LAW COMMISSION
OF INDIA

FORTY-FIRST REPORT

(THE CODE OF CRIMINAL PROCEDURE, 1898)

SEPTEMBER, 1969

(Vol. I)

GOVERNMENT OF INDIA
MINISTRY OF LAW

CONTENTS

NEW DELHI-1,

September 24, 1969.

DEAR LAW MINISTER,

I have pleasure in sending herewith the forty-first Report of the Law Commission on the Code of Criminal Procedure, 1898. This brings to a conclusion one of the major tasks of revision undertaken by the Commission.

2. A detailed examination of the Code with a view to its complete revision was undertaken in the Commission some time in 1961. The previous Commission under the chairmanship of Shri J. L. Kapur submitted, between 1963 and 1968, four Reports (thirty-second, thirty-third, thirty-fifth and thirty-sixth) on problems arising out of, or in connection with, certain specific provisions of the Code. In February, 1968, it submitted a comprehensive Report (thirty-seventh) on the first fourteen Chapters comprising sections 1 to 176 of the Code.

3. When the present Commission was constituted in March, 1968, with four whole-time Members and the fifth Member from the Law Ministry, it was possible to meet much more frequently and devote greater time and attention to the revision of the Code than before.

4. Towards the end of the study, the Commission felt that it would be desirable to have personal discussions with Judges of High Courts, representatives of the Bar and officers of the State Governments on the more important general questions which had come up before us for consideration. Between January 15 and March 15 of this year, one or more Members of the Commission visited eight High Courts for these discussions which were of great value to us.

5. While this last Report on the Code has naturally to be read along with the thirty-seventh, which deals in detail with roughly one-third of the Code, and also with the other four Reports of the Commission mentioned above, we have endeavoured to make the present Report a comprehensive one, and to include in it the Commission's recommendations for the revision of the Code in a consolidated form.

6. Finally, we wish to express our appreciation of the immense amount of work put in by our Secretary, Shri P. M. Bakshi, in collecting and analysing the material for our discussions and the untiring and diligent manner in which he assisted the Commission right through.

Yours sincerely

K. V. K. SUNDARAM

Hon'ble Shri P. Govinda Menon,
Minister of Law & Social Welfare,
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INTRODUCTION

Some time after the Law Commission, as first constituted, had submitted its report[1] on the Reform of Judicial Administration, the Commission was re-constituted and it was asked by the Government of India to undertake a detailed examination of the Code of Criminal Procedure with a view to its general revision. The work was started immediately and has been going on continuously since 1961.

While this intensive study of the Code was in progress, the Commission found it necessary to consider a few specific problems arising out of certain provisions of the Code and report separately thereon to the Government. In chronological order these were :—

(i) Report on the Evidence of Officers of the Mint and of the Indian Security Press regarding forged stamps, currency notes etc., (connected with section 510 of the Code)[2];

(ii) Report on section 9 of the Code regarding the appointment of Sessions Judges, Additional Sessions Judges and Assistant Sessions Judges[3];

(iii) Report on section 44 of the Code and a suggestion to add a provision relating to the reporting of, and the disclosure in evidence about, offence relating to bribery[4]; and

(iv) Report on sections 497, 498 and 499 of the Code with reference to the question of granting of bail with conditions.[5]

Thereafter the Commission gave its comprehensive Report[6] on the first fourteen chapters comprising sections 1 to 176, of the Code.

The Commission was then re-constituted in March, 1968, with the following Members :—

(1) Shri K. V. K. Sundaram, retired Chief Election Commissioner of India, (Chairman);

(2) Shri S. S. Dulat, retired Judge of the Punjab High Court;

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1 14th Report : given on September 26, 1953.
2 25th Report : given on September 27, 1963.
3 32nd Report : given on May 29, 1967.
4 33rd Report : given on December 15, 1967.
5 36th Report : given on January 9, 1968.
6 37th Report, given on February 19, 1968, was signed by Shri J. L. Kapur (Chairman) and Sarvashri K. G. Datar, S. S. Dulat, T. K. Tope and R. P. Mookerjee (Members). Shri R. P. Mookerjee signed the Report subject to a dissenting note.

(3) Shri B. N. Lokur, formerly Law Secretary to the Government of India;

(4) Shrimati Anna Chandi, retired Judge of the Kerala High Court; and

(5) Shri S. Balakrishnan, Joint Secretary and Legal Adviser to the Government of India.

Shri B. N. Lokur, however, was with the Commission only for a short period from March 20 to July 4, 1968, when he was appointed a Judge of the Allahabad High Court. His place was taken by Shri R. L. Narasimham, retired Chief Justice of the Patna High Court, on August 5, 1968.

After reconstitution, the Commission took up a detailed study of the Code from where the previous Commission had ended its Report, *viz.*, section 177. One matter which particularly engaged the attention of the Commission was the scheme of commital proceedings, both as it operated before the amendment of the Code in 1955 and as it has been operating since that amendment. The opinions received by the Commission from qualified and well-informed persons were highly critical of the changes made in 1955. Many of them were of the view that commital proceedings, as now held under section 207A of the Code, served no useful purpose. There were also suggestions that commital proceedings in any form were unnecessary and should be totally abolished and that all cases triable by a Court of Session should be brought directly before it instead of being committed to it for trial after a preliminary inquiry by a Magistrate. As this was obviously a very important matter, it was decided to obtain the views of the High Courts, the Bar Council and the State Governments and a detailed letter was addressed to them in August 1968 soliciting their views.

Towards the end of its study of the Code, the Commission felt that, before coming to final conclusions, it would be desirable to consult the Bench and the Bar on the more important general questions which had come up for discussion and that their views could be ascertained more quickly and satisfactorily by Members of the Commission going round the High Courts, meeting the Judges and representatives of the Bar interested in criminal procedure and informally discussing with them the questions we had in mind. The Commission accordingly started these discussions in the first week of January, 1969, in Delhi itself, meeting first the Judges of the High Court for Delhi and Himachal Pradesh and then representatives of the High Court Bar Association and of the District Bar Association. Between January 15 and March 15, one or more Members of the Commission visited the High Courts

at Allahabad, Bangalore, Bombay, Calcutta, Chandigarh, Jabalpur, Madras and Patna and held discussions. At all these centres we took the opportunity of discussing with the concerned officers of the State Governments and police chiefs various problems connected with the constitution of criminal courts, separation of the executive from the judiciary, the organisation of public prosecutors and the Code provisions relating to police investigation.

These discussions have been of invaluable assistance to us in clarifying our ideas and formulating our recommendations for revising the Code. We would, in particular, record our grateful thanks to the Judges of High Courts for readily sparing time for the meetings and giving us the benefit of their individual views on the topics discussed.

Although the first fourteen chapters of the Code have been exhaustively analysed in the previous Report of the Law Commission and a number of amendments have been proposed, we have found it unavoidably necessary to review their recommendations, to modify or alter them here and there, and to suggest in places a different line of revisions. A finely integrated and comprehensive law like the Code of Criminal Procedure cannot possibly be revised piecemeal since amendments suggested in one part of the Code naturally affect provisions in other parts to a greater or lesser extent. We, therefore, propose in this final Report on the Code to consider it chapter by chapter starting from the beginning and to present the Commission's recommendations in a consolidated form.

CHAPTER I

PRELIMINARY

Territorial extent of the Code.

1.1. The Code, as enacted in 1898, provided in section 1(2) that it extended to the whole of British India. This seemingly comprehensive extent clause had, however, to be read in the light of the Scheduled Districts Act, 1874, which remained on the statute book till the Government of India Act, 1935, came into force. The Scheduled Districts Act listed in a Schedule a large number of backward areas in different parts of India and gave them the common name of scheduled districts. By sections 3, 4 and 5 of the Act, the Local Government was enabled, with the sanction of the Governor-General in Council, to notify what enactments were in force and what enactments were not in force in any of the scheduled districts and to extend to the scheduled districts any Act in force in British India. Section 6 of the Act enable the Local Government, *inter alia,* to appoint officers to administer criminal justice within a scheduled district, to regulate the procedure of such officers but not so as to restrict the operation of any enactment in force in the district, and to direct by what authorities any jurisdiction, powers or duties incidental to the operation of any such enactment shall be exercised or performed.

Not in force in some "scheduled districts".

1.2. After the passing of the Code in 1898, the Local Government acting under the Scheduled Districts Act declared the Code to be in force in some scheduled districts and not to be in force in some others, with the result that in spite of the clear-cut extent clause in that first section of the Code, it required research into old notifications and directions to find out whether the Code was actually in force in a scheduled district and, if so, in what form. When the Government of India Act, 1935, was brought into force on the 1st April, 1937, the Scheduled Districts Act, 1874, was repealed by Adaptation of Indian Laws Order-in-Council but "without prejudice to the continued validity of any notification, appointment, regulation, direction or determination made thereunder before" that date. The Order-in-Council further provided that the appropriate Government, Central or Provincial, may within six months of that date adapt any enactment in force in a scheduled district by virtue of a notification under the Scheduled Districts Act in order to bring the enactment into accord with the Government of India Act, 1935.

Changes in extent clause after independence.

1.3. The extent clause in the Code was modified thrice between 1947 and 1951 in consequence of the constitutional changes that took place during those eventful years. First the expression "whole of Britsh India" was changed to "all the Provinces of India" by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948, meaning thereby all the provinces of the Dominion of India. Then it was changed by the Adaptation of Laws Order, 1950, to read "the whole of India except Part B States". Thirdly, the Code of Criminal Procedure (Amendment) Act, 1951, which came into force on the 1st April, 1951, substituted "the State of Jammu and Kashmir and Manipur"

for "Part B States" thereby enlarging the territorial extent of the Code to the whole of India except these two named States : (Manipur was then a Part C State). Finally in 1956 the Union Territories Laws (Amendment) Act, 1956, omitted the reference to Manipur in the extent clause.

Code does not apply to Nagaland–Decision of Supreme Court.

1.4. While by virtue of the two Acts of Parliament last mentioned the Code ostensibly extends to the whole of India except the State of Jammu and Kashmir, it is, in fact, not in force in the State of Nagaland nor in the autonomous districts and the North East Frontier Tract of Assam. The question whether the Code is in force in Nagaland came up before the Supreme Court for consideration in *State of Nagaland* v. *Ratan Singh*.[1] The Court held that the Code did not apply to the State but certain rules made by the Governor of Assam under section 6 of the Scheduled Districts Act, 1874, on March 25, 1937, in supersession of all previous orders on the subject continued to be in force and governed the trial of offenders in the State. The Court concluded its judgment with the following observations :—

> "We may, however, say that it would be better if, as soon as it is found to be expedient, all Rules are cancelled and one uniform set of Rules is made for the whole of this area. This would obviate having to find out through the mazes of history and the congeries of rules, notifications and regulations what law is applicable. If any difficulty is felt in making new rules, recourse may easily be taken to the provisions of section 31 of the State of Nagaland Act which enables the President, by order, to remove any difficulty to give effect to the provisions of the State of Nagaland Act. The history of this area shows that there have been difficulties in the past in ascertaining laws which were applicable at any point of time in any particular area and led to the passing of many Acts of British Parliament and of the Governor-General in Council to remove such difficulties. We do not think that such a state of affairs should continue indefinitely when the state of Nagaland Act itself gives sufficient power to remove difficulties."[2]

Code does not apply to Assam tribal areas.

1.5. The Commission is informed by the Government of Assam that each of the autonomous districts of Assam has its own rules for the administration of justice made under the Scheduled Districts Act, 1874, and subsequently modified by the Assam Autonomous Districts (Administration of Justice) Regulation, 1952, and the Code of Criminal Procedure is not as such in force in these districts. It is also not in force in the four frontier tracts which comprise the North East Frontier Agency. According to the Government of Assam, some small portions of these tracts falling in the plains were transferred to the districts of Darrang and Lakhimpur in February, 1951, but the Code has even now not been made applicable to these areas.

No excluded areas in other States.

1.6. So far as the other States and Union Territories are concerned, no area appears to be excluded from the operation of the Code either because it was a scheduled district before 1937 or

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[1] (1966) 3 S.C.R. 830.

[2] *Ibid* pp. 854-55.

because it is a scheduled area under the Fifth Schedule to the Constitution.

Amendment of extent clause recommended.

1.7. It seems to us desirable that the extent clause in the Code should state the factual position, obviating, as the Supreme Court has put it, a need "to find out through the mazes of history and the congeries of rules, notifications and regulations" whether the Code is applicable or not in a particular area. We propose that it should be amended to read :—

> "It extends to the whole of India except the State of Jammu and Kashmir, the State of Nagaland and the tribal areas[1] within the State of Assam; etc.,"

Position in Jammu and Kashmir.

1.8. While there appears to be good justification for Nagaland and the tribal areas of Assam having their own simple rules for the administration of criminal justice and for not introducing the complicated provisions of the Code which are apparently not suitable for the social conditions prevailing therein, it seems to us highly anomalous that Jammu and Kashmir should be excluded from the operation of the Code. This is due to the fact that under the Constitution (Application to Jammu and Kashmir) Order, the power of Parliament to legislate for this State in respect of matters mentioned in the Concurrent List is limited to a few entries and the entry relating to criminal procedure (entry 2 in List III) is not one of them. As regards criminal law also, the power of Parliament to legislate for Jammu & Kashmir is very limited. Neither the India nPenal Code nor the Code of Criminal Procedure, 1898, is in force in the State. It has two separate Codes, the Ranbir Penal Code and the Jammu and Kashmir Criminal Procedure Code, which are practically the same in wording and arrangement of sections as the Codes in force in the rest of India.

Anomaly under section 188.

1.9. It will be noticed that by virtue of the definition of "India" in section 4(1)(j) of the Code, any place in the State of Jammu and Kashmir is outside "India" for the purposes of the Code. This gives rise to an anomalous situation under section 188 of the Code. If a citizen of India, whether he is a resident of that State or of some other State in India, commits in Jammu an offence punishable under the Indian Penal Code, he may be dealt with at any place in any other State of India where he may be found, but before the charge is inquired into at the latter place, the sanction of the State Government will be required (there being no "Political Agent" for the State of Jammu and Kashmir).[2] It is anomalous that all offences punishable under the Indian Penal Code, when committed in the State of Jammu and Kashmir, should be triable in any place in the rest of India where the offenders may be found, without any reference to the venue rules for inquiry and trial contained in sections 177 to 183 of the Criminal Procedure Code. This curious situation is due to the fact that these two Codes do not extend to the State, and even Parliament's power to legislate for the State does not extend to criminal law and criminal

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[1] See para. 20(1) of the Sixth Schedule to the Constitution.

[2] *State* v. *Om Parkash*, (1966) Cr.L.J. 366 (Punjab). In this case the accused was alleged to have committed bigamy in Jammu and returned to his ordinary place of residence in Punjab.

procedure. We recommend that the anomaly should be removed, by first suitably amending the Constitution (Application to Jammu and Kashmir) Order, 1950, under article 370, and then by extending the two Codes to the State.

Code extends also to territorial waters.

1.10. Another point that requires consideration with reference to the extent clause in the Code is the exercise of criminal jurisdiction in and in relation to the territorial waters of India. The Code extends to the whole of the territory of India except the territory of the State of Jammu and Kashmir. Notwithstanding the use of the word "territory" which etymologically has a land significance, there is of course no doubt that the territory of India, as of any sovereign State, includes its territorial waters. This internationally accepted principle has recently been formulated in the Convention on the Territorial Sea and the Contiguous Zone, 1958, in the following terms[1] :—

> "The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.
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> The sovereignty of a coastal State extends also to the air space over the territorial sea as well as to its bed and subsoil."

A Presidential Proclamation announced on the 30th September, 1967, that the territorial waters of India extend into the sea to a distance of 12 nautical miles measuring from the appropriate base line. The Code accordingly extends to the land territory of India (excluding Jammu and Kashmir) and to the belt of sea, 12 nautical miles wide, adjacent to the coast.

References to territorial water in Central Acts.

1.11. The earliest reference in Indian legislation to territorial waters is to be found in section 4 of the Indian Fisheries Act, 1897. This Act originally extended to the whole of British India; now it extends to the whole of India excluding the territories which were formerly comprised in Part B States. Sub-section (1) of section 4 makes it an offence for any person to use dynamite or other explosive substance in any "water" with intent thereby to catch or destroy any fish that may be therein; and sub-section (2) explains—

> "In sub-section (1), the word 'water' includes the sea within a distance of one marine league of the sea coast; and an offence committed under that sub-section in such sea may be tried, punished and in all respects dealt with as if it had been committed on the land abutting on such coast."

According to British concepts of those days, the territorial waters of a State were only one marine league, or three nautical miles, wide; but presumably because of difficulties arising out of the Territorial Waters Jurisdiction Act (41 and 42 Vict.c. 73), it was considered necessary to make the position clear by means of this explanation.

In recent legislation, section 2(2) of the Merchant Shipping Act, 1958, provides for the applicability of the Act to any foreign ship while it is "within India, including the territorial waters

[1] See Articles 1 and 2 of the Convention.

thereof". The Customs Act of 1962 contains in section 2(27) a definition of India as including the territorial waters of India. Section 23 of, and item 14 in the Second Schedule to, the Extradition Act, 1962, refer to any offence "committed on board any vessel on the high seas, or any aircraft while in the air outside India or the Indian territorial waters, which comes into any port or aerodrome of India."

Territory of coastal State, district or sub-division includes its territorial waters.

1.12. Since the territory of India comprises the territories of the States and the Union Territories—*vide* article 1(3) of the Constitution—the territory of each of the States and Union Territories abutting on or surrounded by the sea must include the territorial waters adjacent to its coast. By the same reasoning, where the local jurisdiction of a court covers a sessions division, district or sub-division which has a sea-coast, it must be regarded as covering not only the land and internal waters of the sessions division, district or sub-division, but also the stretch of territorial sea adjacent to its coast. We think it is desirable to make this clear in an appropriate place in order to avoid any doubt or dispute over jurisdiction.[1]

Difficulty regarding presidency-towns–section 20.

1.13. We notice in this connection that section 20 of the Code defines the local limits of a Presidency Magistrate's jurisdiction in the following terms :—

> "Every Presidency Magistrate shall exercise jurisdiction in all places within the presidency-town for which he is appointed, and within the limits of the port of such town and of any navigable river or channel leading thereto, as such limits are defined under the law for the time being in force for the regulation of ports and port-dues."

In the case of the presidency-towns of Bombay and Madras, both of which have a sea coast, it would appear that the local jurisdiction of a Presidency Magistrate extends only to that part of the territorial sea adjacent to the presidency-town which is within the limits of the port. The rest of the territorial sea, of which there must be a considerable extent both in Bombay and in Madras, would be outside the jurisdiction of the Presidency Magistrates and of any other Magistrates. (This difficulty does not arise in the case of Calcutta, as it is not on the sea coast). Since the establishment of the City Sessions Courts in Bombay and Madras, the local jurisdiction of a Presidency Magistrate in either of these presidency-towns is co-extensive with that of the City Sessions Court. There is no reason why, as in the case of any other coastal district, this should not extend to the whole of the territorial sea pertaining to the "district"[2] of Greater Bombay or Madras.

Saving provisions in section 1(2).

1.14. The existing extent clause also contains two kinds of saving provisions. The first saves the operation of any special or local law and any special jurisdiction or power conferred and any special form of procedure prescribed, by any other law. The second excepts three categories of officials from the application

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[1] See para. 1.27 below.

[2] *See* section 7(4) of the Code, which provides that "every presidency-town shall for the purposes of the Code be deemed to be a district".

of the Code, with a rider to the effect that the State Government may by notification extend any provisions of the Code to any of these categories.

First group of excepted persons.

1.15. The first group of excepted persons consisted of the Commissioners and Deputy Commissioners of Police[1] in the three towns of Calcutta, Madras and Bombay and the whole police force in the towns of Calcutta and Bombay. The Bombay Police Act, 1951, however, amended this provision by deleting the references to Bombay with the result that, since then, the Code applies to the police in that town, including the Commissioner of Police in the same way as it does to the police in the other parts of the State. As regards the police in Calcutta, a number of notifications have been issued from time to time by the State Government under the proviso to section 1(2), applying a number of important sections of the Code, some with modifications and some without, to the Commissioner of Police and to the police force of the State. Among the sections so extended are sections 47 to 51, 53, 58, 102, 103, 151, 154, 156, 161 to 165, 167, 172, 173, 550 and 551. In Madras while the Code applies to the city police who are governed by the Madras City Police Act, 1888, it does not apply to the Commissioner and Deputy Commissioners of Police who are also governed by the same Act. No notification seems to have been issued under the proviso to section 1(2) of the Code extending any of its provisions to these police officers.

Omission of clause (a) recommended.

1.16. There does not seem to be any real or sufficient reason for this exception. It would be more logical and appropriate to leave the Code generally applicable to all police forces. If any special provisions inconsistent with the provisions of the Code are required for the police in the town of Calcutta or for the Commissioner and Deputy Commissioners of Police in Madras, they could be made in the relevant State Act. We would recommend the omission of clause (a) of section 1(2).

Second group of excepted persons.

