proper to provide that a defendant who is accused of defamation, and who rests his defence on the truth of the imputation alleged to be defamatory, shall be held strictly to the proof of the substance of the imputation if the imputation be particular, and shall be compelled to descend to particulars in his plea if the imputation

be general. It will not be expected that we should here go into any details respecting the law of criminal pleading. It is sufficient here to say, that the importance of framing that part of the law in such a manner as to give full protection to persons whose character has been unjustly aspersed has not escaped our attention.

We may here observe that an imputation which is not defamatory may, under certain circumstances, be punishable on other grounds. Such an imputation may be intended to excite disaffection. If so, though not punishable as defamation, it will be punishable as sedition. An attack made, in good faith, on the public administration of the Governor of a presidency, will in no case be a defamation. But if the author of it designed to inflame the people against the government, he will be liable to punishment under Clause 113.

Again : an imputation which is not defamatory may be intended to excite a mob to violence against an individual. If so, the author of the imputation is punishable under Clause 94.

Again : an imputation which is not defamatory may be uttered in the hearing of the person who is the object of it, for the purpose of wantonly and maliciously annoying that person. If so, it is punishable under Clause 485. There are many cases in which it is fit that unpleasant truth should be told respecting an individual. But there is no case in which it is desirable that such truth should be told in such a way that the telling of it is a gross personal outrage. A person who has detected, or thinks that he has detected, a dishonest misrepresentation in a book, has a right to expose it publicly ; but he cannot be allowed to intrude into the presence of the author of the book, and to tell him to his face that he is a liar. A person who knows the mistress of a female school to be a woman of infamous character deserves well of society if he states what he knows ; but he cannot be allowed to follow her through the streets calling her by opprobrious names, though he may be able to prove that all those names were merited. A person who brings to notice the malversation of a public functionary deserves applause. But a person who hangs a public functionary in effigy at that functionary's

door, with an opprobrious label, does what cannot be permitted even though every word on the label, and every imputation which the exhibition was meant to convey, may be perfectly true.

We do not apprehend that the clauses relating to the printers and publishers of defamatory matter require any explanation or defence.