1.17. The second category of excepted persons was "heads of villages in the Presidency of Fort St. George". This territorial reference was changed by the Code of Criminal Procedure (Amendment) Act, 1951, to the State of Madras, ignoring the fact that certain parts of the former Presidency had been transferred to the Province of Orissa when the latter was formed in 1936. The reference was further changed by the Adaptation of Laws (Number 2) Order, 1956, to "the State of Madras as it existed immediately before the 1st November, 1956", the date of the large-scale reorganisation of States. The effect of this amendment was to take out of the purview of the saving provision, heads of villages in the territories transferred from the State of Andhra and Mysore in 1953. But heads of villages in the territories transferred from the State of Madras to Andhra Pradesh, Mysore and Kerala in 1956 and subsequently are apparently still excepted from the application of the Code.

Omission of clause (b) recommended.

1.18. The reason for this exception appears to be that heads of villages in the areas where the Madras Village-Police Regulations of 1816 and 1821 (11 of 1816 and 4 of 1821) are in

[1] *See* definition of Commissioner of Police in section 4(1)(g).

force have the power to try cases of a trivial nature and impose a mild punishment and also have certain police-powers under those Regulations. These being special and local laws, their provisions are already saved by section 1(2) of the Code and it appears unnecessary to except headmen of villages again from the general application of the Code. Clause (b) of the section could also be omitted without affecting the existing position.

Third group of excepted persons.

1.19. The third category of excepted persons was "village police-officers in the Presidency of Bombay", and is at present "village police-officers in the State of Bombay as it existed immediately before the 1st November, 1956". This description covers all those parts of the States of Maharashtra, Gujarat and Mysore which went to make up the former State of Bombay. These village police officers are all governed by the Bombay Village Police Act, 1867, which is clearly a special law and a local law. There seems to be no real need for providing in clause (c) that nothing in the Code shall apply to these village police officers.

Section 1 (2) revised.

1.20. We accordingly propose that section 1(2) should be amended to read :—

> "(2) It extends to the whole of India except the State of Jammu and Kashmir, *the State of Nagaland and the tribal areas in the State of Assam;* but, in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force....."

Section 3 practically spent.

1.21. Sub-section (1) of section 3 provides for the construction of references to the old Codes and other enactments repealed by the Code of 1898. The general rule in section 8 of the General Clauses Act, 1897, regarding the construction of references to repealed enactments, would have taken care of the matter, but for the fact that enactments passed before the passing of that Act are not governed by that Act. Such references cannot at present be many and sub-section (1) may be omitted as being hardly of any practical importance. Sub-section (2) contains rules for the construction of certain expressions which are used in old enactments, being expressions which refer to Magistrates or Judges under the phraseology used in the pre-1898 Codes. These rules of construction also may be regarded as practically spent, and sub-section (2) can be safely omitted.

Proposed rule of construction in earlier Report.

1.22. In the earlier Report,[1] it was proposed to insert in section 3 a provision for the construction of expressions used in the existing enactments where those expressions refer to Magistrates by their present nomenclature. This provision was as follows :

"In every enactment passed on or after the first day of July, 1898 and before the Code of Criminal Procedure (Amendment) Act, 197..comes into force,—

(a) references to a Magistrate of the first, second or third class shall be construed as references to a

[1] 37th Report, paragraph 74.

Judicial Magistrate of the first, second or third class respectively;

(b) references to any other Magistrates, not being references to a Presidency Magistrate, shall be construed as references to the corresponding Judicial or Executive Magistrate as the nature of the case may require."

On further consideration we feel that the latter rule of construction is too vague and unprecise to be of any practical assistance.

Proposed rule in Union Territories Bill.

1.23. We notice that the Union Territories (Separation of Judicial and Executive Functions) Bill, 1968, as introduced in Parliament contains the following clause :—

Functions exercisable by Judicial and Executive Magistrates.

"5. Where under any law, the functions exercisable by a Magistrate relate to matters which involve the appreciation or sifting of evidence or the formulation of any decision which exposes any person to any punishment, or penalty, detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any court, such functions shall, subject to the provisions of this Act and the Code of Criminal Procedure, 1898, as amended by this Act, be exercisable by a Judicial Magistrate; and where such functions relate to matters which are administrative or executive in nature, such as the grant of a licence, the suspension or cancellation of a licence, sanctioning a prosecution, or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate."

As a broad classification of the functions of judicial and executive magistrates and as a guide to the authorities in Union Territories when faced with the task of interpreting other laws in force in these Territories, this provision may have some use. But on the other hand they may not find it easy to interpret and apply this clause to border-line cases where the nature of the functions is either not very clear or partly executive and partly judicial. If any such provision is included in the Code itself and made applicable, not only to laws in the central and concurrent field, but also to laws in the State field, the constitutional question can be raised whether Parliament is competent to legislate in this indirect fashion affecting State laws. In our opinion, such a provision is more likely to raise technical difficulties and problems of interpretation than help to solve them.

1.24. We are proposing in the next chapter that every district should have on the judicial side a Chief Judicial Magistrate, one or more Judicial Magistrates of the first class and one or more Judicial Magistrates of the second class, but need not have any Sub-divisional Magistrates or Magistrates of the third class as at present. On the executive side it should have a District Magistrate, Sub-divisional Magistrates and other executive Magistrates without class distinction. Presidency Magistrates will be replaced by Metropolitan Magistrates. When the amended Code comes into force in any State and the magistracy is re-organised on this

pattern, we do not apprehend that any grave difficulty will immediately arise in administering other Acts—State or Central—which contain references to magistrates. The definition of "Magistrate"[1] in the various General Clauses Acts as including every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force will continue to apply unless there is something repugnant, in the subject or context. Thus a reference to a magistrate without any qualification may be taken to be a reference to any judicial or executive magistrate and, until it is clarified by a specific amendment made by the competent legislature, there can be legal no objection to either type of Magistrate performing the function. Reference to District Magistrates and Sub-divisional Magistrates are normally to be found in connection with the discharge of executive functions and since these functionaries will be found in each district, no difficulty can arise.

1.25. We therefore consider that the following rule of construction will be sufficient from the practical point of view :—

Construction of references to Magistrates in other enactments.

3. In every enactment passed before the Code of Criminal Procedure (Amendment) Act, 197.., comes into force,—

(a) any reference to a Magistrate of the first class shall be construed as meaning a Judicial Magistrate of the first class;

(b) any reference to a Magistrate of the second class or of the third class shall be construed as meaning a Judicial Magistrate of the second class;

(c) any reference to a Presidency Magistrate or Chief Presidency Magistrate shall be construed as meaning a Metropolitan Magistrate or Chief Metropolitan Magistrate respectively.

Section 4(l)—Existing definitions considered and amended.

1.26. (i) The expression "Advocate General" occurs only in sections 194 and 333 both of which are proposed to be omitted. Clause (a) may accordingly be omitted.

(ii) The expression "Clerk of the State" occurs in one or two sections relating to original trials before the High Court which are proposed to be omitted. Clause (e) also may be omitted.

(iii) In clause (f) which defines "cognizable offence", the words "within or without the presidency-towns" may be omitted as the Code will extend also to the police in presidency-towns.

(iv) Clause (g) which defines "Commissioner of Police" may be omitted in view of the proposal to remove all special provisions in the Code applicable to Commissioners of Police in the presidency-towns.

(v) The definition of "complaint" in clause (h) was discussed in detail in the previous Report.[2] In view of the conflicting decisions and uncertainty in regard to this definition and the connected provisions in sections 173, 190, 207A and 251A of the Code, the

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[1] *See* e.g., s. 3(32) of the General Clauses Act, 1897.

[2] 37th Report, para. 75 and Appendix III.

Commission recommended that the definition should make it clear that the report made by the police on an unauthorised investigation of a non-cognizable case is a complaint. We agree with this recommendation and propose to substitute for the words "the report of a police officer" in clause (h) the words "a police report". A definition of police report will have to be added in this section.[1]

(vi) The definition of "High Court" in clause (i) is completely out of date. For every State, there is a High Court under the Constitution which is the highest court of criminal appeal other than the Supreme Court. As regards the Union Territories, the position is that the jurisdiction of a State High Court has been extended by Parliament by law to some of them,[2] and in others, a High Court[3] or a Judicial Commissioner's Court[4] established by law is the highest court of criminal appeal. The definition may accordingly be as follows :—

(i) "High Court" means—

(i) in relation to any State, the High Court for that State under the Constitution;

(ii) in relation to a Union Territory to which the jurisdiction of the High Court for a State has been extended by law, that High Court; and

(iii) in relation to any other Union Territory, the highest court of criminal appeal for that Territory, other than the Supreme Court.

(vii) In clause (k) which defines "inquiry", the previous Commission recommended a minor amendment to remove an ambiguity, namely, to place the words "other than a trial" within brackets.

(viii) In clause (n) which defines "non-cognizable offence" and "non-cognizable case", the specific reference to presidency-towns is unnecessary. The words "within or without a presidency-town" which now occur in the definition may be omitted.

(ix) In regard to the definition of "officer in charge of a police-station" contained in clause (p), the Commission considered in the earlier Report[5] a suggestion that the definition should be amended to provide that a sub-inspector in charge, even when out on duty in the interior, should continue to be regarded as the officer in charge of the police station for the purposes of the Code. The Commission, however, felt that such a change in the definition would not be suitable, since the scheme of the Code is that at any given time there is only one officer in charge of a police

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1 *See* para. 1.27 below.

2 Jurisdiction of the Calcutta High Court has been extended to the Andaman and Nicobar Islands; of the Kerala High Court to the Laccadive, Minicoy and Amindivi Islands; of the Gujarat High Court to Dadra and Nagar Haveli; of the Madras High Court to Pondicherry, and of the High Court for Punjab and Haryana to Chandigarh.

3 High Court for Delhi and Himachal Pradesh.

4 There is a Judicial Commissioner's Court for Goa, Daman and Diu, for Manipur and for Tripura.

5 37th Report, para. 83.

station. We agree with this view and consider that the definition does not require any amendment.

(x) Clause (q) defines a "place" as including a house, building, tent and vessel. In the earlier Report[1] reference was made to a decision of the Supreme Court[2] that a motor vehicle is not a "place" within the meaning of sections 102 and 103 of the Code, so that the formalities laid down by those sections need not be observed when a motor vehicle is to be searched. The Commission was of the opinion, that the judgment of the Supreme Court had revealed a lacuna in the definition of "place", because, as a motor vehicle is not a place, the powers of search under various other sections of the Code which authorise searches of a "place", would not authorise searches of motor vehicles. The Commission considered it desirable expressly to include vehicles in the definition which would then read :—

> "(q) "place includes also a house, building, tent, *vehicle* and vessel;"

We agree with this recommendation.

(xi) With reference to clause (r) which defines the expression "pleader", the Commission observed[4] that it was unnecessary to enumerate the various classes of practitioners and suggested that the definition should be simplified as follows :—

> "(r) 'pleader' used with reference to any proceeding in any Court, means a *person* authorised under any law for the time being in force to practise in such Court . . ., and includes any other person appointed with the permission of the Court to act in such proceeding."

(xii) Clause (w) defines a "warrant case" as a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding one year. Cases relating to other offences are summons cases. In the Report[5] on the Reform of Judicial Administration, the Commission recommended the substitution of "three years" for "one year" in this definition, in order that, as a general rule, all offences which do not carry a punishment of imprisonment for more than three years might be triable under the summons case procedure. The main reasons for this recommendation were that it would lead to the expeditious disposal of a large number of cases particularly those relating to statutory offences which are for the most part of a technical nature; that even under the Indian Penal Code, there are several offences of the same kind, but differing in degree, which at present have different modes of trial; that the distinction between summons-cases and warrant-cases is arbitrary, *e.g.* offences under sections 168 and 169, or offences under section 342 on the one hand and sections 343 and 344 on the other; and that the expansion of the category of summons cases as recommended would not be prejudicial to the accused.

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[1] 37th Report, para 84.

[2] *Bhagwanbhat* v. *State*, (1963) 3 S.C.R. 386, 392 (Search under the Bombay Prohibition Act, 1949).

[3] For example, sections 98(1) and 165(1).

[4] 37th Report, para. 86.

[5] 14th Report, Vol. 2, pages 723-724.

The Commission, however, reached a different conclusion in the 37th Report for the following reasons :—

> "In the first place, expansion of the category of summons-cases, as recommended in the earlier Report, would bring in numerous offences, of which some are really serious,—for example, offences under sections 136, 153A, 295A, 419, 465 etc., Indian Penal Code; and we are not convinced that there will be no prejudice to the accused in such cases. Secondly, the objection that the division is at present arbitrary would survive even if the limit is raised to three years, because the dividing line will still be dependent on an arbitrary period (period of maximum imprisonment). Thirdly, some of the offence—such as those under sections 153A, 295A and 465, Indian Penal Code—involve nice questions of intention or interpretation of facts, and the warrant-case procedure, whereunder a precise charge is to be formulated, is, in our view, preferable for such offences. We are not, therefore, carrying out the recommendation made in the earlier Report."

We also agree that no change is necessary in clause (w).

Additional definitions.

1.27. (i) With a view to shortening the language of some sections, we propose to add in section 4(1) a definition of "local jurisdiction" as follows :—

> "(mm) 'local jurisdiction' in relation to a Court or Magistrate, means the local area within which the Court or Magistrate may exercise all or any of its or his powers under this Code, and, where such local area adjoins the sea, includes the territorial waters extending into the sea to a distance of twelve nautical miles measured from the coast."

Normally, the Code refers to "a Court within the local limits of whose jurisdiction the offence was committed" (*vide* sections 177 to 183) : it would be simpler to refer to "a Court within whose local jurisdiction the offence was committed".

(ii) As indicated in the previous paragraph, sub-para. (v), a clause will be necessary defining "police report" as follows :—

> "(rr) 'police report' means a report by a police officer to a Magistrate under sub-section (1) of section 173."

Rule of construction for references to Magistrates.

1.28. In the next chapter we are proposing the replacement of presidency-towns by metropolitan areas and the appointment of metropolitan magistrates in those areas. The powers of the Chief Metropolitan Magistrate and of the Metropolitan Magistrate will however, with a few exceptions, be the same as those of the Chief Judicial Magistrate and of Judicial Magistrates of the first class respectively. In order to avoid repetitive references to the two categories of magistrates, we may have a rule of construction in section 4 as follows :—

> "(1A) Except in Chapter II and unless the context otherwise requires—
>
> (a) any reference without qualifying words to a Magistrate includes an Executive Magistrate as well

as a Judicial Magistrate and a Metropolitan Magistrate;

(b) any reference to a Magistrate of the second class means a Judicial Magistrate of the second class;

(c) any reference to a Magistrate of the first class means a Judicial Magistrate of the first class, and includes in relation to a metropolitan area a Metropolitan Magistrate;

(d) any reference to the Chief Judicial Magistrate includes, in relation to a metropolitan area, the Chief Metropolitan Magistrate for that area.

Section 4(2).

1.29. As noted by the Commission in the previous Report, the first part of section 4(2) stating that "words which refer to acts done extend also to illegal omissions" is superfluous in view of section 3(2) of the General Clauses Act, 1897, and may be omitted. The second part, however, may remain, for the time being.

Section 5.

1.30. Section 5 does not require any modification.

CHAPTER II

CONSTITUTION OF CRIMINAL COURTS AND OFFICES

Separation of executive from judiciary by parliamentary legislation.

2.1. The problem of separating the executive from the judiciary has been fully discussed[1] in the previous Report. The Commission recommended[2] that this separation should be effected by central legislation and we entirely agree with this recommendation. It is very desirable that the uniform Code of Criminal Procedure which has been evolved in the course of a century, should not be allowed to take different forms in different States. The set-up of criminal courts, the distinction between judicial and executive magistrates and their respective functions under the Code should, in our view, be the same in all the States and should be clearly laid down in the Code itself instead of being regulated as at present by executive orders in some States and special State legislation in others.

Present position n States.

2.2. Madras was the first State to work out a comprehensive scheme of separation of the judiciary from the executive and to initiate the reform even before the passing of the Constitution.[3] Pursuant to the directive principle of state policy laid down in article 50 of the Constitution, the States have been taking steps to form separate cadres of judicial magistrates, place them under the control of the High Court and make them independent of the executive. In as many as seven States, *viz.*, Maharashtra, Gujarat, Jammu and Kashmir, Mysore, Punjab, Haryana and West Bengal, the separation of the judicial magistrates from the executive magistrates has been brought about by amending the Code. In West Bengal, however, the recently passed Separation of Judicial and Executive Functions Act, 1968, has so far been brought into force only in the presidency-town of Calcutta and in Hooghly District. In the other States (except Nagaland where the Code itself is not operative), separation of functions has been effected to a varying extent by executive orders on the lines originally adopted in Madras. It appears to be complete in Andhra Pradesh, Assam (excluding the autonomous districts and the North East Frontier Tracts, where again the Code is not operative), Bihar, Kerala, Madras, Orissa and Rajasthan. The scheme is in operation in the greater part of Uttar Pradesh and Madhya Pradesh and it is only a question of time and of finding the requisite number of qualified judicial officers before it is brought into operation throughout these two States.

Present Position in Union territories.

2.3. As regards the Union territories, Chandigarh and a good part of Himachal Pradesh are covered by the Punjab Act. Executive orders, similar to those passed in Madras, are in force in Pondicherry. A bill to provide for the separation of executive and judicial functions in the Union territories other than Chandigarh has been recently passed by Parliament, and

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[1] 37th Report paras. 32 to 62.

[2] 37th Report para. 49.

[3] *See* 14th Report, Vol. II, page 851.

the Act is expected to be brought into force and implemented in all the territories fairly soon.

No practical difficulty in central amendment of Code.

2.4. We do not apprehend any serious practical difficulty in giving effect to the scheme of separation on a uniform basis by a central amendment of the Code. In areas where separation of the executive has not been effected, steps should be taken to do so by means of executive orders as in Madras, in anticipation of such central amendment.

Classification of Magistrate in previous Report too elaborate.

2.5. The previous Report recommended[1] that this amendment should provide for a broad classification of Courts of Magistrates into Courts of Judicial Magistrates and Courts of Executive Magistrates, for a further classification of Judicial Magistrates as Presidency Magistrates, Chief Judicial Magistrates, Judicial Magistrates of the first class, Judicial Magistrates of the second class, Judicial Magistrates of the third class and Special Judicial Magistrates, and for a parallel classification of Executive Magistrates as District Magistrates, Sub-divisional Magistrates, Executive Magistrates of the first class, Executive Magistrates of the second class, Presidency Magistrates especially empowered by the State Government and Special Executive Magistrates. We consider that any such elaborate classification is unnecessary and that a simpler scheme for the set-up of Courts in all the States is both desirable and feasible.

Executive Magistrates.

2.6. As regards the Executive Magistrates, we do not see any point in maintaining the distinction of first and second class. The functions to be performed by Executive Magistrates under the Code are very few and they hardly admit of being divided into more important functions that will have to be performed by Executive Magistrates of the first class and less important ones that could be left to junior magistrates put in the second class. In fact, the day-to-day, routine work of an executive magistrate under the Code arising in any sub-division may not require more than one officer to handle. We notice that in Bombay, according to the amendment of the Code made in 1951, executive magistrates are not divided into those of the first class and of the second class nor is there a division of functions between senior and junior magistrates. Provision is made for a category designated Taluka Magistrates who are presumably subordinate revenue officers in charge of talukas. We propose that there need be only one class of executive magistrates under the Code, that the chief officer in charge of the administration of the district (whether known as District Collector, District Officer or Deputy Commissioner) should continue, as at present, to be the District Magistrate, and that the institution of Sub-divisional Magistrates on the executive side should also be retained. If there is need for an executive magistrate at the taluka or tahsil level in any State, an executive or revenue officer of the Government can be appointed simply as Executive Magistrate to exercise functions under the Code.

Judicial Magistrates — abolition of third class recommened

2.7. As regards the classes of Judicial Magistrates, the view was expressed in the previous Report[2] that the institution of third class magistrates might be necessary for purposes of training and its retention was recommended. We, however, find

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[1] 37th Report paras. 94 to 103, new Section 6A.

[2] *Ibid*, para. 93.

that in many States there are no magistrates of the third class at all. In the States where separation of the executive from the judiciary has been effected, civil judicial functions and magisterial functions are ordinarily combined in the same officer and, even for purposes of initial training it is hardly necessary that a civil judge or munsif should start with the very limited jurisdiction and powers now available to a magistrate of the third class under the Code. We are of the opinion that this class could be safely abolished.

Chief Judicial Magistrate for every district.

2.8. In the previous Report[1] it is recommended that in every district there should be a Chief Judicial Magistrate, mainly to take the place of the District Magistrate on the judicial side and to exercise proper supervision and control over the work of all other judicial magistrates in the district. This has been provided for in the Punjab Act and we have no doubt that this is a better system than the Bombay system under which all judicial magistrates are directly subordinate to the Sessions Judge. Because of the diverse and important nature of the work which the District and Sessions Judge has to do, he has little time to spare for inspecting magistrates' courts and giving guidance to them in their work. We are of the opinion that this important task can be performed best by a Chief Judicial Magistrate who will naturally be in closer touch with the judicial magistrates in the district than the Sessions Judge.

No need for Sub-divisional Magistrates (Judicial)

2.9. There, however, appears to be no need for a special category of Sub-divisional Magistrates on the judicial side. We notice that in the eastern States, particularly Bihar and West Bengal, where the revenue districts are large and the Sub-divisional system of administration is of long standing, the Sub-divisional Magistrate coordinates and distributes the work among the other magistrates working in the sub-division and exercises a certain measure of superintendence over them. In these States wherever considered necessary, an Additional Chief Judicial Magistrate may be posted at sub-divisional Headquarters. Provision for the appointment of one or more Additional Chief Judicial Magistrates in a district has been recommended in the previous Report and we think that this category of senior and experienced magistrates could be utilised to serve the same purpose as Sub-divisional Magistrates do at present in these States.

Proposed set-up of Magistrates' Courts in districts.

2.10. We accordingly propose that in every district (outside the presidency-towns) it is sufficient to have three categories of magistrates, namely, Judicial Magistrates of the first class, Judicial Magistrates of the second class and Executive Magistrates. Every district will have a Chief Judicial Magistrate who will have all the powers of a Judicial Magistrate of the first class and certain additional powers which we shall discuss in the next chapter. Where found necessary, one or more Judicial Magistrates of the first class may be appointed as Additional Chief Judicial Magistrates. On the executive side there will continue to be the District Magistrate at the head, Additional District Magistrates to the extent found necessary in large districts and Sub-divisional Magistrates as at present.

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[1] 37th Report, para. 99.

Presidency magistrates.

2.11. In the previous Report[1] as well as in the earlier Fourteenth Report,[2] the Law Commission has recommended the continuance of the special class of judicial magistrates known as Presidency Magistrates functioning in the three presidency-towns. At the same time, the Commission stressed[3] that only persons of special merit should be appointed as Presidency Magistrates. The high standard for recruitment to this cadre which prevailed until not very long ago is apparently not being maintained, which is unfortunate. However, we agree that the administration of criminal justice in large cities requires a measure of special treatment. The magistrates there ought to be better qualified and more competent to deal expeditiously with sophisticated crimes, particularly in the socio-economic field, which are more common in the cities. Apparently from this point of view, Gujarat found it necessary to have special magistrates for the city of Ahmedabad and enacted the Ahmedabad City Courts Act, 1961, under which the City Magistrates were equated in all respects with the Presidency Magistrate of Bombay. Other large cities like Delhi, Bangalore and Hyderabad might hereafter feel the same need.

Name to be changed.

2.12. We therefore propose that the institution of Presidency Magistrates should be maintained in the Code. Presidencies having disappeared from the political map of India more than 30 years ago, it is archaic to refer to Calcutta, Bombay and Madras as "presidency-towns", and it will be a misnomer to call other large cities by that name. These areas may more appropriately be referred to as "metropolitan areas" and the special class of magistrates functioning therein as "Metropolitan Magistrates".

Power to declare metropolitan areas and set up Metropolitan Magistrates' Courts.

2.13. It should be provided in the Code that a State Government may by notification declare any area in the State comprising a city whose population exceeds one million to be a metropolitan area, and then set up as many Courts of Metropolitan Magistrates for that area as it thinks fit. The State Government should have the power to extend, reduce or alter the boundaries of the area from time to time as changed circumstances may require, but not in such manner as to reduce its population to less than one million. The three presidency-towns and the city of Ahmedabad would automatically become metropolitan areas under the proposed amendment. As regards the city of Calcutta, we have pointed out the anomaly that exists at present purely on account of historical reasons. The original limits of this "presidency-town" still form the limits of the local jurisdiction of the City Sessions Court and of the Presidency Magistrates' Courts despite the enormous growth of the city. It would be open to the State Government to extend the limits of the "metropolitan area" of Calcutta by a notification under the new provision and thereby to remove the anomaly, either completely, or to such extent as may appear to be desirable.

Executive Magistrates in Metropolitan areas.

2.13a. In the presidency-towns there are at present no officers corresponding to District Magistrates and Sub-divisional Magistrates, although under section 7(4) every presidency-town

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[1] 37th Report, paras. 69 and 101.

[2] 14th Report, Vol. II, page 801.

[3] 37th Report, para. 69.

is deemed to be a district for the purpose of the Code. In Bombay, some presidency magistrates are specially invested with the powers of an executive magistrate under the Code. There seems to be no good reason for making this distinction in regard to metropolitan areas. As every such area will be a separate district, it may have the same set-up on the executive side as any other district, and the functions of the Metropolitan Magistrates under the Code may be exactly the same as those of Judicial Magistrates in any other district.

Territorial divisions.

2.14. Sections 7 and 8 deal with the territorial divisions of a State (which term includes a Union territory) for the purposes of administering criminal justice. Although sub-section (1) of section 7 provides that "every State (excluding the presidency-towns) shall be a sessions division, or shall consist of sessions divisions", the exclusion has become meaningless after the establishment of City Sessions Courts under special State Acts. Each of the presidency-towns is now a sessions division for the purposes of the Code and the State Acts have made the requisite amendment in the sub-section. For instance, as amended by Bombay Act 23 of 1951, the sub-section reads, "The State of Bombay shall consist of sessions divisions; and every sessions division shall, for the purposes of this Code, be a district or consist of districts." Sub-section (4) of section 7 already provides that every presidency-town shall be deemed to be a district, with the result that at present every presidency-town is a district as well as a sessions division, and the rest of the State in which the presidency-town is situated has to be divided by the State Government into one or more sessions divisions and each sessions division into one or more districts.

Sub-divisions in metropolitan areas.

2.15. Under sub-section (1) of section 8, a presidency-town may not be divided into sub-divisions, but the State Government is authorised to divide other districts into sub-divisions. There appears to be no good reason for this special exclusion of presidency-towns in regard to a purely discretionary power. It is quite conceivable that in an area declared to be a "metropolitan area" in future, the State Government may find it convenient to create sub-divisions and to appoint Executive Magistrates separately for such sub-divisions.

Revised section 6, 7 and 8.

2.16. We propose, in the light of the foregoing discussion, the following revised provisions in place of the existing sections 6, 7 and 8 of the Code :—

Classes of criminal courts.

"6. Besides the High Courts and the Courts constituted under any special law, there shall be in every State the following classes of Criminal Courts, namely :—

(i) Courts of Session;

(ii) Judicial Magistrates of the first class;

(iii) Judicial Magistrates of the second class;

and

(iv) Executive Magistrates,

and in addition, in every State having a metropolitan area, Metropolitan Magistrates.

Territorial divisions.

"7. (1) Every State shall be a sessions division or shall consist of sessions divisions; and every sessions division shall, for the purposes of this Code, be a district or consist of districts :

Provided that every metropolitan area shall, for the said purposes, be a separate sessions division and district.

(2) The State Government, in consultation with the High Court, may alter the limits or the number of such divisions and districts.

(3) The State Government may divide any district into sub-divisions and may alter the limits or the number of such sub-divisions.

(4) The sessions divisions, districts and sub-divisions existing in a State when the Code of Criminal Procedure (Amendment) Act, 197..., comes into force therein shall be deemed to have been formed under this section.

Metropolitan areas.

8. (1) The State Government may, by notification in the Official Gazette, declare that, as from such date as may be specified in the notification, any area in the State comprising a city whose population exceeds one million shall be a metropolitan area for the purposes of this Code.

(2) As from the commencement of this Code, each of the presidency-towns of Bombay, Calcutta and Madras and the city of Ahmedabad shall be deemed to be an area notified under sub-section (1) to be a metropolitan area.

(3) The State Government may, by notification in the Official Gazette, extend, reduce or alter the limits of, a metropolitan area, but not in such manner as to reduce its population to less than one million."

Appointment of Sessions Judges.

2.17. Section 9 provides for the establishment of a Court of Session for every sessions division and for the appointment of judges to that Court. As the section stands at present, it is the duty of the State Government to establish the Court of Session and to appoint the Sessions Judge. The State Government is further empowered to appoint Additional and Assistant Sessions Judges to exercise jurisdiction in the Court, to appoint the Sessions Judge of one sessions division to be at the same time and Additional Sessions Judge of another sessions division and to direct at what place or places the Court shall ordinarily hold its sittings.

Constitutional position.

2.18. In the *State of Assam* v. *Ranga Muhammad*,[1] the Supreme Court decided that the transfer of "district judges" already in the cadre from one district to another in the State must be regarded as part of the "control over district courts" referred to in article 235 of the Constitution and as such, the power to direct such transfers is vested exclusively in the High Court. Such transfers and the "postings" involved therein are outside the scope of the power conferred on the Governor of

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[1] (1967) 1 S.C.R. 454: A.I.R. 1967 S.C. 903.

the State by article 233. The word "posting" may mean either the stationing of an employee at a particular place or the assignment of an appointee to a particular position or job. According to the Supreme Court, the word "posting", occurring as it does in association with the words "appointment" and "promotion", clearly bears the second meaning. "These words indicate the stage when a person first gets a position or job and 'posting' by association means the assignment of an appointee or promotee to a position in the cadre of district judge."[1]

Commission's previous recommendation.

2.19. In view of this decision, the Law Commission took up for urgent consideration the question whether section 9 required to be modified in order to bring it into line with the Constitution and made its recommendation in the 32nd Report. Briefly put, the Commission took the view that all the functions in relation to a Court of Session, except its initial establishment, and in relation to the Judges of the Court mentioned in section 9, are functions of "control over the district courts" and consequently the relevant powers must be vested in the High Court. It recommended that sub-section (1) of section 9 should be split into two parts, the first stating that "the State Government shall establish a Court of Session for every sessions division", and the second stating that "the High Court shall appoint a Judge of such Court". In the other sub-sections of section 9, "High Court" should be substituted for "State Government".

Connotation of "appoint" in section 9.

2.20. We have considered the awkwardness involved in making the High Court the competent authority for "appointing" the Sessions Judges, Additional Sessions Judges and Assistant Sessions Judges under sub-sections (1) and (3) of section 9. The two sub-sections when so worded, will strike one as being inconsistent with article 233, but the inconsistency is more apparent than real. We have to understand the "appointments" referred to in section 9 of the Code, *not* as the first appointment to the cadre of Sessions Judges, Additional Sessions Judges or Assistant Sessions Judges, *but* as the process of assigning or posting officers already in the cadre to a specified Sessions Court. It is not easy to find a more appropriate expression than "appoint" for the purposes of section 9, and since the section will have to be read and construed in the light of article 233, no practical or legal difficulty can arise by using the word "appoint".

2.20a. It has been brought to our notice that occasionally, owing to the sudden transfer or demise of the Sessions Judge and delay in the choosing and posting of his successor, the sessions division remains without a Judge for a considerable period causing great hardship and inconvenience to the public. Section 17(4) which enable the Sessions Judge to make provision for the disposal of urgent applications "when he himself is unavoidably absent or incapable of acting" cannot obviously be pressed into service in this contingency as the previous incumbent has ceased to be the Sessions Judge and there is no one in the sessions division to make the necessary formal order. It appears desirable that an express provision should be included

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[1] *State of Assam* v. *Ranga Muhammad,* (1967) 1 S.C.R. 454; A.I.R. 1967 S.C. 903.

in section 9 enabling the High Court to take action in such a contingency.

2.21. We accordingly propose that section 9 be revised to read as follows :—

Court of session.

"9. (1) For every sessions division, there shall be a Court of Session, the Judge of which shall be appointed by the High Court.

(2) The Court of Session shall ordinarily hold its sitting at such place or places as the High Court may by notified order specify; but if, in any particular case, the Court of Session is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sitting at any other place in the session division, it may, with the consent of the prosecution and the accused, sit at that place for the disposal of the case or the examination of any witness or witnesses therein.

(3) The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session.

(3) The Sessions Judge of one sessions division may be appointed by the High Court to be also an Additional Sessions Judge of another division, and in such case he may sit for the disposal of cases at such place or places in either division as the High Court may direct.

[1](5) Where the office of the Sessions Judge is vacant, the High Court may make provision for the disposal of any urgent application by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by a Chief Judicial Magistrate, in the sessions division; and such Judge or Magistrate shall have jurisdiction to deal with any such application."

Section 10 to 13—Provisions for appointment of Judicial Magistrates separated.

2.22. Sections 10 to 13 provide for the appointment in each district of the District Magistrate, Additional District Magistrates, Sub-divisional Magistrates and other Subordinate Magistrates and for defining the local limits of their jurisdiction. In order to implement the scheme of separation of executive magistrates from the Judicial Magistrates, the provisions for the appointment of these two distinct categories of magistrates will have to be separate. Those relating to judicial magistrates may be as follows :—

Courts of Judicial Magistrates.

"10. (1) In every district (not being a metropolitan area), there shall be established as many Courts of Judicial Magistrates of the first class and of the second class, and at such places, as the State Government may, in consultation with the High Courts, notify in the Official Gazette.

(2) The presiding officers of such Courts shall be appointed by the High Court.

Chief Judicial Magistrate and Additional Chief Judicial Magistrate.

11. (1) In every district (not being a metropolitan area), the High Court shall appoint a Judicial Magistrate of the first class to be the Chief Judicial Magistrate.

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[1] Existing sub-section (5) of section 9 has been omitted as being spent and no longer necessary

(2) The High Court may appoint any Judicial Magistrate of the first class to be an Additional Chief Judicial Magistrate and such Magistrate shall have all or any of the powers of a Chief Judicial Magistrate under this Code or under any other law for the time being in force as the High Court may direct."

In these two sections also, the word "appoint" will bear the same connotation as in section 9 namely, the assignment of judicial officers in the cadre of magistrates to particular districts and investing them with the powers of a Judicial Magistrate of the first or second class or with the powers of a Chief Judicial Magistrate, as the case may be.

Application of articles 233 to 235 to Judicial Magistrates recommended.

2.23. The separation of the executive from the judiciary will be effective only when the judicial magistrates are brought under the control of the High Court and this can be readily achieved by action under article 237 of the Constitution. The provisions of articles 233, 234 and 235 should be made applicable by a public notification of the Governor to all judicial magistrates in the State. We note that this action has already been taken in some States.

Number and location of courts to be determined by State Government in consultation with High Court.

2.24. It will be observed that in the revised section 10 above, the power to determine the number of courts of Judicial Magistrates of either class and their location is left to the State Government since it will have to take into account various administrative and financial considerations. The State Government, however, is required to exercise this power in consultation with the High Court in order that an adequate number of magistrates' courts is established in all districts and at suitable places.

Section 14-Special Executive Magistrates not required.

2.25. With regard to Special Magistrates dealt with in section 14 of the Code, the previous Report of the Commission recommended[1] that there might be two categories, Special Judicial Magistrates and Special Executive Magistrates. On reconsideration, we do not think that there is likely to be any need for the latter, since the functions devolving on the Executive Magistrates under the revised Code are going to be very limited and, in any event, the State Government will have the power to appoint as many Executive Magistrates as it finds necessary for performing those functions. As recommended[1] in the previous Report, the High Court should be the only authority to appoint Special Judicial Magistrates in any district or Special Metropolitan Magistrates in any metropolitan area, and with this transfer of power to the High Court, sub-sections (3) and (4) of the existing section 14 are not necessary. The section may accordingly be revised as follows and placed after the revised section 11 above :—

Special Judicial Magistrates.

"12. (1) The High Court may confer upon any person who holds or has held any judicial post under the Union or a State or possesses such other qualifications as may be prescribed by the High Court in this behalf all or any of the powers conferred or conferrable by or under this Code on a

[1] 37th Report, para 119.

Judicial Magistrate of the first class or of the second class, in respect to particular cases or to particular classes of cases or to cases generally, in any district not being a metropolitan area.

(2) Such Magistrates shall be called Special Judicial Magistrates and shall be appointed for such term as the High Court may by general or special order direct."

Section 12—Local jurisdiction of Judicial Magistrates.

2.26. Under section 12 the local limits of the jurisdiction of subordinate magistrates are defined by the State Government, or, subject to its control, by the District Magistrate. So far as Judicial Magistrates, including Special Judicial Magistrates, are concerned, this power may be given to the Chief Judicial Magistrates subject to the control of the High Court. The revised section may be as follows :—

Local jurisdiction of Magistrates.

"13. (1) Subject to the control of the High Court, the Chief Judicial Magistrate may from time to time define the local areas within which the Magistrates appointed under section 10 or under section 12 may exercise all or any of the powers with which they may be invested under this Code.

(2) Except as otherwise provided by such definition, the jurisdiction and powers of such Magistrates shall extend throughout the district."

Section 15—Benches of Judicial Magistrates.

2.27. Section 15 provides for the formation and functioning of Benches of magistrates in a very general way. In practice, however, Benches are only formed of Honorary Magistrates, i.e., persons who are appointed as Special Magistrates under section 14, and Stipendiary Magistrates are never asked to sit together as a Bench. As an institution, Benches of Honorary Magistrates are not much in favour but, provided the right type of educated and public-spirited persons come forward for rendering this service to the community and are chosen and appointed by the High Court, they can certainly give much valuable assistance to the hard-worked Stipendiary Magistrates. We would, therefore, retain the section in a simplified form. The power to form benches may be vested in the Chief Judicial Magistrate subject to the control of the High Court. It is hardly necessary to provide for the formation of a bench consisting of some Special Magistrates invested with first class powers and some others with second class powers. Looking at it from the practical point of view, such a Bench is not usually formed; and in fact it does not appear to be very desirable that it should be formed and invested with the powers of a Judicial Magistrate of the first class.

Section 16.

2.28. Under section 16 the power to frame rules for the guidance of Benches is conferred on the State Government as well as on the District Magistrate subject to the control of the State Government. It is proposed that this power should be with the Chief Judicial Magistrate subject to the control of the High Court.

Section 15 and 16 combined and simplified.

2.29. Sections 15 and 16 may accordingly be combined and simplified as follows :—

Benches of Judicial Magistrates.

"14. (1) Subject to the control of the High Court, the Chief Judicial Magistrate may direct any two or more Special

Judicial Magistrates of the same class to sit together as a Bench for trying cases, and every such Bench shall, for the purposes of this Code, be deemed to be a Judicial Magistrate of that class.

(2) Subject to the control of the High Court, the Chief Judicial Magistrate may make rules for the guidance of such Benches as respects—

(a) the classes of cases to be tried;

(b) the times and places of sitting;

(c) the constitution of the Bench for conducting trials;

(d) the mode of settling differences of opinion which may arise between the Magistrate in session."

Section 18 to 21—Provisions revised for Metropolitan Magistrates' Courts.

2.30. Sections 18 to 21 deal with the courts of Presidency magistrates on lines not very different from those adopted in sections 10 to 15 in regard to courts of magistrates in the districts. We have recommended above that, after the revision of the Code, the three Presidency Magistrates' Courts and the Ahmedabad City Magistrates' Court should be known as Courts of Metropolitan Magistrates. At present articles 233, 234 and 235 of the Constitution apply only in relation to the Chief Presidency Magistrate and the Additional Chief Presidency Magistrate (*vide* definition of "district judge" in clause (a) of articles 236), and not in relation to the other Presidency Magistrates and their Courts (even if the latter could be regarded as Courts different from the Court of the Chief Presidency Magistrate or the Court of an Additional Chief Presidency Magistrate). When the Code is revised and Presidency Magistrates are replaced by Metropolitan Magistrates, it will naturally be necessary for the Governor to issue a public notification under article 237 directing the application of articles 233, 234 and 235 to all Metropolitan Magistrates.

Revised Sections.

2.31. In lieu of existing section 18 to 21 of the Code, the following sections may be put in this Chapter, immediately after the revised section 14 proposed above :—

Courts of Metropolitan Magistrates.

"15. (1) In every Metropolitan area there shall be established as many Courts of Metropolitan Magistrates, and at such places, as the State Government may, in consultation with the High Court, notify in the Official Gazette.

(2) The presiding officers of such Courts shall be appointed by the High Court.

Chief Metropolitan Magistrate.

16. (1) The High Court shall appoint a Metropolitan Magistrate to be the Chief Metropolitan Magistrate for the area.

(2) The High Court may appoint any Metropolitan Magistrate to be an Additional Chief Metropolitan Magistrate and such Magistrate shall have all or any of the powers of a Chief Metropolitan Magistrate under this Code or under any other law for the time being in force as the High Court may direct.

Special Metropolitan Magistrates.

17. (1) The High Court may confer upon any person who holds or has held any judicial post under the Union or a State or possesses such other qualifications as may be prescribed by the High Court in this behalf, all or any of the powers conferred or conferrable by or under this Code on a Metropolitan Magistrate in respect to particular cases or to particular classes of cases or to cases generally, in any metropolitan area.

(2) Such Magistrates shall be called Special Metropolitan Magistrates and shall be appointed for such term as the High Court may by general or special order direct.

Benches of Metropolitan Magistrates.

18. (1) Subject to the control of the High Court, the Chief Metropolitan Magistrate may direct any two or more Special Metropolitan Magistrates to sit together as a Bench for trying cases and every such Bench shall, for the purposes of this Code, be deemed to be a Metropolitan Magistrate.

(2) Subject to the control of the High Court, the Chief Metropolitan Magistrate may make rules for the guidance of such Benchts as respects—

(a) the classes of cases to be tried;

(b) the times and places of sitting;

(c) the constitution of the Bench for conducting trials;

(d) the mode of settling differences of opinion which may arise between the Magistrates in session."

Provisions for Executive Magistrates.

2.32. The appointment of Executive Magistrates and the definition of their local jurisdiction may be provided for separately in two sections as follows :—

Executive Magistrates.

"19. (1) In every district, the State Government may appoint as many persons as it thinks fit to be Executive Magistrates and shall appoint one of them to be the District Magistrate.

(2) The State Government may appoint any Executive Magistrate to be an Additional District Magistrate, and such Additional District Magistrate shall have all or any of the powers of a District Magistrate under this Code or under any other law for the time being in force as the State Government may direct.

(3) The State Government may place an Executive Magistrate in charge of a sub-division and relieve him of the charge as occasion requires. Such Magistrate shall be called Sub-divisional Magistrates.

Local limits of Executive Magistraties' Jurisdiction.

20. (1) Subject to the control of the State Government, the District Magistrate may from time to time define local areas within which Executive Magistrates may exercise all or any of the powers with which they may be invested under this Code.

(2) Except as otherwise provided by such definition, the jurisdiction and powers of such Magistrates shall extend throughout the district."

Section 11 omitted.

2.33. We do not think that a provision similar to section 11 is practically necessary. Even if a temporary hiatus in the office of a District Magistrate is allowed by the State Government to occur, which itself is unlikely, it will not be very material so far as his functions under the Code are concerned.

Section 17 replaced by four new sections.

2.34. Reverting to existing section 17 of the Code which deals with the subordination of Courts, it is proposed, for the sake of greater clarity, to replace it by four sections as follows :—

Subordination of Assistant Sessions Judges.

"21. (1) All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction.

(2) The Sessions Judge may, from time to time, make rules consistent with this Code as to the distribution of business among such Assistant Sessions Judges.

(3) The Sessions Judge may also make provision for the disposal of any urgent application, in the event of his absence or inability to act, by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by the Chief Judicial Magistrate, and such Judge or Magistrate shall have jurisdiction to deal with any such application.

Subordination of Judicial Magistrates.

22. (1) Chief Judicial Magistrates shall be subordinate to the Sessions Judge; and all Judicial Magistrates shall, subject to the general control of the Sessions Judge, be subordinate to the Chief Judicial Magistrate.

(2) The Chief Judicial Magistrate may, from time to time, make rules or give special orders consistent with this Code as to the distribution of business among such Magistrates and Benches.

Subordination of Metropolitan Magistrates.

23. (1) All Metropolitan Magistrates, other than the Additional Chief Metropolitan Magistrates, shall be subordinate to the Chief Metropolitan Magistrate.

(2) The High Court may, for the purposes of this Code, define the extent of the subordination, if any, of the Additional Chief Metropolitan Magistrates to the Chief Metropolitan Magistrate.

(3) The Chief Metropolitan Magistrates may, from time to time, make rules or give special orders consistent with this Code as to the distribution of business among Metropolitan Magistrates and as to allocation of business to Additional Chief Metropolitan Magistrates.

Subordination of Executive Magistrates.

24. (1) All Executive Magistrates, other than Additional District Magistrates, shall be subordinate to the District Magistrate, and every Executive Magistrate (other than a Sub-divisional Magistrate) exercising powers in a sub-division shall also be subordinate to the Sub-divisional Magistrate, subject, however, to the general control of the District Magistrate.

(2) The District Magistrate may, from time to time, makes rules or give special orders consistent with this Code

as to the distribution of business among the Executive Magistrates subordinate to him and as to allocation of business to an Additional District Magistrate."

Section 22 and 25-Justices of the Peace.

2.35. Section 22 empowers the State Government to appoint Justices of the Peace and section 25 declares the Judges of High Courts, Sessions Judges, District Magistrates and Presidency Magistrate to be Justices of the Peace *ex-officio*. In the previous Report, the Commission recommended[1] that the appointment of Justices of the Peace under section 22 should be made in consultation with the High Court and that such Justices should be citizens of India. While we agree with the latter recommendation, we do not think it necessary that the High Court should be consulted in regard to appointments to an office the functions of which are not essentially, or even mainly, of a judicial character.

At present, except in Bombay and West Bengal, the powers and duties of a Justice of the Peace are not defined by law. We agree that this lacuna in the Code should be filled as recommended[2] in the previous Report.

Under section 25, Judges of the High Court are, at present, *ex-officio* Justices of the Peace for the while of India. We think that it is not necessary to retain this part of the section, as being Justices of the Peace does not add to the dignity of Judges of the High Court. We do not think it necessary to add to the list of *ex-officio* Justices of the Peace as recommended in the previous Report.[3]

In lieu of sections 22 and 25, the following sections may be included in this Chapter :—

Justices of the Peace.

"25. (1) In virtue of their respective offices, Sessions Judges, Chief Metropolitan Magistrates, Chief Judicial Magistrates and District Magistrates are Justices of the Peace within and for the whole of the State in which they are serving.

(2) The State Government may, by notification in the Official Gazette, appoint any person resident in the State, being a citizen of India, to be a Justice of the Peace within and for the local area specified in the notification.

Powers of Justices of the Peace.

26. (1) A Justice of the Peace shall have, within the area for which he is such Justice, the power of arrest conferred on a police officer by section 54 and on an officer-in-charge of a police station by section 55.

(2) A Justice of the Peace making an arrest in exercise of any such power shall forthwith take or cause to be taken the person arrested before the officer-in-charge of the nearest police station and furnish such officer with a report as to the circumstances of the arrest; and such officer shall thereupon re-arrest the person.

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[1] 37th Report, para. 138.

[2] 37th Report, paras. 139 and 140.

[3] 37th Report, para. 142.

(3) A Justice of the Peace shall have, within such area, power to call upon any police officer to aid him—

(a) in taking or preventing the escape of any person who has participated in the commission of any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having so participated;

(b) in the prevention of crime in general and, in particular, in the prevention of a breach of the peace or a disturbance of the public tranquility.

(4) Where a police officer has been called upon by a Justice of the Peace to render aid under sub-section (3), such call shall be deemed to have been made by an authority competent to make the call.

(5) Subject to such rules as may be made by the State Government, a Justice of the Peace for a local area may, when so requested in writing by a police officer investigating an offence committed within that area, record any statement made by a person in respect of whom an offence affecting the human body is believed to have been committed, being a statement relating to the circumstances of the offence or of the transaction which resulted in the offence. Such statement shall be recorded in the manner hereinafter prescribed for recording the evidence of a witness in the trial of a warrant case.

(6) A Justice of the Peace for any local area, not being a legal practitioner, may, in accordance with such rules as may be made by the State Government—

(a) issue a certificate as to the identity of any person residing within such area, or

(b) verify any document brought before him by any such person, or

(c) attest any such document required by or under any law for the time being in force to be attested by a Magistrate;

and until the contrary is proved, any certificate so issued shall be presumed to be correct, any document so verified shall be deemed to be duly verified, and any document so attested shall be deemed to have been attested by a Magistrate."

CHAPTER III

POWERS OF COURTS

High Courts' original jurisdiction.

3.1. Under section 28, any offence under the Indian Penal Code may be tried by the High Court, and under section 29, any offence under any other law which contains no special provision as to the trying courts, may be tried by the High Court. Section 194 provides that the High Court may take cognizance of any offence upon a commitment made to it in the manner provided in Chapter XVIII of the Code. Detailed provisions are then made in Chapter XXIII with regard to the procedure of High Courts in trying cases. Although these provisions apply to all High Courts in India, only those of Calcutta, Madras and Bombay exercised ordinary original criminal jurisdiction at any time and this jurisdiction was limited by the Letters Patent establishing these High Courts to the three presidency-towns. With the establishment of City Sessions Courts in Bombay in 1948 and in Madras in 1956, the High Courts at these two places altogether ceased to try criminal cases.

Present position in Calcutta.

3.2. In Calcutta, however, although a City Sessions Court was established in 1957 with jurisdiction over the presidency-town of Calcutta, it was precluded from trying offences punishable under sections 131 to 134, 302, 307, 396, 468 and 477A of the Indian Penal Code. These offences, when committed within the presidency-towns, were retained within the ordinary original jurisdiction of the Calcutta High Court and continued to be triable with the aid of a jury. In this connection it may be mentioned that the area of this presidency-town is only a part, and the smaller part at that, of the area comprised within the Municipal Corporation of Calcutta. The other part of the city is within the jurisdiction of the Sessions Judge of the 24-Parganas District who holds Court in Alipore.

Law Commission's recommendation in 14th Report.

3.3. The Law Commission, in its 14th Report, considered that this division of original criminal jurisdiction between the Calcutta High Court and the City Sessions Court was[1] "full of anomalies. For example, whereas an offence under section 302 I.P.C. for which the Court may impose a sentence of death or imprisonment for life, is exclusively triable by the High Court, an offence under section 303 for which the only penalty is the sentence of death, is triable by the City Sessions Court." The Commission further said[1], "The City Sessions Courts in Bombay and Madras which have been established much earlier than the Calcutta Court possess all the powers which the High Court did in the respective States in exercise of its ordinary original criminal jurisdiction. The evidence given before us revealed that the City Sessions Courts in those States were functioning efficiently. There is no reason why the Court should not be able to deal with these matters in Calcutta. We, therefore, recommend that the City Sessions Court be given exclusive and the ordinary original

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[1] 14th Report, Vol. II, p. 1201.

criminal jurisdiction of the High Court be abolished. This will result in a substantial saving of the judge time in the High Court."

Law Commission's recommendation—37th Report.

3.4. In the 37th Report, however, the Law Commission took a different view[1]. They thought it was better to have justice from the court of superior jurisdiction than from a court of inferior jurisdiction and where justice from a superior court was available under the existing law (as in Calcutta), strong reasons should be needed to disturb the law. They further pointed out that the judgment of the High Court on the original side had enriched not only our civil law but also our criminal law. They thought that there were cogent reasons for not disturbing the existing position and that it would be too big a price to pay for uniformity.

Earlier recommendation preferred.

3.5. We have again considered the matter and come to the conclusion that the earlier recommendation made by the Law Commission in its 14th Report is definitely to be preferred. We were struck by the fact that original trials in the Calcutta High Court are held up for an unduly long time as compared to trials before the City Sessions Court. Apart from that fact, we are unable to see any reason for treating a small part of the city of Calcutta on a different footing from the rest of the country. There can hardly be any doubt that the City Sessions Court at Calcutta is as competent to deal with murder, dacoity, forgery and account falsification cases as the Sessions Court sitting and functioning in Alipore. The transfer of this work from the Calcutta High Court to the City Sessions Court would relieve the former of a considerable work load which should be welcome in the present state of heavy arrears in that High Court. We therefore recommend that this vestigial jurisdiction of the Calcutta High Court should be abolished and the City Sessions Court should have the same complete jurisdiction with regard to criminal cases as all other Courts of Session in the country.

Section 28 and 29 combined and revised.

3.6. This proposal does not require the deletion of the references to High Courts in sections 28 and 29 of the Code since these will continue to be relevant for the extremely rare, but possible, exercise of the extraordinary original criminal jurisdiction vested in them. We, however, recommend that the two sections may be combined and formally re-drafted as follows :—

Courts by which offences are triable.

"28. Subject to the other provisions of this Code,—

(a) any offence under the Indian Penal Code may be tried by the High Court or by the Court of Session or by any other Court by which such offence is shown in the Second Schedule to be triable; and

(b) any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court, and when no Court is so mentioned, it may be tried by the High Court or by any Court by which such offence is shown in the Second Schedule to be triable."

[1] 37th Report, para. 145.

The illustration to the existing section 28 may be omitted in view of our proposal to do away with commitment proceedings and, even otherwise, as not being very necessary for elucidating the section.

Section 30 recommendation in the previous Report.

3.7. In the previous Report[1], various suggestions were considered in regard to section 30, such as, whether it should be retained at all, whether it should be modified by increasing or reducing the range of offences triable by Magistrates empowered under the section, whether it would not be preferable to have all the lesser Sessions cases tried by Assistant Sessions Judges instead of such Magistrates, etc. Finally, however, the Report recommended that the section should be retained with one or two minor amendments leaving the position flexible.

Few Magistrates empowered under the section.

3.8. It appears that only in four States, *viz.*, Punjab, Haryana, Madhya Pradesh and Jammu & Kashmir, Magistrates have been empowered under section 30 and even in these States, except Jammu & Kashmir, the number so empowered is very small. There are four such Magistrates in Punjab, three in Haryana and only one in Madhya Pradesh. Five Presidency Magistrates have been empowered under section 30 in Bombay, but none in Calcutta, Madras or Ahmedabad.

Chief Judcial Magistrates to have enhanced powers of punishment.

3.9. The object of the section is, of course, to reduce the volume of work before Courts of Session and to get the less important sessions cases disposed of more expeditiously by experienced Magistrates. We have recommended in the previous chapter that there should be a Chief Judicial Magistrate for each district. He would naturally be a senior and experienced Magistrate who could be safely entrusted with the power to impose punishment up to seven years' imprisonment. In the hierarchy of Judges and Magistrates in a district, the Chief Judicial Magistrate would normally hold the same rank as an Assistant Sessions Judge and be equally competent from the professional point of view. After the separation of the executive from the judiciary, there would not be any objection to such a Magistrate trying serious cases and awarding sentences up to seven years simply because he is designated a Magistrate. It is further more desirable that, in addition to the administrative control and supervision which he would be expected to exercise over other Magistrates in the district, he should also be made responsible for the trial of important criminal cases. The vesting of the Chief Judicial Magistrate in each district (and of the Chief Metropolitan Magistrate in each metropolitan area) with enhanced powers of punishment will give the necessary relief to the Sessions Courts and will, in our opinion, be advantageous from every point of view. If in any metropolitan area or other large district the number of cases which ought to be tried by the Chief Metropolitan Magistrate or the Chief Judicial Magistrate is large, one or more Additional Chief Metropolitan Magistrates or Additional Chief Judicial Magistrates may be appointed[2] and invested[3] by the High Court with the power to impose a sentence up to seven years' imprisonment.[4]

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1 37th Report, para. 151.
2 Section 11, above.
3 Section 16, above.
4 Section 32, below.

Retention of Section 30 not necessary in view of revised Second Schedule.

3.10. It is, however, unnecessary to retain section 30 in its present form or in a modified form. We propose to revise the Second Schedule drastically, enlarging the number of offences triable by Magistrates of the first class and *pro tanto* reducing the number of offences triable exclusively by the Court of Session. Broadly speaking, offences punishable with imprisonment for 7 years or less will be within the jurisdiction of Magistrates. Offences in respect of which only the Court of Session is mentioned in the Second Schedule as revised will all be offences which, by reason of their nature, should be tried only by that Court. Even where the punishment does not exceed 7 years' imprisonment as is the case with a few of these offences[1], they should be triable only by the Court of Session and it is not necessary to confer a special jurisdiction on the Chief Judicial Magistrate to try such offences. Some offences triable by a Magistrate of the first class under the Second Schedule are punishable with more than 7 years' imprisonment. The Chief Judicial Magistrates, being himself a Magistrate of the First Class, will be competent to try all these offences. A provision on the lines of section 30 empowering him to try as a magistrate all offences not punishable with death or imprisonment for life or with imprisonment for a term exceeding seven years is therefore not required. Section 30 is accordingly proposed to be omitted.

Section 31.

3.11. No change is required in section 31.

Sections 32 and 34 combined and revised.

3.12. Section 32 and 34 lay down the maximum sentences which Magistrates of different categories may pass. In view of the omission of section 30 proposed above, it would be desirable to combine the two sections. We have in the previous chapter recommended the abolition of third class Magistrates. When the separation of the executive from the judiciary is fully effected, a great majority of Magistrates will be legally qualified and trained members of the judiciary who can be entrusted with somewhat higher sentencing powers than they now have under section 32. We propose that a Magistrate of the second class may pass a sentence of imprisonment not exceeding one year or of fine not exceeding rupees one thousand or both. Similarly, the powers of a Metropolitan Magistrate or of a Magistrate of the first class may be enhanced to three years as respects imprisonment and rupees five thousand as respects fine. The revised section 32 may be as follows :—

Sentences which Magistrates may pass.

"32. (1) A Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years.

(2) A Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years, including such solitary confinement as is authorised by law, or of fine not exceeding five thousand rupees, or of both.

(3) A Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, including such solitary confinement as is authorised by law, or of fine not exceeding one thousand rupees, or of both."

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[1] Sections 124, 201, 211, 234, 308, 376, 402, 489C, 500(a) and 502(a) of the Indian Penal Code.

Sections 33 and 35.

3.13. Sections 33 and 35 do not require any change of substance.

Sections 36 to 38 and 3rd and 4th Schedules omission recommended.

3.14. Section 36 describes what are called the ordinary powers of District Magistrates, Sub-divisional Magistrates and Magistrates of the first, second and third class. These powers which accrue to these different categories of Magistrates directly from the provisions of the Code are catalogued in five different parts of the Third Schedule. Similarly, the Fourth Schedule sets out in a sizeable chart, the additional powers with which a Sub-divisional Magistrate or a Magistrate of the first, second or third class may be invested by the State Government or by the District Magistrate, as provided in particular sections of the Code. While these two Schedules might have had some utility in the past for reference purposes, they are, from the statutory point of view, an unnecessary duplication. The nature and extent of the ordinary powers or of the additional powers have in every case to be ascertained from the particular section of the Code and the orders of the appropriate authority empowering the Magistrates either individually or as a class. There appears to be no point in maintaining sections 36 and 37 and carefully revising the Third and the Fourth Schedules after taking into account all the changes which are being proposed in the relevant sections and in the categories of Magistrates. We consider that these two sections and Schedules, and consequentially section 38 also, should be omitted.

Section 39 to 41.

3.15. In the last three sections of this Chapter which deal with the conferment, continuance and cancellation of powers, a reference to the High Court will have to be made in addition to the reference to the State Government, since in many places the High Court is being made the authority for conferring powers in judicial matters. Similarly, sub-section (2) of section 41, should be amended to include the Chief Judicial Magistrate besides the District Magistrate."

ANNEXURE

(As proposed to be revised)

CHAPTER III

Powers of Courts

Courts by which offences are triable.

28. Subject to the other provisions of this Code,—

(a) any offence under the Indian Penal Code may be tried by the High Court or by the Court of Sessions or by any other Court by which such offence is shown in the Second Schedule to be triable; and

(b) any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court, and when ni Court is so mentioned, it may be tried by the High Ciurt or by any Court by which such offence is shown in the Second Shedule to be triable.

Jurisdiction in the case of juveniles.

29B. Any offence not punishable with death or imprisonment for life, committed by any person who at the date when he

appears or is brought before the Court is under the age of fifteen years, may be tried—

(a) by a Chief Metropolitan Magistrate or Chief Judicial Magistrate, or

(b) by a Metropolitan Magistrate or Magistrate of the first class specially empowered under sub-section (1) of section 8 of the Reformatory Schools Act, 1897, or under other similar law providing for the custody, trial or punishment of youthful offenders.

Jurisdiction of Chief Magistrates.

30. Notwithstanding anything contained in section 28, a Chief Metropolitan Magistrate or Chief Judicial Magistrate may try all offences not punishable with death or with imprisonment for life or with imprisonment exceeding seven years.

Sentence which High Courts and Sessions Judges may pass.

31. (1) A High Court may pass any sentence authorised by law.

(2) A Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law; but any sentence of death passed by him shall be subject to confirmation by the High Court.

(3) An Assistant Sessions Judge may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding ten years.

Sentences which Magistrates may pass.

32. (1) A Chief Metropolitan Magistrate or Chief Judicial Magistrate may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding seven years.

(2) A Metropolitan Magistrate or Magistrate of the first class may pass a sentence of imprisonment for a term not exceeding three years, including such solitary confinement as is authorised by law, or of fine not exceeding five thousand rupees, or of both.

(3) A Magistrate of the second class may pass a sentence of imprisonment for a term not exceeding one year, including such solitary confinement as is authorised by law, or of fine not exceeding one thousand rupees, or of both.

Sentence of imprisonment in default of fine.

33. (1) A Magistrate may award such term of imprisonment in default of payment of fine as is authorised by law :

Provided that the term—

(a) is not in excess of the Magistrate's powers under section 32; and

(b) where imprisonment has been awarded as part of the substantive sentence, shall not exceed one-fourth of the term of imprisonment which the Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 32.

34. (Omitted).

Sentence in cases of conviction of several offences at one trial.

35. (1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code, sentence him for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence to send the offender for trial before a higher Court :

Provided that—

(a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years; and

(b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence.

(3) For the purpose of appeal by a convicted person, the aggregate of consecutive sentence passed against him under this section shall be deemed to be a single sentence.

36, 37, 38. (Omitted).

Mode of conferring powers.

39. (1) In conferring powers under this Code, the High Court or the State Government, as the case may be, may, by order, empower persons specially by name or in virtue of their office, or classes of officials generally by their official titles.

(2) Every such order shall take effect from the date on which it is communicated to the person so empowered.

Powers of officers appointed.

40. Whenever any person holding an office in the service of Government who has been invested by the High Court or the State Government with any powers under this Code throughout any local area is appointed to an equal or higher office of the same nature within a like local area under the same State Government, he shall, unless the High Court or the State Government, as the case may be, otherwise directs or has otherwise directed, exercise the same powers in the local area in which he is so appointed.

Withdrawal of powers.

41. (1) The High Court or the State Government, as the case may be, may withdraw all or any of the powers conferred under this Code on any person by it or by any officer subordinate to it.

(2) Any powers conferred by the Chief Judicial Magistrate or by the District Magistrate may be withdrawn by him.

CHAPTER IV

AID AND INFORMATION TO THE MAGISTRATES AND THE POLICE

Previous Reports.

4.1. In this short chapter which consists of only four sections, no major changes of substance were recommended in the previous Report. The Law Commission in its 33rd Report considered a suggestion to insert a provision in this chapter under which a duty would be cast on public servants to give information about the commission of offences under sections 161 to 165A of the Indian Panel Code and section 5 of the Prevention of Corruption Act, 1947, but advised against the proposed measure.

Section 42.

4.2. The words "whether within or without the presidency towns" may be omitted from section 42 as being superfluous.

Section 44.

4.3. Under section 44, every person aware of the commission of, or of the intention to commit, certain specified offences is bound to give information to the nearest magistrate or police officer. Amongst the sections mentioned at present are sections 435 and 436 of the Indian Penal Code, relating to mischief by fire. With the object of encouraging the detection of similar offences in respect of roads, bridges, embankments, light-houses, vessels etc., the previous Report[1] recommended the addition of sections 431 to 434 and 437 to 439 of the Indian Penal Code. We agree with this recommendation. In this section also the words "whether within or withouot the presidency towns" are superfluous and may be omitted.

Section 45.

4.4. While in the main paragraph of section 45(1), certain words were added in 1955 to cover members of village panchayats, consequential amendment was not made in clause (a) of the section. A recommendation to make this amendment was made in the previous Report.[2]

Amendments recommended.

4.5. The following amendments may, accordingly, be made in this chapter—

(1) In section 42, the words "whether within or without the presidency towns" shall be omitted;

(2) In sub-section (1) of section 44,—

(i) the words "whether within or without the presidency towns" shall be omitted; and

(ii) for the figures "435, 436", the figures and words "431 to 439", shall be substituted; and

(3) In section 45, sub-section (1), clause (a), after the words "or police-officer", the words "or of the panchayat of which he is a member" shall be inserted.

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[1] 37th Report, para. 176 (v).

[2] 37th Report, para. 180.

CHAPTER V

ARREST, ESCAPE AND RETAKING

Sections 46 to 53—Physical examination of arrested person.

5.1. Chapter V is divided into two parts, part A dealing with "arrest generally" and part B with "arrest without warrant". In regard to part A consisting of sections 46 to 53, no amendments have been suggested in the previous Report; But the Commission considered[1] at length the question as to how far the physical examination of the arrested person is legally and constitutionally permissible and what provision, if any, should be made in the Code for this purpose. It came to the conclusion that a provision on the subject was needed and recommended a new section authorizing, in certain circumstances and subject to certain safeguards, the examination of the person of the accused by a qualified medical practitioner. We agree that such a provision is necessary for effective investigation and will not offend against article 20(3) of the Constitution. A new section 53A may be inserted after section 53 as follows :

Examination of person by medical practitioner.

"53A. (1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of the offence, it shall be lawful for a registered medical practitioner acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2) Whenever the person of a woman is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner."

Section 54.

5.2. In part B of this chapter the previous Report recommended a few amendments and two new provisions to which we shall briefly refer. In regard to section 54(1), clause *ninthly*, there has been a sharp controversy as to whether the "requisition" received from the other police-officer must be in writing before it can be acted upon. We agree that it should be set at rest. The clause should refer to "any person for whose arrest *any requisition, whether written or oral,* has been received from another police officer."

Section 55.

5.3. Two minor amendments are proposed in section 55. First, in clause (a) of sub-section (1), the reference should be to *"any person within the limits of such station who is* found taking precautions to conceal his presence under circumstances etc."

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[1] 37th Report, para. 183 and **Appendix 6.**

Secondly, in clause (c), the phrase "in fear for injury" should be replaced by "in fear of injury".

Section 56.

5.4. For the avoidance of any controversy, it is proposed to insert a sub-section (1A) in section 56 reading :—

> "(1A) Nothing in sub-section (1) shall affect the power of a police-officer to arrest a person under section 54."

Section 57.

5.5. Where a person committing or accused of committing a non-cognizable offence refuses, on demand by a police officer, to give his name and residence, or gives a false name or residence, he can be arrested by the police officer, under section 57(1). Under section 57(2), when the true name and residence is ascertained such person is to be released on his executing a bond to appear before a magistrate if so required. In the previous Report,[1] the words "having jurisdiction" were proposed to be added after the words "a magistrate", (following the Bombay and Punjab amendments). We are, however, of the view that this amendment is unnecessary. If strictly interpreted, it would throw upon the police officer the burden of finding out which magistrate would have jurisdiction to deal with the case and entering the name of that magistrate in the bond, which in the circumstances would be quite impracticable.

Section 59.

5.6. Section 59 deals with the right of a private person to arrest any person who "in his view" commits a non-bailable and cognizable offence. Two points pertaining to this section were considered in the previous Report. The first point[2] was whether it is necessary to replace the words "in his view" by the words "in his sight" or by the words "in his presence". The case law on the subject was examined, but it was considered unnecessary to make any change. The matter was raised again before us, and it was stressed that a verbal alteration was desirable, since the word "view" might also mean "opinion". As this point has provoked considerable discussion,[3] we think that the opportunity may be taken to clarify it. Both in section 57 and in section 64, the words "in his presence", are used to express the same idea. We propose that the words "in his presence" may be substituted for the words "in his view" in section 59(1) also. The second point[4] was that the section should expressly enable the private person not only to arrest the offender himself, but also "to cause him to be arrested." Sub-section (1) of section 59 may accordingly be amended to read as follows :—

> "(1) Any private person may arrest or *cause to be arrested* any person who in his *presence* commits a non-bailable and cognizable offence, or any proclaimed offender, and, without unnecessary delay, shall make over *or cause to be made over* any person so arrested to a police-officer, or in the absence of a police-officer, take such person or cause him to be taken in custody to the nearest police-station."

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1 37th Report, para. 198.
2 37th Report, para. 200(i).
3 See *Nazir* v. *Rex*. A.I.R. 1951, All. 3 (Full Bench).
4 37th Report, para. 200(ii).

New Sections 59-A and 59B.

5.7. The previous Report[1] recommended the insertion of two new sections after sections 59 as follows :—

Person arrested to be informed of grounds of arrested.

"59A. Every police officer or other person arresting any person without warrant shall communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.

Police-officer to inform person arrested of right to bail.

B. Where a police-officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties to offer bail on his behalf."

Section 61.

5.8. In section 61, the previous Report recommended[2] a verbal change in the opening part making it read "No person who has been arrested without warrant shall be detained in custody for a larger period etc." On reconsideration we do not think that this change from a clear and mandatory direction to the police-officer making the arrest which is in conformity with article 22(2) of the Constitution is necessary or even desirable.

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[1] 37th Report, paras. 201 and 202.

[2] 37th Report, para. 204.

CHAPTER VI

PROCESSES TO COMPEL APPEARANCE

Introductory.

6.1. It is a standing complaint that there is a great deal of avoidable delay in the service of summonses and that the execution of coercive processes is often unsatisfactory. Improvements in this regard can only be effected by administrative action and there is little that can be achieved by amendment of the law. Most of the changes recommended in Chapter VI by the previous Report are of a formal character. Reference should however be made to one important recommendation regarding the service of summonses to witnesses by registered post for which the Commission has proposed a new section. The other changes proposed in this Chapter relate to matters of detail and are briefly reviewed below.

Section 68.

6.2. In sub-section (1) of section 68, an addition is suggested[1] to bring it into line with section 75 in respect of summonses issued by a Bench of Magistrates. The sub-section will read :—

> "(1) Every summons issued by a Court under this Code shall be in writing, in duplicate, signed by the presiding officer of such Court (or, in the case of a Bench of Magistrates, by any Member of such Bench) or by such other officer as the High Court may, from time to time, by rule direct, and shall bear the seal of the Court."

The previous Report has recommended the addition of a sub-section (4) to the effect that "nothing in this section shall affect the provisions of section 174A", which is the new section proposed for service of summons by post. Since other modes of service are provided for in detail also in sections 69 to 74, we do not think it will be desirable to include such a sub-section only in section 68. Since issue of summons by post is to be in addition to, and not in lieu of, any other mode of service adopted by the Court in the particular case there is really nothing in section 68(2) or in the other sections to affect the new section. It would be sufficient to say expressly in section 74A that its provisions operate notwithstanding anything contained in the preceding sections.

Section 69.

6.3. No change was recommended in section 69 in the previous Report. With reference to sub-section (3), however, it was noted that the procedure to be followed after service on a body corporate pertained to the chapter on general provisions in inquiries and trials. This subject is considered[2] in detail under Chapter XXIV but it may be noted here that societies registered under the Societies Registration Act, 1860, although not formally incorporated, possess some of the attributes of a corporation and it is desirable that such societies should be treated on a par with corporation in criminal proceedings. While section 69 deals with

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[1] 37th Report, para. 216.

[2] *See* paras. 24.1 to 24.10 below.

service of summonses on individuals and incorporated companies, it is silent as to service of summonses on registered societies. To remove this lacuna, it is desirable to add a sub-section (4) to section 69 reading as follows :—

"(4) The provisions of sub-section (3) shall apply to a societies registered under the Societies Registration Act, 1860, as they apply to an incorporated company."

Section 70.

6.4. In regard to section 70, the previous Report has recommended[1] that the special provision regarding service of summons on a person in a presidency town through a servant residing with him should be omitted, and instead, an explanation should be added that a servant is *not* a *member* of the family of the person to be summoned within the meaning of this section, whether it be in a presidency town or outside. This section will accordingly be amended to read as follows :—

Service when person summoned cannot be found.

"70. Where the person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicate for him with some adult male member of his family residing with him; and the person with whom the summons is so left shall, if so required by the serving officer, sign an receipt therefor on the back of the other duplicate.

Explanation.[2]—A servant is not a member of the family within the meaning of this section."

Section 71.

6.5. As regards section 71, it is recommended[3] in the previous Report that it should be amended to bring it into line with the corresponding provision in the Code of Civil Procedure. For the words "and thereupon the summons shall be deemed to have been duly served" there should be substituted the following words[4] :—

"and the Court, after making such inquiries as it thinks fit, may either declare that the summons has been duly served or order fresh service in such manner as it considers proper."

Issue of summons to witnesss by post-new section 74A.

6.6. We have already referred[5] to the recommendation made in the previous Report for the insertion of a new section relating to service of summons on a witness by post. This section may be as follows :—

Service of summons of witness by post.

"74A. (1) Notwithstanding anything contained in the preceding sections of this Chapter, a Court issuing a summons to a witness under any of the said sections may, in addition to and simultaneously with the issue of such summons, direct a copy of the summons to be served by registered post addressed to the witness at the place where he ordinarily resides or carries on business or personally works for gain.

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1 37th Report, para. 218.
2 *See* Order 5. Rule 15. Code of Civil Procedure, 1908.
3 37th Report, para. 219.
4 *See* Order 5, Rule 19, Code of Civil Procedure, 1908.
5 *See* paras. 6.1 and 6.2 above.

(2) When an acknowledgment purporting to be signed by the witness or an endorsement purporting to be made by a postal employee that the witness refused to take delivery has been received, the Court issuing the summons may declare that the summons has been duly served.[1]"

Section 77.

6.7. In section 77, the special provision relating to Presidency Magistrates will have to be omitted. Sub-section (1) may be revised to read as follows :—

"(1) A warrant of arrest shall ordinarily be directed to one or more police-officers; but the Court issuing such a warrant may, if its immediate execution is necessary and no police-officer is immediately available, direct it to any other person or persons, and such person or persons shall execute the same."

Section 78.

6.8. Section 78 at present confers a power on the District Magistrate or Sub-divisional Magistrate to issue a special type of "warrant to a land-holder, farmer or manager of land within his district or sub-division for the arrest of an escaped convict, proclaimed offender or person who has been accused of a non-bailable offence and who has eluded pursuit". Although the power is infrequently exercised, there appears to be no objection to conferring it on all Magistrates of the first class and all Executive Magistrates.[2] It is not very clear whether the two clauses "who has been accused of a non-bailable offence and who has eluded pursuit" are intended to qualify only persons other than escaped convicts and proclaimed offenders. The words "eluded pursuit" are also not very apt in the context. It is accordingly proposed that this sub-section may be revised as follows :—

"78. (1) A Magistrate of the first class or an Executive Magistrate may direct a warrant to any land-holder, farmer or manager of land within his local jurisdiction for the arrest of any escaped convict or proclaimed offender or of any person who is accused of a non-bailable offence and is evading arrest."

Section 87.

6.9. In sub-section (2) of section 87, which prescribes the mode of publishing a proclamation regarding an absconding offender, the previous Report has recommended[3] an additional provision to the effect that "The Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides."

Section 88.

6.10. Section 88 deals with the attachment of property of an absconding person and with the investigation of claims and objections made to such attachment and other consequential matters. In the previous Report,[4] two formal amendments have been suggested in sub-sections (2), (6B) and (6C), the effect of which will be to empower the Chief Judicial Magistrate in addition to the District Magistrate and Chief Presidency Magistrate mentioned

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[1] *Cf.* Order 5, rule 20A, Code of Civil Procedure, 1908.

[2] *Cf.* 37th Report, para. 225.

[3] 37th Report, para. 230.

[4] 37th Report, paras. 231 233 and 234.

in the sub-section. On reconsidering the matter it appears to us that the power to endorse an attachment order under sub-section (2) should be with the Chief Judicial Magistrate within whose district the attached property is situate, and not with the District Magistrate of that district. The amendments to be made in section 88 may accordingly be as follows :—

"(i) In sub-section (2) and in sub-section (6B), for the words "District Magistrate or Chief Presidency Magistrate", the words "Chief Judicial Magistrate" shall be substituted;

(ii) In sub-section (6C), for the proviso, the following proviso shall be substituted, *viz.*,

'Provided that, if it is preferred or made in the Court of a Chief Judicial Magistrate, he may make it over for disposal to any Magistrate subordinate to him'."

Section 91.

6.11. As regards section 91, the previous Report[1] has recommended the addition of the following words at the end, namely, "or any other Court to which the case may be transferred for trial".

[1] 37th Report, para. 238.

CHAPTER VII

PROCESSES TO COMPEL PRODUCTION OF THINGS

Section 94(1).

7.1. Section 94 empowers any Court or, in any place beyond the limits of the towns of Calcutta and Bombay, any officer in charge of a police-station, to issue a summons for the production of any document or thing required for the purposes of any investigation, inquiry, trial or other proceeding. The exclusion of the town of Bombay from the purview of this section, so far as the police are concerned, has been removed by a local amendment[1] of the section. The exclusion of Calcutta also may be removed by omitting the words "in any place beyond the limits of the towns of Calcutta and Bombay" from sub-section (1).

Section 94(3).

7.2. In the earlier Report,[2] the Commission examined the effect of section 94 *vis-a-vis* the Bankers' Books Evidence Act, 1891, and recommended that a reference to this Act should be included in sub-section (3) if section 94 so that it may be clear that the provisions of this Act override the general provisions of the Code. It also recommended that the Act should be amended to cover investigations besides inquiries and trials. We agree with both the recommendation. Sub-section (3) of section 94 of the Code may be amended to read—

"(3) Nothing in this section shall be deemed—

(a) to affect sections 123 and 124 of the Indian Evidence Act, 1872, or the Bankers' Books Evidence Act, 1891, or

(b) to apply to any letter, postcard, telegram or other documents or any parcel or thing in the custody of the postal or telegraph authority."

Sections 95 and 96.

7.3. No amendment of substance is required in sections 95 and 96, but the references to "Chief Presidency Magistrate" in both these sections may be replaced by "Chief Judicial Magistrate", which expression will, in a metropolitan area, mean the Chief Metropolitan Magistrate.

Section 98(1).

7.4. In section 98(1), first paragraph, the words "Presidency Magistrate" may be omitted. In the fourth paragraph, power to issue a search-warrant for obscene objects is conferred only on the District Magistrate and Sub-divisional Magistrates in a district and on Presidency Magistrates in a presidency-town. We see no objection to the power being conferred on all Judicial Magistrates of the first class as in the first paragraph. We, therefore, propose that for the words "or a Presidency Magistrate" in the fourth paragraph, the words "or Magistrate of the first class" be substituted.

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[1] Bombay Act 20 of 1956.

[2] 37th Report, paras. 242, 243.

7.5. In section 98(2), the reference to section 19 of the Sea Customs Act, 1878, should be changed to section 11 of the Customs Act, 1962. Section 98(2).

7.6. In the earlier Report[1], the Commission recommended that newspapers, books and documents containing obscene matter should also be brought within the scope of section 99A. We endorse this recommendation. Sub-section (1) of section 99A is, at present, cumbrously worded and can be shortened by omitting the description of the offences under the specified sections of the Indian Penal Code as being redundant. The section may be revised as follows :— Section 99A.

"99A. (1) Where it appears to the State Government that a newspaper, book or document, wherever printed, contains any matter the publication of which is punishable under section 124A, 153A, 292 or 295A of the Indian Penal Code, the State Government may, by notification in the Official Gazette, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, or, as the case may be, every copy of such book or document, to be forfeited to Government; and thereupon— Power to declare certain publications forfeited and to issue search-warrants for the same.

(a) any police-officer may seize the same wherever found in India, and

(b) any Magistrate may by warrant authorise any police-officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or document may be or may be reasonably suspected to be.

(2) In sub-section (1),—

(a) 'newspaper' and 'book' have the same meanings as in the Press and Registration of Book Act, 1867;

(b) 'document' includes any painting, drawing or photograph or other visible representation."

7.7. Under section 99C, an application under section 99B to set aside an order of forfeiture made under section 99A has to be heard and determined by a Special Bench of the High Court composed of three Judges. As pointed out in the earlier Report[2], this will not be possible in the case of the three Judicial Commissioners' Courts which are the High Courts for Goa, Manipur and Tripura. No practical difficulty appears to have arisen, perhaps because no such order was ever passed in these Union Territories. It seems desirable, however, to restrict the section to High Courts which have three or more Judges so that the law does not lay down an impossible procedure for any area. Section 99C may be amended to read :— Section 99C.

"99C. Every such application shall, where the High Court consists of three or more Judges, be heard and determined by a Special Bench composed of three Judges." Hearing by Special Bench.

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[1] 37th Report, para. 254.

[2] 37th Report, para. 257.

Section 100.

7.8. Under section 100, power is conferred on any Presidency Magistrate, Magistrate of the first class or Sub-divisional Magistrate to issue a warrant to search for a person wrongfully confined. It is suggested that, as in section 98, the power may be conferred on the District Magistrate, Sub-divisional Magistrate or Magistrate of the first class. The latter expression will be sufficient to include Metropolitan Magistrates in any metropolitan area.

New section 100A same as section 552.

7.9. The analogous provision conferring powers on a Presidency Magistrate or District Magistrate to compel the restoration of abducted females is tucked away in the last Chapter of the Code as section 552. We propose that this provision with a slight modification be added in Chapter VII immediately after section 100, thus—

Power to compel restoration of abducted females.

"100A. Upon complaint made on oath of the abduction or unlawful detention of a woman, or of a female child under the age of eighteen years, for any unlawful purpose, a District Magistrate, Sub-divisional Magistrate or Magistrate of the first class may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having the lawful charge of such child, and may compel compliance with such order, using such force as may be necessary."

7.10. No changes are required in other sections of this Chapter.

New section 104-A, same as section 550.

We notice that among the really miscellaneous provisions collected in the last Chapter of the Code is section 550. The police power to seize property suspected to be stolen or found in suspicious circumstances is analogous to the powers mentioned in Chapter VII. It would be appropriate to transfer section 550 to this Chapter, and put it after section 104 as section 104A.

Section 105A.

7.11. Section 105A provides for mutual aid between "courts in the territories to which the Code extends" on the one hand, and "courts in the State of Jammu and Kashmir and courts established or continued by the authority of the Central Government in any area outside the said territories" on the other, in the matter of serving summonses and executing warrants of arrest and search warrants. The last mentioned category of courts were those few courts established or continued under the Foreign Jurisdiction Act, 1947, but since no such courts exist at present in any area outside India, there is no need to refer to them. We have, in our discussion of section 1, proposed an amendment in the extent clause[1] so that not only the State of Jammu and Kashmir but also the State of Nagaland and the tribal areas within the State of Assam will be textually excluded from the operation of the Code. The following consequential amendments will be necessary in section 105A so that courts in Nagaland and the tribal areas of Assam may be put in the same position as courts in Jammu and Kashmir :—

"In sub-sections (1) and (2), for the words 'a court in the State of Jammu and Kashmir or a court established or

[1] *See* para. 1. 7.

continued by the authority of the Central Government in any area outside the said territories' the words 'a court in any State or area in India outside the said territories' be substituted."

CHAPTER VIII

SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR

Introductory.

8.1. The main sections of this Chapter are sections 106 to 110. They empower Courts and Magistrates to take security from persons in certain circumstances in order to ensure that they keep the peace and are of good behaviour for a specified period. The remaining sections lay down in detail the procedure to be followed by the Magistrates before ordering anyone to furnish security and the action to be taken after passing such orders. Security proceedings under section 106 are basically different from those under the other four sections in that the demand for security under the first section may be made only by a Court convicting the person of certain types of offences. The order for executing a bond to keep the peace has to be passed by the Court at the time of passing sentence on the convicted person. Proceedings under section 107, 108, 109 or 110, on the other hand, are independent proceedings initiated either by the police or by private individuals and partake of some of the characteristics of a regular trial.

Section 106(1) and section 149, I.P.C.

8.2. The scope of section 106(1) has been discussed in detail in the earlier Report.[1] Noting the uncertainty that exists as to how far a person constructively liable under section 149 of the Indian Penal Code could be ordered to give security under this section, the Commission suggested the addition of a lengthy explanation as follows :—

> "Where any offence specified in this sub-section is committed by a member of an unlawful assembly, in prosecution of the common object of the assembly, or is committed by a member of an unlawful assembly and the offence is one which the member of the assembly knew to be likely to be committed in prosecution of the common object of the assembly, then an order under this section may be passed against every person who is a member of the assembly when the offence is committed, whether or not he has himself committed the offence."

On a further consideration of this point we think that the simpler and better course would be to omit the exception regarding section 149 of the Indian Penal Code which is now to be found in section 106(1). The controversy has arisen because of the specific exception of section 149. If the reference to section 149 is omitted from section 106, the Court may, no doubt, in their discretion demand security from a person convicted under section 149 whatever be the nature of the offence committed by the other member or members of the unlawful assembly. This slight extension of the scope of section 106 of the Code will not, in our opinion, be harmful in any way.

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[1] 37th Report, paras. 279 to 282.

"other offence involving a breach of the peace".

8.3. Another point on which an amendment was suggested in the earlier Report[1] refers to the words "assault or other offence involving a breach of the peace". Judicial decisions are conflicting in regard to what is an offence involving a breach of the peace. So far as the offence of assault is concerned, we think that it should be made clear that a person convicted of the offence could be called upon to furnish security for keeping the peace and it would not be necessary to inquire whether the assault was inside a house or in a public place or was otherwise accompanied by circumstances to show an intended, actual or likely breach of the peace. Similar considerations should, in our opinion, apply also to any offence which consists of, or includes, using criminal force or committing mischief. The latter appears to be specially desirable in order to check violent demonstrations involving deliberate destruction of property which are unfortunately becoming common.

Courts mentioned in section 106(1).

8.4. As to the categories of Courts which may take action, the section enumerates "a High Court, a Court of Session or the Court of a Presidency Magistrate, a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class". It should be quite sufficient to mention a Court of Session and the Court of a Magistrate of the first class, since District Magistrates and Sub-divisional Magistrates will not be trying cases and a Magistrate of the first class will include a Metropolitan Magistrate.

Section 106 revised.

8.5. Section 106 may be revised as follows :—

"106. (1) When a Court of Session or the Court of a Magistrate of the first class convicts a person of any of the offences specified in sub-section (1A) or of abetting any such offence and is of opinion that it is necessary to take security from such person for keeping the peace, the Court may, at the time of passing sentence on such person, order him to execute a bond, with or without sureties, for keeping the peace during such period, not exceeding three years, as it thinks fit.

(1A) The offences referred to in sub-section (1) are—

(a) any offence punishable under Chapter VIII of the Indian Penal Code, other than an offence punishable under section 143, 153A or 154 thereof;

(b) any offence which consists of, or includes, assault or using criminal force or committing mischief;

(c) any offence of criminal intimidation; and

(d) any other offence which caused, or was intended or known to be likely to cause, a breach of the peace.

(2) If the conviction is set aside on appeal or otherwise, the bond so executed shall become void.

(3) An order under this section may also be made by an Appellate Court or by the High Court when exercising its powers of revision."

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[1] 37th Report, para. 282.

Section 107 necessary for maintaining peace and order.

8.6. Security proceedings under section 107 may be taken by a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class against any person who is likely to commit breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity. A private member's Bill[1] introduced in Parliament in 1967 sought to repeal this section and section 109 on the ground that these sections "have been instruments of oppression in the hands of the local police". We are unable to agree with this view. We understand that most of the State Governments have expressed themselves strongly against the proposed repeal of sections 107 and 109. A provision of this nature is, in our opinion, very necessary for maintaining peace and order in any area.

Power should be vested in all executive magistrates.

8.7. In all States where separation of the judiciary has been introduced in some form or other, powers under this section are exercisable exclusively by executive magistrates. In order to be effective, proceedings under the section have to be taken urgently, and as they are immediately concerned with the maintenance of peace and order, the functions should, in our opinion, be assigned to executive magistrates. We do not, however, think it necessary to restrict the power to take action under sub-section (1) to District Magistrates and Sub-divisional Magistrates. A District Magistrate who is the administrative head of the district will not in practice have any time to look to such proceedings. It is therefore proposed that any executive magistrate may be vested with the power to take security proceedings under this section. It is not necessary to invest judicial magistrates with concurrent powers.

Sub-sections (3) and (4) may be omitted.

8.8. With this change in sub-section (1) there will be no need for the provisions contained in sub-sections (3) and (4) which at present enable a magistrate of the second or third class to take action in an emergency, issue a warrant of arrest for the person proceeded against and send him to the sub-divisional magistrate or a magistrate of the first class for being dealt with under sub-section (1). Sub-sections (3) and (4) may be omitted.

Section 107 revised.

Secutiry for keeping the peace in other cases.

8.9. Section 107 may accordingly be revised as follows :—

"107. (1) *When an Executive Magistrate receives information* that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity *and is of opinion that* there is sufficient ground for proceeding, he may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period not exceeding one year as the Magistrate thinks fit.

(2) Proceedings under this section may be taken before *any Executive Magistrate* when either the place where the breach of the peace or disturbance is apprehended is *within his* local jurisdiction or there is within

[1] Bill No. 41 of 1966 by Shri Madhu Limaye M.P.

such jurisdiction a person who is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act as aforesaid beyond *such jurisdiction*."

Secutiry for good behaviour under sections 108, 109 and 110.

8.10. Sections 108, 109 and 110 provide for taking security for good behaviour from persons disseminating seditious matters or matters amounting to intimidation or defamation of a Judge, from vagrants and suspected persons, and from habitual offenders, respectively. The question arises whether this power which is now vested in all senior Magistrates, judicial and executive, should be vested only in Judicial Magistrates or in Executive Magistrates or concurrently in both. The present position in the States where separation of the judiciary from the executive has been effected to some extent, is not uniform. In the earlier Report,[1] emphasis was laid on the preventive nature of these security proceedings and on their vital impact on the maintenance of law and order and the recommendation was to the effect that the powers under all the three sections should be vested exclusively in Executive Magistrates.

Power to vest exclusively in judicial magistrates of the first class.

8.11. This matter was again discussed in detail before us. We are of the view that, having regard to the fact that the final order to be passed in these proceedings affects the liberty of the person against whom the proceedings are instituted and that sitting of evidence in a judicial manner is required before an order demanding security can justifiably be passed, it is desirable to vest these powers exclusively in Judicial Magistrates. Inquiry under any of these three sections partakes of the character of a trial, though technically the person against whom the proceedings are taken is not an accused person, there is no offence to be inquired into or tried and the ordinary rules of evidence are relaxed to some extent. All Magistrates of the first class may, in our opinion, be given powers under these three sections. At the same time, we do not think that the powers under these sections need be vested concurrently in both Judicial and Executive Magistrates although this is the position in some States at present. Under a statutory scheme of separation, such a system is likely to create confusion and even otherwise has nothing to commend it.

Section 108 (1) revised.

8.12. Sub-section (1) of section 108 may accordingly be revised as follows :—

"(1) When a Magistrate of the first class receives information that there is within his local jurisdiction any person who, within or without such jurisdiction, either orally or in writing or in any other manner, intentionally disseminates or attempts to disseminate or abets the dissemination of,—

(a) any matter the publication of which is punishable under section 124A or 153A of the Indian Penal Code, or

(b) any matter concerning a Judge which amounts to criminal intimidation or defamation under the Indian Penal Code,

[1] 37th Report, para. 286.

and the Magistrate is of opinion that there is sufficient ground for proceeding, the Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit."

Section 109 revised.

8.13. As regards section 109, clause (a), the Commission referred[1] in the earlier Report to the controversy as to whether the person proceeded against should be concealing his presence within the Magistrate's jurisdiction or whether it is sufficient if the person, being within Magistrate's jurisdiction, is taking precautions to conceal his presence with a view to committing an offence. The following re-draft of the section will make the intention clear :—

Security for good behaviour from vagrants and suspected persons.

"109. When a Magistrate of the first class receives information—

(a) that there is within his local jurisdiction a person taking precautions to conceal his presence and that there is reason to believe that he is doing so with a view to committing an offence, or

(b) that there is within his local jurisdiction a person who has no ostensible means of subsistence or cannot give a satisfactory account of himself, the Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit."

Section 110 amended.

8.14. In section 110, the opening paragraph may be amended as follows :—

"When a Magistrate of the first class receives information that there is within his local jurisdiction a person who—".

Sections 118 and 123(3).

8.15. In regard to sections 118 and 123, we notice that it is provided in section 367(6) that an order under section 118 or section 123(3) shall be deemed to be a judgment. The object of this provision (inserted by the Amendment Act of 1923) is apparently to ensure that reasons are given separately and in sufficient detail as to each person proceeded against under this Chapter. It would, in our opinion, be more appropriate to lay down this requirement (which in practice is observed by Magistrates) in section 118 itself by adding a sub-section as follows :—

"(2) Every order made under this section shall contain the point or points for determination, the decision thereon and the reasons for the decision."

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[1] 37th Report, para. 299.

Order under section 123(3) are passed by Sessions Judges who may be expected to give reasons without a statutory requirement. We do not consider it necessary to add a similar provision in section 123(3).

8.16. Section 124 gives power to the Chief Presidency Magistrate in a presidency-town and to the District Magistrate elsewhere to release persons jailed for failing to give security if he thinks that it can be done without hazard to the community. This is treated as a purely executive or administrative function, analogous to the power vested in the Government to suspend, commute or remit sentences passed on persons convicted of offences. As such we do not consider it necessary or even desirable to coner a concurrent power on the Chief Judicial Magistrate, as recommended by the Commission in the earlier Report.[1] Since our scheme visualises a District Magistrate in metropolitan areas, we propose to omit all references to Chief Presidency Magistrate in section 124. Section 124.

In sub-section (2) an exception is made of when the original "order has been made by some Court superior to the District Magistrate". It would be simpler and clearer to refer expressly to the High Court and the Court of Session. The words in brackets may be amended to read "unless the order has been made by the High Court or the Court of Session".

8.17. In section 125 also, the reference to the Chief Presidency Magistrate may be omitted and the words "not superior to his Court" may be replaced by the words "other than the High Court or the Court of Session". Section 125.

8.18. As recommended in the earlier Report,[2] esction 126 requires to be amended so that the power to discharge sureties vests in the Court which ordered the bond to be taken. The section may be revised as follows :— Section 126.

> "126. (1) Any surety for the peaceable conduct or good behaviour of another person *ordered to execute a bond under this Chapter* may at any time *apply to the Court making such order* to cancel the bond. Discharge of sureties.
>
> (2) On such application being made, the *Court* shall issue a summons or warrant, as *it* thinks fit, requiring the person for whom such surety is bound, to appear or to be brought before *it.*"

8.19. In view of the amendment made in section 126, section 126A will require a consequential amendment, *viz.* the addition of "or Court" after "Magistrate". Section 126A.

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[1] 37th Report, para. 317.
[2] 37th Report, para. 321.

CHAPTER IX

UNLAWFUL ASSEMBLIES

Introductory.

9.1. Sections 127 to 130A deal with the dispersal of unlawful assemblies. Powers in this respect are conferred primarily on any Magistrate or officer in charge of a police-station. When the public security is manifestly endangered and when no Magistrate can be communicated with, any commissioned officer of the armed forces may disperse the assembly with the help of the forces under his command.

Power to disperse for executive magistrates only.

9.2. In the earlier Report the question whether the powers should be with Executive Magistrates or with both Judicial and Executive Magistrates was examined and the Commission came to the conclusion[1] that it would be better to confine these powers to Executive Magistrates. We are also of the same view.

Provisions should remain in the Code.

9.3. The Commission considered an extreme suggestion made by the Madras Bar Council that Magistrates should not have anything to do with the dispersal of unlawful assemblies and it should be left to the police and the armed forces to tackle them. The Commission did not agree with the suggestion and saw no need to disturb the structure of the Code by putting the provisions in a separate law. We share this view.

Sections 132 and 132A.

9.4. Section 132—clauses (b) and (d)—provides that no officer acting under section 131 in good faith and no inferior officer, or soldier, sailor or airman in the armed forces doing any act in obedience to any order which he was bound to obey, shall be deemed to have thereby committed an offence. The expression "officer" is defined in section 132A as meaning a person commissioned or gazetted or in pay as an officer of the armed forces and including a junior commissioned officer, a warrant officer, a petty officer and a non-commissioned officer. Though the expression "inferior officer" is not defined, it is fairly clear that this expression as used in section 132(d) covers all officers other than the one actually in command in a certain situation and who have to act in obedience to that officer's orders. In every armed force of the Union, other than the Army, the Air Force and the Navy, there is a division between officers and men, but the latter may not strictly come within the description of "soldier, sailor or airman". In order to remove this slight lacuna, we propose that clause (d) of section 132 should refer generally to "officer or member of the armed forces" and a definition of "member" added in section 132A.

Amendments proposed.

9.5. No other amendments of substance are required in this Chapter. The following amendments may be carried out :—

(i) In sections 127 to 132, for the word "Magistrate" wherever it occurs, the words "Executive Magistrate" be substituted;

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[1] 37th Report, paras. 323 and 324.

(ii) In section 127, sub-section (2) be omitted;

(iii) In section 128, the words "whether within or without the presidency towns" be omitted;

(iv) In section 132, clause (d), for the words "inferior officer, or soldier, sailor or airman in the armed forces", the words "officer or member of the armed forces" be substituted; and in the proviso, for the words "soldier, sailor or airman in the armed forces", the words "member of the armed forces" shall be substituted;

(v) In section 132A, the following clause be added, namely :—

"(c) 'member', in relation to armed forces, means a person in the armed forces other than an officer."

CHAPTER X

PUBLIC NUISANCES

Section 133.

10.1. Under section 133, a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class may take action for the removal of any such public nuisance as is described in the section on receiving a police report or other information and on taking such evidence (if any) as he thinks fit. In the earlier Report,[1] the Commission considered that this function should be with the Executive Magistrates and further that it need not be confined to District Magistrates and Sub-divisional Magistrates. We agree that Judicial Magistrates need not be brought in to adjudicate on these matters and to pass orders for the removal of nuisances and, accordingly, the reference to a "Magistrate of the first class" in sub-section (1) will have to be omitted. We, however, consider that instead of empowering any Executive Magistrate to take action under the section, the State Government should specially empower an Executive Magistrate if and when considered necessary.

In view of the definition[2] we are proposing for the expression "police report" which will not be applicable in this context, it is better to refer to "the report of a police officer" instead of "a police report".

The first four lines of section 133(1) may accordingly be revised to read :—

> "(1) When a District Magistrate or a Sub-divisional Magistrate or an Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit."

Consequentially, the last paragraph of section 133(1) may be amended to read :—

> "to appear before himself or some other Executive Magistrate subordinate to him, at a time and place to be fixed by the order and show cause why the order should not be made absolute in the manner hereinafter provided."

Sections 135 to 139—jury provisions unnecessary.

10.2. Sections 135 to 139 contemplate the appointment of a jury consisting of not less than five members who will practically decide whether the conditional order made by the Magistrate under section 133 is reasonable and proper or whether it should be modified in any way or whether it should be made absolute. In the earlier Report[3] the Commission did not agree with the concurrent suggestion of a State Government and of a High Court Judge that the provision for the appointment of a jury in these proceedings is not necessary. The Commission expressed the view that the function of the jury is to decide

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[1] 37th Report, para. 330(ii).

[2] *See* para. 1.27 above.

[3] 37th Report, paras. 133, 141.

whether the measures directed by the Magistrate are reasonable and proper and as the powers given to the Magistrate are of an exceptional nature, the jury provisions which are intended to operate as a check on the exercise of the summary and arbitrary dealing with the right of property may be retained.

On considering the matter further, we are unable to agree with this view. We notice that the Committee set up in Uttar Pradesh for investigating causes of corruption in subordinate courts stated that, "experience over the years had shown that very rarely did a party ask for the appointment of a jury; further whenever a party did ask for the appointment of a jury, the request was not made in order to have a proper decision of the case but was made mainly for the purpose of delaying the proceedings." Even in regard to sessions trials, we are proposing the abolition of the jury system since it has not worked satisfactorily in practice. A jury of the type provided for in section 138 (the foreman and one-half of the remaining members being nominated by the Magistrate and the other members by the preson concerned) is, in our opinion, most unlikely to be helpful in reaching a proper decision. It will be difficult for the Magistrate to find person in the locality imbued with a strong civic sense, and capable of resisting extraneous pressure, to serve as jurors in such proceedings.

Revision of sections 135 and 136 and omission of section 138 and 139.

10.3. Sections 135 and 136 may accordingly be revised as follows :—

Person to whom order is addressed to obey or show cause or claim jury.

"135. The person against whom such order is made shall—

(a) perform, within the time and in the manner specified in the order, the act directed thereby; or

(b) appear in accordance with such order and show cause against the same . . .

Consequence of his failing to do so.

"136. If such person does not perform such act or appear and show cause . . ., he shall be liable to the penalty prescribed in that behalf in section 188 of the Indian Penal Code, and the order shall be made absolute."

Sections 138 and 139 which provided for the appointment of jury and the further procedure may be omitted.

Section 139A should be placed before section 137.

10.4. Section 139A lays down the procedure before the Magistrate when the person against whom a conditional order is made under section 133 denies in a relevant case the existence of a public right. No amendments of substance are required in this section, but it should obviously precede section 137 and not come after it. As section 138 is to be omitted, the following consequential amendments will be required in section 139A—

(i) in sub-section (1), omit "or section 138";

(ii) in sub-section (2) omit "or section 138", as the case may require"; and

(iii) in sub-section (3), omit "nor shall any question in respect of the existence of any such public right be inquired into by any jury appointed under section 138".

Section 137 revised.

10.5. As pointed out by the Commission in the earlier Report,[1] it has to be made clear in section 137 that the Magistrate has the power to modify the conditional order on the basis of the inquiry made by him and then make it absolute. Section 137 may be revised as follows :

Procedure where he appears to show cause.

"137. (1) If he appears and shows cause against the order the Magistrate shall take evidence in the matter as in a summons case.

(2) If the Magistrate is satisfied that the order, either as originally made or subject to such modification as he considers necessary, is reasonable and proper, the order shall be made absolute without modification or, as the case may be, with such modification.

(3) If the Magistrate is not so satisfied, no further proceedings shall be taken in the case."

New section for local investigation and expert evidence.

10.6. In the earlier Report[2], the Commission has suggested an additional provision enabling the Magistrate to direct local investigation and the examination of experts. The provision which should be useful is as follows :—

Power of Magistrate to direct local investigation and examination of an expert.

"137A. (1) The Magistrate may, for the purpose of an inquiry under this Chapter—

(a) direct a local investigation to be made by such person as he thinks fit; or

(b) summon and examine an expert.

(2) Where the Magistrate directs a local investigation by any person under sub-section (1), the Magistrate may—

(a) furnish such person with such written instructions as may seem necessary for his guidance; and

(b) declare by whom the whole or any part of the necessary expenses of the local investigation shall be paid.

(3) The report of such person may be read as evidence in the case;

(4) Where the Magistrate summons and examines an expert under sub-section (1), the Magistrate may direct by whom the costs of such summoning and examination shall be paid."

Section 140 to 143.

10.7. The reference to section 139 in section 140(1) and the whole section 141 will have to be omitted. No amendment is required in section 142. In section 143, the reference to "any other Magistrate" may be changed to "any other Executive Magistrate".

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[1] 37th Report, para 339(ii).

[2] 37th Report, para. 340.

CHAPTER XI

TEMPORARY ORDERS IN URGENT CASES OF NUISANCE AND APPREHENDED DANGER

Introductory.

11.1. Chapter XI consists of a single, well-known and frequently used section—section 144. This confers an omnibus power on senior Magistrates to issue, what the marginal heading of the section pithily describes as "order absolute at once in urgent cases of nuisance or apprehended danger." The wide range of situations in which Magistrates may resort to this power in the public interest will be apparent from a reading of the second paragraph of sub-section (1). Neither the usefulness of the section nor its validity under the Constitution has been seriously questions. In the earlier Report[1], the Commission proposed only a formal amendment in sub-section (1), an amendment of substance in sub-section (3) and an additional sub-section with reference to sub-section (6).

Section 144(1).

11.2. Sub-section (1) of section 144 now confers power on "a District Magistrate, a Chief Presidency Magistrate, a Sub-divisional Magistrate or any other Magistrate, (not being a Magistrate of third class) specially empowered by the State Government or the Chief Presidency Magistrate or the District Magistrate to act under this section." It should, in our opinion, be quite sufficient to confer power on "a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf." It will be recalled that in matropolitan areas also, there will be Executive Magistrates appointed by the State Government for performing functions under the Code.

Section 144

11.3. As regards sub-section (3), the Commission noticed in the earlier Report[2] the limitations of the expression "to the public generally when frequenting or visiting a particular place" and suggested that there should be a reference to area in addition to place and a reference to people residing in a place or area in addition to people frequenting or visiting a place or area. In view of the different opinions expressed in judicial decisions, sub-section (3) of section 144 requires to be amplified as follows :—

> "(3) An order under this section may be directed to a particular individual, *or to persons residing in a particular place or area*, or to the public generally frequenting or visiting *a particular place or area.*"

Section 144(6).

11.4. Under sub-section (6), an order made under section 144 will not remain in force for more than two months "unless, in cases of danger to human life, health or safety, or a likelihood of a riot of an affray, the State Government otherwise directs." This loosely worded sub-section appears to confer a very wide

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1 37th Report, paras. 353 to 355.

2 37th Report, para. 354 and Appendix 9.

power on the State Government to extend temporary orders made by Magistrates for an indefinite period in certain cases. The sub-section has come in for criticism from the constitutional angle in the High Courts. In the earlier Report[1], the Commission, after discussing these decisions at length, considered it unnecessary to lay down any maximum period for the State Government's directions, but proposed that persons affected by the order should be given a right of representation to the State Government.

Redraft suggested.

11.5. We also agree that it is not necessary to specify any maximum period in sub-section (6), but we propose that it should be re-drafted as follows and placed immediately after sub-section (3) :—

> "(3A) No order under this section shall remain in force for more than two months from the making thereof :
>
> Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or an affray, the State Government may, by notification in the Official Gazette, direct that an order under this section shall remain in force for such longer period as it may specify."

The provisions of sub-sections (4) and (5) will then apply to an order the duration of which has been extended by the State Government under this proviso, as they apply to the original order of the Magistrate. There should be no need for a provision enabling the persons concerned to represent to the State Government.

No amendments are required in the other sub-sections of section 144.

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[1] 37th Report, Appendix 10.

CHAPTER XII

DISPUTES AS TO IMMOVABLE PROPERTY

Introductory.

12.1. Since disputes over land and water, crops and other produce of land and rights of user in respect of immovable property often result in breach of the peace, violence and bloodshed, Chapter XII (sections 145 to 148) arms the magistracy with powers to intervene at an incipient stage of the dispute and compel the disputants to have recourse to legal remedies. Experience over the years has proved the usfulness of the provisions contained in this Chapter of the Code.

Powers to be exercised by Executive Magistrates only.

12.2. At present only District Magistrates, Sub-divisional Magistrates and Magistrates of the first class are competent to take action under section 145 or section 147. In Bombay this power is vested by a local amendment in the Chief Presidency Magistrate, District Magistrates, Sub-divisional Magistrates or other Executive Magistrates specially empowered by the State Government in this behalf. We agree with the recommendation of the Commission in the earlier Report[1] that Judicial Magistrates need not deal with cases of this type. Since in the scheme we are proposing, there will be no Executive Magistrates of the second or third class and metropolitan areas also will have separate Executive Magistrates, it is proposed that all Executive Magistrates may be vested with the power to take action under this Chapter.

Section 145—changes made in 1955.

12.3. When the Code was amended in 1955, important changes were made in sub-section (1) and (4) of section 145 with the object of curtailing the proceedings before the Magistrate and expediting the completion of the inquiry as to which party was in possession of the property. Before 1955 the parties were only required to put in written statements of their claims as respects the fact of actual possession of the subject of dispute and it was for the Magistrate to record at the inquiry all such evidence, oral and documentary, as may be produced by the parties. After the amendment of 1955, the parties are required under sub-section (1) to put in such documents or to adduce, by putting in affidavits, the evidence of such persons as they rely upon in support of their claims; and under sub-section (4), the Magistrate is normally expected to complete the inquiry and reach a conclusion on the basis of these documents and affidavits. The first proviso to sub-section (4) gives him a discretion to summon and examine any person whose affidavits has been put in by a party.

Revised procedure not satisfactory.

12.4. The revised procedure does not appear to have worked satisfactorily in practice. It is said that stereotyped affidavits prepared by lawyers on the same lines as the written statements are put in by both sides and these do not help the Magistrate very much in reaching a sound decision. Examination of witnesses under the first proviso cannot in most cases be avoided and consequently there is no saving of the Court's time. The

[1] 37th Report, para. 357.

main object of the amendment, which is to get the inquiry completed rapidly, has not been achieved. On principle also, it is better that the Magistrate is required to decide the important fact of possession on the basis of oral evidence given before him and tested by cross-examination in the presence of parties. We therefore recommend that the procedure as it existed before 1955 should be restored.

Date for counting period of two months under section 145 (4).

12.5. At the completion of the inquiry under sub-section (4), it is the duty of the Magistrate to decide whether any, and if so which, of the parties was at the date of the order made by him under sub-section (1) in actual possession of the property which is the subject of dispute. If, however, it appears to the Magistrate that any party has, within two months next before the date of this order, been forcibly and wrongfully dispossessed, he may treat that party as if he had been in possession on the date of the order. Sometimes it happens that the Magistrate passes his first order under sub-section (1) some appreciable time after receiving the police-report or other information about the dispute with the result that the two months' limit specified in the proviso does not assist the party wrongfully dispossessed. In the earlier Report[1] the Commission, after examining the case law on the subject, recommended that the period of two months should be counted backwards from the date of receipt of the police-report or other information, instead of the date of making the order under sub-section (1) on the basis of that report or information.

Sub-sections (1) and (4) revised.

12.6. Sub-sections (1) and (4) of section 145 may accordingly be revised as follows :—

"(1) *When an Executive Magistrate* is satisfied from the *report of a police officer* or upon other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof *within his local jurisdiction* he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader on a *specified date and time* and to put in written statements of their respective claims as to the fact of actual possession of the subject of dispute.

"(4) The Magistrate shall than, without reference to the merits or the claims of any of the parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive all such evidence as may be produced by them, take such further evidence, if any, as he thinks necessary, and, if possible, decide whether any and which of the parties was, at the date of the order made by him under sub-section (1), in possession of the subject of dispute :

Provided that if it appears to the Magistrate that any party has been forcibly and wrongfully dispossessed within two months next before the date on which the report of the police officer or other information was received by the

[1] 37th Report, paras. 358 to 362 and 374.

Magistrate, or after that date and before the date of his order under sub-section (1), he may treat the party so dispossessed as if that party had been in possession on the date of his order under sub-section (1)."

New sub-section (5A).

12.7. The third proviso to the existing section 145(4) enables the Magistrate to attach the property if he considers the case to be one of emergency. In the earlier Report[1] the Commission recommended that it should be made clear that the order of attachment could be passed at any time *after the main order* under sub-section (1) had been passed. It further recommended two new sub-sections providing for matters consequential to attachment. We agree that these provisions are necessary but they may be made in one sub-section as follows :—

"(5A) If the Magistrate, at any time after making the order under sub-section (1), considers the case to be one of emergency, he may attach the property which is the subject of dispute, pending his decision under this section, and make such arrangements as he considers proper for looking after the property. The Magistrate may, if he thinks fit, appoint a receiver who, subject to his control, shall have all the powers of a receiver appointed under the Code of Civil Procedure, 1908; and if in any such case the order of the Magistrate under sub-section (1) is cancelled under sub-section (5), the Magistrate shall withdraw the attachment and make such consequential or incidental orders as may be just."

Sub-section (6).

12.8. With reference to sub-section (6) of section 145, the Commission recommended in the earlier Report[2] a specific provision to the effect that the order made under sub-section (6) shall be served and published in the manner laid down in sub-section (3). A sentence to this effect may be added to sub-section (6).

No other amendments of substance are required in section 145.

Section 146—reversion to pre-1955 position recommended.

12.9. Before 1955, the procedure under section 146 was short and simple. If the Magistrate decided that none of the parties was in possession, or if he was unable to satisfy himself as to which party was in possession, then he had the power to attach the property "until a competent court has determined the rights of the parties thereto, or the person entitled to possession thereof". The amendment of 1955 introduced a novel scheme, whereunder in such cases, besides attaching the property, the Magistrate has to draw up a statement of the facts of the case and to forward the record of the proceedings to a competent civil court, for deciding the question of possession. Further, the Magistrate has to direct the parties to appear before a civil court on a date to be fixed by the Magistrate. The object of this amendment was to shorten the overall time taken in the criminal proceedings and the subsequent civil proceedings. The new procedure was examined in the earlier Report,[3] and both theoretical and practical objections were raised. Theoretically the procedure was anomalous, since it contemplated a

[1] 37th Report, para. 375.

[2] 37th Report, para. 387.

[3] 37th Report, paras. 392 to 394.

reference to a civil court as a part of the proceedings in a criminal court. The main object of the proceedings under this Chapter was to take steps for immediately preventing a breach of the peace, and once those steps were taken, the proceedings in the criminal court should come to an end. As regards the practical working of the amendment of 1955, dissatisfaction had been expressed in several quarters. The earlier Report, therefore, recommended restoration of the former position. We are also of the same view.

The section may be revised as follows :—

Power to attach subject of dispute.

"146. (1) If the Magistrate decides that none of the parties was then in such possession, or is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach it until a competent Court has determined the rights of the parties thereto, or the person entitled to possession thereof :

Provided that the District Magistrate or the Magistrate who has attached the subject of dispute may withdraw the attachment at any time if he is satisfied that there is no longer any likelihood of a breach of the peace in regard to the subject of dispute.

(2) When the Magistrate attaches the subject of dispute, he may, if he thinks fit, and if no receiver of property, the subject of dispute, has been appointed by any Civil Court, appoint a receiver thereof, who, subject to the control of the Magistrate, shall have all the powers of a receiver appointed under the Code of Civil Procedure, 1908 :

Provided that in the event of a receiver of the property, the subject of dispute, being subsequently appointed by any Civil Court, the Magistrate—

(a) shall order that the receiver appointed by him shall hand over possession to such receiver and shall thereupon be discharged, and

(b) may make such other consequential or incidental orders as may be just."

Section 147—sub-section (1) revised.

12.10. Section 147 deals with the power of Magistrates to intervene in cases where the dispute is in regard to right of user of any land or water, whether such right is claimed as an easement or otherwise.

Sub-section (1) of section 147 may be revised on the same lines[1] as sub-section (1) of section 145 to read as follows :—

"(1) *When an Executive Magistrate* is satisfied, from *the report of a police officer* or other information, that a dispute likely to cause a breach of the peace exists regarding any alleged right of user of any land or water... within *his local jurisdiction,* whether such right be claimed as an easement or otherwise, he shall make an order in writing, stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend

[1] *See* para. 22.6 above.

his Court in person or by pleader *on a specified date and time* and to put in written statements of their respective claims...

Explanation—The expression "land or water" has the meaning given to it in sub-section (2) *of section* 145."

Sub-section (2) amended.

12.11. In regard to sub-section (2), there is a conflict of decisions as to the scope of the words "prohibiting any interference with the exercise of such right". The Commission, after noting this conflict in the earlier Report,[1] recommended that the position should be clarified so as to empower the Court to order in a proper case, the removal of any obstruction in the exercise of any such right. In the proviso to this sub-section, it was recommended that instead of "three months next before the institution of the inquiry", it should be "three months next before the receipt under sub-section (1) of the report of a police officer or other information." We agree with both these amendments.

New section 147A

12.12. It was noted in the earlier Report[2] that there was a controversy as to whether a proceeding brought under section 145 could be converted into one under section 147, and *vice versa*. The Commission considered it desirable to empower the Magistrate to proceed under whichever section he found to be applicable, irrespective of the view taken at the stage of initiating proceedings. The following new section may be added for this purpose :—

Convertibility of proceedings under section 145 and 147.

"147A. When in any proceedings commenced under sub-section (1) of section 145 the Magistrate finds that the dispute is as regards an alleged right of user of land or water, he may, after recording his reasons, continue with the proceedings as if they had been commenced under sub-section (1) of section 147,

and when in any proceedings commenced under sub-section (1) of section 147 the Magistrate finds that the dispute should be dealt with under section 145, he may, after recording his reasons, continue with the proceedings as if they had been commenced under sub-section (1) of section 145."

Section 148(1).

12.13. In the earlier Report,[3] the Commission recommended the addition of a reference to the Chief Presidency Magistrate in section 148(1) on the assumption that in presidency-towns, the Chief Presidency Magistrate will also function as the Chief Executive Magistrate. Since in the scheme now proposed for metropolitan areas, there will be District Magistrates and Sub-divisional Magistrates as in other districts, no amendment is required in this section.

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[1] 37th Report, para. 398.
[2] 37th Report, para. 401.
[3] 37th Report, para. 402.

CHAPTER XIII

PREVENTIVE ACTION BY THE POLICE

No amendment necessary.

Chapter XIII (sections 149 to 153) contains provisions empowering the police to take action in various ways to prevent the commission of cognizable offences and the causing of injury to any public property, moveable or immovable. Section 153 empowers a station house officer to inspect weights and measures, and if he finds any of them to be false, to seize them.

No changes appear to be necessary in this Chapter.

CHAPTER XIV

INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE

Scheme of Chapter.

14.1. Chapter XIV deals with police investigation in all its aspects from the moment when the information about the commission of an offence is received at the station-house to the stage when the police complete the investigation and send a final report to the Magistrate. A sharp distinction is drawn right at the beginning of the Chapter between cognizable cases and non-cognizable cases. The latter may be investigated by the police only on the orders of a Magistrate. If a person goes to the station-house with a report about a non-cognizable offence, the police-officer has to advise him to lodge a complaint before a Magistrate. If the information indicates the commission of a cognizable offence, investigation can commence without the orders of a Magistrate, but the investigation officer has to send a report about it to the Magistrate. If the offence does not appear to be serious and if the station-house-officer thinks there is no sufficient ground for starting an investigation, he need not investigate but, here again, he has to send a report to the Magistrate who can direct the police to investigate, or if the Magistrate thinks fit, hold an inquiry himself.

During investigation, the police-officer has the power to require the attendance of witnesses before him and to put questions to them which they are bound to answer. He has also the power to send any witness he likes before a Magistrate and have his statement recorded on oath. The police-officer has the power to search any place and seize anything material found at the place. In such a case he must prepare on the spot a list of the articles seized and send a copy of the list to the Magistrate. If as a result of his investigation the police-officer arrests any person, he must have that person presented before a Magistrate within 24 hours and thereafter the custody of the arrested person will be under the control of the Magistrate.

Function of Magistrate during investigation.

14.2. A noticeable feature of the scheme as outlined above is that a Magistrate is kept in the picture at all stages of the police investigation, but he is not authorised to interfere with the actual investigation or to direct the police *how* that investigation is to be conducted. This demarcation of functions between the police and the magistracy at the investigation stage has been clearly laid down by the Privy Council in *Khwaja Nazir Ahmed's* case.[1] It would appear that the power to "direct an investigation" under section 159 should be resorted to by a Magistrate only when he found that the police had desisted from investigation on insufficient grounds and felt that further investigation was likely to produce results. Following the decision of the Privy Council just cited, it has been held by the Supreme Court[2] "that the formation

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1 A.I.R. 1945 P.C. 18.

2 *Abhinandan Jha* v. *Dinesh Mishra*, (1967) 3 S.C.R. 668, 678.

of the opinion as to whether or not there is a case to place the accused for trial is that of the officer-in-charge of the police station and that opinion determines whether the report (on completion of investigation) is to be under section 170, being a 'charge-sheet' or under section 169, a 'final report'." This arrangement seems to us to be basically sound and we do not think there is anything to be gained by giving the Magistrate further powers of supervision and control over the police during investigation.

Section 154—copy of first information report to be given to informant.

14.3. Section 154 regulates the manner of recording the first information relating to the commission of a cognizable offence. After the information has been reduced into writing by the station-house-officer, it has to be read over to the informant and his signature obtained on it. Under the law however the informant is not entitled to get a copy of the report then and there. In some of the States, police rules require a copy of the first information report to be given to the informant. We consider this a healthy practice and propose that it should be placed on a statutory basis by adding the following sub-section to section 154 :—

> "(2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant."

Section 155(1)—no amendment needed.

14.4. Section 155(1) requires that if the information given to a police-officer is about a non-cognizable offence, he must enter the substance of such information in a book and "refer the informant to the Magistrate". In the earlier Report,[1] the Commission recommended that the words "having jurisdiction" should be added after the word "Magistrate". We feel, however, that this addition is not necessary and the amendment will not be of any practical assistance to the informant who will, in any event, have to find out for himself which particular Magistrate has jurisdiction to deal with his complaint.

Case relating to a cognizable and a non-cognizable offence.

14.5. A non-cognizable offence can be investigated by the police on the orders of a Magistrate, and once such an order is given a police officer has in that investigation the same powers as he has while investigating a cognizable offence. Cases often occur when during the investigation of a cognizable offence it appears that a non-cognizable offence also has been committed and the question then arises whether the investigation can proceed without a Magistrate's order. The Commission recommended in the earlier Report[2] that it should be made clear that the investigation can proceed in respect of both offences and suggested adding an explanation to section 155. We entirely agree with this recommendation, but propose a separate section 156A for this purpose as being more suitable. The section may be as follows :—

Case cognizable when it relates to cognizable and non-cognizable offences.

> "156A. *Where a case relates to two or more offences of which at least one is cognizable, the case shall, for the purposes of section 154, 155 and 156, be deemed to be a cognizable case, notwithstanding that the rest of the offences are non-cognizable.*"

Sections 157 to 159.

14.6. Sections 157, 158 and 159 do not call for any comments or amendments.

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[1] 37th Report, para. 413.

[2] 37th Report, para. 415.

Section 160.

14.6a. Under section 160 the investigating police-officer may require the attendance of witnesses before himself. In the earlier Report,[1] the Commission recommended that a witness summoned by the police should be paid his reasonable expenses. We agree and propose the addition of the following sub-section :—

> "(2) Subject to any rules made by the State Government, the reasonable expenses of any person attending in compliance with an order under sub-section (1) at a place other than his residence shall be paid to him by the police."

Sections 161 162—General.

14.7. Sections 161 and 162, dealing with the oral examination of witnesses by the police, the record to be made of their statements and the use to which it may be put subsequently, form the crux of this Chapter. They have attracted a variety of comments and a variety of suggestions. We regret that, in spite of earnest and prolonged discussion, we have not been able to agree among ourselves as to how best these sections could be modified or altered.

Section 161 empowers an investigation officer to examine orally any person acquainted with the facts and circumstances of the case. That person is bound to answer all questions concerning the case except those which tend to incriminate himself. The investigating officer is permitted, but not obliged, to reduce into writing any statement made to him; and if he does so, he must make a separate record of the statement of each witness. Section 162 then says that the recorded statement must not be signed by the witness, and the statement so recorded cannot be used for any purpose other than contradicting the person making it if he appears to give evidence as a prosecution witness.

Discretion to record examination of witness—Commission's former views.

14.8. In a previous Report,[2] the Commission expressed the view that the discretion allowed to a police-officer to record or not to record the statement of a witness orally examined by him is in such unrestricted terms that the whole purpose of section 173 (which requires copies of such recorded statements to be given to the accused) could be defeated by a negligent or a dishonest police-officer. It therefore recommended that the police-officer should be obliged by law to reduce to writing the statement of *every witness whom the prosecution propose to examine at the trial.* This view was accepted in the 37th Report of the Commission,[3] but its recommendation went further to suggest that the statement of *every witness questioned by the police under section 161* must be recorded.

Present view of Commission that discretion should not be fettered.

14.9. It is of course true that the discretion allowed to a police-officer to record, or not to record, any statement made to him during investigation is expressed in absolute terms. Such wide discretion naturally attracts suspicion. We can therefore readily understand why the previous Reports suggested some limitation which would help to guide the exercise of this discretion. When, however, we come to consider the concrete situation with which the law here seeks to deal, we find that there is for practical

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[1] 37th Report, para. 425.
[2] 14th Report Vol. 2, page 755, para. 47.
[3] 37th Report, para. 437(b).

purposes no point in imposing a restriction on the judgment of the investigating officer. The reason is this. A police-officer investigating a crime has to question, and then to examine orally, a large number of persons, many of whom may have no useful information to give and much of the information is later found to be pointless. It would be too great a burden on him if he should be required by law to reduce into writing *every* statement made to him; nor would it serve any purpose apart from distracting attention from the main task.

It was for this reason, we think, that the Law Commission suggested, in the earlier Report[1], that the statement of only those persons whom the prosecution proposed to produce at the trial need be recorded. Even this requirement seems to us to be unworkable. The investigator does not always know what the result of his investigation is going to be; nor does he necessarily know who will be produced at the trial. The proposed guide line is not therefore a helpful guide, and we would hesitate to suggest it as such. Our view is that there is no need to place any fetter on the discretion of the police-officer at the stage of investigation.

This discretion is, in practice, not capable of being abused, nor have we heard any complaint that it is being abused. There has been no lack of complaint that the record prepared by the investigating officer is not accurate, but no serious complaint that the statements of material witnesses are not recorded. Here again, we think the reason is simple. A police-officer can, without contravening the law, omit to record the statement of every important witness orally examined by him, but such an officer will not, we think, stay long in the police force. His superior officers will, in every case, see to it that his reports are informative enough for them to judge how the investigation is proceeding. Any apprehension, therefore, that because of negligence or dishonesty a police-officer may misuse his discretion in this connection, does not appear well-founded in practice, however plausible it may appear on theoretical considerations. We feel it is better to leave it to the investigating officer to record only what, in his judgment, is worth recording and leave the rest to departmental instructions and supervision. The permissive and discretionary provisions now contained is section 161 ["may examine orally" in sub-section (1) and "may reduce into writing" in sub-section (2)] should not be fettered down in any way.

Section 161(2)—witness bound to answer truly?

14.10. Sub-section (2) of section 161 requires every person examined by the police-officer to answer every question put to him. The sub-section, however, avoids saying that the person examined must answer those questions "truly". There is, thus, at that stage, no legal obligation to speak the truth as there is later in Court. The reason for this curious attitude of the law in this respect was explained by the Select Committee in 1898 in these words[2] :—

> "We have amended that clause by reverting to the law as it stood under the Codes of 1861 and 1872. Under these Codes a person examined by a police-officer was bound to

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[1] 14th Report, Vol. 2, page 755, para. 47.

[2] Report of the Select Committee dated 16-2-1898.

answer all material questions, but[1] was not liable to be prosecuted for giving false evidence in respect of his answers under sections 193 of the Indian Penal Code. It seems to us unfair that a man should be liable to be convicted of giving false evidence on the strength, or by the aid, of a statement supposed to have been given to a police-officer, but which is not given on oath, which he has not signed and which he has had no opportunity of verifying. Such statements may be hurriedly taken down as rough notes, as the police-officer is not trained in taking evidence, and the notes are often faired out by another officer. They bear no resemblance to depositions and ought to have no weight as such attached to them. We are aware that there are inconveniences in abolishing the direct liability for giving false evidence to the police, but the balance of expediency seems to us to be in favour of the old law. The provisions of sections 202 and 203, Indian Penal Code, appear to us to afford a sufficient safeguard against false information."

The Law Commission dealt with this matter in a previous Report[2] and, although feeling that the absence of the word "truly" virtually suggests that the "version of the witnesses need not be the true one", still thought that going back to the position as in 1882 was not wholly desirable as it might lead to numerous prosecutions of witnesses for making false statements to the police. The same view was accepted by the Commission in the 37th Report[3].

We recognise that a legal obligation to speak the truth carries with it the liability to punishment if the truth is not spoken. We think, however, that this is how it should be. If it is necessary to provide that information must be supplied by every person questioned by the police, the law must also require that the information is not false or misleading. There seems no point in saying to every citizen in clear terms that he must answer every question put to him by the police but need not tell the truth.

We are, in this connection, not unmindful of the practical aspect of the matter. In the Legislature's mind in 1898 the apprehension was that prosecutions for making a false statement to the police might be numerous and they would be unfair if based mainly on the police record of the statement, which record will not have been prepared with great care. We do not know if this had actually happened during the years 1882 and 1898; but we have no reason to think that it would happen in 1969. Prosecutions for giving false evidence in Court are rare enough, and their successful termination rarer still. The same reasons will operate more effectively to inhibit prosecutions for making false statements to the police.

The Delhi Police Commission headed by a retired Chief Justice has suggested[4] that the word "trully" should be put back

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[1] See *Kassim Ali*, (1879) I.L.R. 7 Cal. 121 and I.L.R. 10 Cal. 405.

[2] 14th Report, Vol. 2, Page 752, para. 44.

[3] 37th Report, para. 435 and Appendix 11.

[4] Report of the Delhi Police Commission, (1968), Vol. 1, page 175, paras. 27-28.

in section 161. Similarly, a recent Seminar[1] on Criminal Law which, although organised by a wing of the police, was attended by a number of judges and jurists from all over the country, made the same recommendation. We strongly feel that the law should not be so framed as to give the impression that a person appearing before a competent authority is free to tell lies. We, therefore, propose that in section 161(2), the word "truly" be inserted after the words "bound to answer."

Section 162 (1)—statement to be signed by literate witness.

14.11. Section 162(1) first lays down the prohibition that "no statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it." In the 14th Report[2], the Law Commission recommended that literate witnesses should be required to sign their statements. In the 37th Report[3], the Commission did not favour such a change. We feel, as did the earlier Law Commission, that such a provision would be a step in the right direction. There is no reason why a witness able to read the record of his statement should not sign it in token of its accuracy and we recommend, therefore, that a witness who can read his statement as recorded by the police should be required to sign it.

Section 162(1)—use of statements in evidence.

14.12. The second part of section 162(1) is controversial and has been so for a long time[4]. It provides that no statement of a witness to the police, or any record thereof whether in a police-diary or otherwise, or any part of such statement or record, shall be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of the offence under investigation, but when that witness is called for the prosecution in such inquiry or trial, any part of the statement if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872.

It is this provision that is freely used during criminal trials. A prosecution witness is confronted with his police statement and if the two are contradictory, the witness is discredited unless the contradiction is explained. In principle, the procedure is sound. We have, however, heard complaints that the police record of a witness's statement is often inaccurate and that a dishonest police-officer can write anything he likes. The real remedy for that, we think, lies in improving the calibre of the investigating officer. We have heard it said that subordinate police-officers who investigate most of the cases are universally corrupt, and there is little chance of improving them in this respect. A suggestion has even been made that the police should be relieved of the task of investigation which should be entrusted to some other agency[5]. We can find nothing practical about this suggestion. Any agency working under conditions similar to the police will be subject to the same temptations and will develop

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[1] Seminar on Criminal Law and Contemporary Social Change (8th to 10th May, 1969—New Delhi) Report of Study Group D.

[2] 14th Report, Vol. 2, pages 752 to 755, paras. 45 to 47.

[3] 37th Report, para. 437(c).

[4] *See* 37th Report, Appendix 11 which traces history of section 162.

[5] The suggestion was put forth before us during our consideration of the subject by one of the Members.

the same weaknesses. Nor need we despair of any improvement in the police force. We should, on the other hand, hope that with advance of literacy and improvement in the general standard of living, a public opinion will be created wholly intolerant of corruption, and with improvement in the working conditions of the subordinate police, corruption will gradually disappear.

Suggestions regarding section 162 considered.

14.13. Except for the purpose mentioned in the proviso, section 162(1) prohibits the use of a statement made to the police during investigation. Two rival suggestions have been made in this connection. One is that the ban imposed by section 162 should be removed and the police record made available for all purposes, subject to the rules in the Evidence Act. In other words, the suggestion is that the statement should be available not only for contradicting the witness, but also for corroborating him[1]. The rival suggestion is that statements to the police should be totally unusable for any purpose and the proviso to section 162 should be deleted[2].

It seems to us that there are serious difficulties in the way of accepting either suggestion and neither offers any substantial improvement in the existing situation. A total ban on the use of police statements would deprive the defence of an opportunity to discover what a particular witness said at the earliest opportunity. To get over the difficulty, it is suggested that the statement of every "material witness" should be recorded by a Magistrate under section 164, and that this statement would be available to the prosecution as well as defence. It is clear, however, that the statement before a Magistrate would not be the earliest statement, but made some time after the witness had been examined by, and made a statement to, the police. The time lag between the two statements may sometimes be considerable and is liable to be used for improving upon the first statement. It seems to us that the statement under section 164 would not be a good substitute for the statement before the police.

Secondly, the practical difficulties of getting the statement of every material witness recorded by a Magistrate would be considerable. A police-officer would have to interrupt his investigation every time he came across a material witness in order to take him to a magistrate; or else, he would have to wait till the end of the investigation and produce all the material witnesses before a magistrate, possibly several days after some of the witnesses actually appeared before the police. Neither situation strikes us as satisfactory. Our courts have steadily discouraged the use of section 164 for recording statements of some witnesses during investigation. We doubt if, by making its use compulsory in all cases or in a certain class of cases, we would be making any improvement.

The alternative suggestion seems, at first sight, less difficult. Police statements are, at present, available for contradicting a witness, and to make them available for corroborating the same witness seems merely to complete the picture. Actually, how-

[1] Seminar on Criminal Law and Contemporary Social Changes. (8th to 10th May, 1969—New Delhi) Report of Study Group D.

[2] This is linked with the suggestion that the statements should be recorded under s. 164. *See* note appended to this Report.

ever, there is a material difference between contradiction and corroboration; and what is good enough for contradicting a witness is not always good enough for corroborating him. It is obvious that if a witness says one thing at one time and another at another time, it is *prima facie* good ground for distrusting him; but if a witness says the same thing every time he is questioned, the reason for trusting him is not so obvious: many liars are consistent. The policy of law in permitting a witness to be contradicted by a police statement and not permitting him to be corroborated by the same statement is basically sound and sensible. On the other hand, there seems to be considerable risk (in the existing circumstances) in extending the scope of the proviso along the suggested lines.

We are, therefore, not attracted by either proposal; and, apart from the change we have suggested above in regard to the first part of section 162(1), we are content, like the previous Law Commission[1], to leave the substance of the second part and proviso unchanged[2].

Section 162(1)—Contradiction by prosecution of its own witness.

14.14. Before 1955, the statement of a witness to the police could be used for contradicting him only by the defence and only if he appeared for the prosecution. The section was amended in 1955 by adding that a witness appearing for the prosecution could also be confronted with his statement to the police at the instance of the prosecution, but only with the permission of the Court. The intention is that, if a prosecution witness is won over by the other side, it can be shown that he is not trustworthy as he had earlier made a different statement. In the Fourteenth Report[3], the Law Commission commented on this change and said that it could not serve any useful purpose. The Commission, however, did not then recommend any change, and we too are not recommending any change.

We have also considered another suggestion[4] that a defence witness should be allowed to be contradicted by his statement to the police. With respect, we do not think it would be desirable to allow a witness to be contradicted by a record prepared by the opposite party. The Commission took the same view in the earlier Report[5].

14.15. In the light of the above discussion, we propose that section 161(3) and the main paragraph of section 162(1) be amended as follows:—

> "161. (3) The police-officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate *and true* record of the statement of each such person whose statement he records, *and where the person can read the statement so recorded, obtain his signature thereon after he has read it.*

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[1] *Cf.* 37th Report, discussion as to section 162.

[2] Two of us Shri R. L. Narasimham and Shri S. Balakrishnan, do not agree with this view. Their suggestions for amending Chapter XIV of the Code are set out in a Note appended to this Report.

[3] *See* observations in *Laxman* v. *Kalu* A.I.R. 1968 S.C. 1390.

[4] 14th Report, Vol. 2, page 753, para. 45.

[5] 37th Report, paras. 450 and 451 and Appendix 12.

162. (1) No statement made by any person to a police-officer in the course of an investigation under this Chapter,... no record thereof, whether in a police diary or otherwise, and no part of such statement or record, shall be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made."

Section 163.

14.16. Section 163(1) contains a direction to police officers and other persons in authority not to offer any such inducement, threat or promise as is mentioned in section 24 of the Evidence Act. Sub-section (2) then says that such persons in authority need not by any caution or otherwise prevent any voluntary statement being made by any person, implying that a caution is not necessary to a person making a confession. Then comes section 164 which mentions the elaborate precautions that should be taken by a magistrate before recording a confession and that includes a caution and a warning. It has been judicially observed that the provisions in section 163(2) and section 164(3) are not in harmony. In the earlier Report,[1] the Commission had consequently recommended that it should be made clear that section 164 over-rides this implication of section 163(2). We agree and propose that the following proviso should be added to section 163(2) :—

"Provided that nothing in this sub-section shall affect the provisions of sub-section (3) of section 164."

Section 164.

14.17. Under section 164(1) at present, any Presidency Magistrate or Magistrate of the first class and any Magistrate of the second class empowered by the State Government is competent to record confessions and statements during investigation. We agree with the recommendation in the earlier Report[2] that only judicial magistrates should have these powers. We think, however, that after separation of the judiciary all second class magistrates could be trusted to exercise their powers and no special empowerment by the State Government or by the High Court would be necessary.

The earlier Report[3] considered the question whether statements recorded under section 164 should be on oath or not and recommended that they should be. The actual practice, we understand, varies; but it would certainly be proper if such statements were always made on oath and this should be expressly provided in the section itself.

By way of drafting improvement, we propose a re-arrangement of the provisions put together in sub-sections (2) and (3) of section 164. The sectio nmay be revised to read as follows :—

Recording of confessions and statements.

"164. (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an

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[1] 37th Report, para. 460.

[2] 37th Report, paras. 461 to 464.

[3] 37th Report, para. 466. *See* also 28th Report on the Oaths Act, pages 29, 30.

investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial.

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) Any such confession shall be recorded in the manner provided in section 364 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect :—

'I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B.
Magistrate.'

(4) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.

(5) A Magistrate recording a statement under this section shall do so in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case, *and shall have power to administer oath to the witness whose statement is recorded.*"

Sections 165 and 166.

14.18. When a police officer decides to search a place during investigation, he has to record his reasons: and if any articles are seized, he must prepare a list. Copies of the records thus prepared have to be sent to a magistrate at once, and sub-section (5) of section 165 further provides that the "owner or occupier of the place searched shall on application be furnished with a copy" of the same by the magistrate. The cost of the copies is to be ordinarily paid by the owner or the occupier. We agree with the recommendation in the earlier Report[1] that such copies should be furnished free of cost and propose that in section 165(5) and in section 166(5), after the word "furnished", the words "free of cost" be inserted.

Section 167.

14.19. Section 167 provides for remands. The total period for which an arrested person may be remanded to custody—police or judicial—is 15 days. The assumption is that the investigation must be completed within 15 days, and the final report under section 173 sent to court by then. In actual practice, however, this has frequently been found unworkable. Quite often, a complicated investigation cannot be completed within 15 days, and if the offence is serious, the police naturally insist that the accused be kept in custody. A practice of doubtful legal validity

[1] 37th Report, paras. 473 and 476.

has therefore grown up. The police file before a magistrate a preliminary or "incomplete" report, and the magistrate, purporting to act under section 344, adjourns the proceedings and remands the accused to custody. In the Fourteenth Report,[1] the Law Commission doubted if such an order could be made under section 344, as that section is intended to operate only after a magistrate has taken cognizance of an offence, which can be properly done only after a final report under section 173 has been received, and not while the investigation is still proceeding. We are of the same view, and to us also it appears proper that the law should be clarified in this respect. The use of section 344 for a remand beyond the statutory period fixed under section 167 can lead to serious abuse, as an arrested person can in this manner be kept in custody indefinitely while the investigation can go on in a leisurely manner. It is, therefore, desirable, as was observed in the Fourteenth Report, that some time limit should be placed on the power of the police to obtain a remand, while the investigation is still going on: and if the present time limit of 15 days is too short, it would be better to fix a longer period rather than countenance a practice which violates the spirit of the legal safeguard. Like the earlier Law Commission, we feel that 15 days is perhaps too short, and we propose therefore to follow the recommendation in the Fourteenth Report that the maximum period under section 167 should be fixed at 60 days. We are aware of the danger that such an extension may result in the maximum period becoming the rule in every case as a matter of routine[2]: but we trust that proper supervision by the superior courts will prevent that. We propose accordingly to revise sub-sections (2) and (4) of section 167 as follows :—

"(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not *exceeding fifteen days at a time and sixty* days in the whole. If he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction :

Provided that—

(a) *no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;*

(b) *no Magistrate of the second class not specially empowered in this behalf by the High Court shall authorise detention in the custody of the police.*

(4) *Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.*"

14.20. The Thirty-seventh Report[3] did not propose any material alteration in sections 168 to 172; nor do we. Only one

Sections 168 to 172.

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[1] 14th Report, Vol. 2, pages 758-760, paras. 53 to 56.

[2] *Cf.* 37th Report, paras. 477, 478.

[3] *See* 37th Report, paras. 485 to 497.

suggestion needs to be noticed[1]. It is that the police diaries which under section 172 a court can send for and look at should be open to inspection by an accused person. We are unable to accept the sugestion, as it would dteer informers conveying information to the police and hamper speedy investigation. It is clear that under the law, as it is, all relevant statements recorded by the police are handed over to the accused, and nothing else is necessary.

Section 173—supply of copies of documents to accused.

14.21. Section 173 requires every investigation to be completed without delay, and on completion the police officer must send to the proper magistrate a report in a form prescribed by the State Government, mentioning the particulars of the offence and of the accused and of the witnesses, apart from certain other matters. Further, the section provides that after sending such a report and, in any case, before the inquiry or trial starts in court, the police officer must furnish the accused certain documents, such as copies of statements of witnesses to be produced at the trial, copies of documents to be relied upon by the prosecution and copies of any confession made during investigations. There has been a lot of complaint that these copies are not furnished in time in most cases, causing much avoidable delay. Also, we were told at nearly every place we visited that these copies prepared by the police are hardly legible, and nearly every time an adjournment beocmes necessary to neable defence counsel to obtain legible copies. The copies are hurriedly prepared by hand in most cases. It is possible that police officers whose statutory duty it is to prepare and hand over the copies to the accused are not adequately equipped for the purpose, and the extra work involved has not led to a proportionate increase in the staff. It would, we think, be much simpler if the statutory duty is shifted from the police to the magistrate taking cognizance. He would then be in a better position to ensure that the case in court is not held up for want of proper copies and also to ensure that legible copies are furnished.

Where documents are voluminous, inspection should suffice.

14.22. It has at times been found that documents relied upon by the prosecution are too voluminous to be copied out or even their extracts prepared. This difficulty has been felt particularly by the Central Bureau of Investigation while investigating complicated cases of commercial fraud where a large number of account books have to be produced in evidence. In the earlier Report,[2] the Commission recommended that in such circumstances, and subject to the orders of a competent court, the documents may be made available for inspection by the accused. We agree that this should be provided.

Re-opening of investigation.

14.23. A report under section 173 is normally the end of the investigation. Sometimes, however, the police officer after submitting the report under section 173 comes upon evidence bearing on the guilt or innocence of the accused. We should have thought that the police officer can collect that evidence and send it to the magistrate concerned. It appears, however,[3] that courts have

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[1] Suggestion considered and not accepted in 37th Report, paras. 492 to 497.

[2] 37th Report, para. 506(b).

[3] *See* 37th Report, para. 499 (Reviews case-law).

sometimes taken the narrow view that once a final report under section 173 has been sent, the police cannot touch the case again and cannot re-open the investigation. This view places a hindrance in the way of the investigating agency, which can be very unfair to the prosecution and, for that matter, even to the accused. It should be made clear in section 173 that the competent police officer can examine such evidence and send a report to the magistrate. Copies concerning the fresh material must of course be furnished to the accused.

Section 173 revised.

14.24. We propose that section 173 should be revised as follows :—

Report of Police officer on completion of investigation.

"173. (1) Every investigation under this Chapter shall be completed without unnecessary delay.

(2) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police—report a report, in the form prescribed by the State Government, stating—

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) *whether any offence appears to have been committed, and if so, by whom;*

(e) *whether the accused has been arrested;*

(f) *whether he has been released on his bond under section* 169, *and, if so, whether with or without sureties;*

(g) whether he has been forwarded in custody under section 170.

The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under section 158, the report shall, in any cases in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of hte Magistrate, direct that officer in charge of the police-station to make further investigation.

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(5) *When such report is in respect of a case to which section* 170 *applies, the police-officer shall forward to the Magistrate along with the report—*

(a) all documents or relevant extracts thereof on which the prosecution proposes to relv *other than those already sent to the Magistrate during investigation;* and

(b) the statements recorded under...section 161 of all persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any *such statement* is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall *indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.*

(7) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate. Where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (5) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report under sub-section (2)."

Section 174 to 176.

14.25. Section 174 provides for an inquest by the police in certain circumstances, and section 175 empowers a police-officer holding an inquest to summon two or more persons for the purpose. Every person questioned at the inquest is bound to answer truly the questions put to him. In the earlier Report[1] the Commission has suggested the deletion of the word "truly", as it does not occur in section 161. Since we are now proposing to insert[2] that word in section 161, it need not be taken out of section 176. In certain circumstances the inquest must be held by a magistrate and these are mentioned in section 176. We agree with the recommendation in the earlier Report[3] that before holding the inquest the magistrate must inform the near relatives of the deceased so that they may, if sufficiently interested, attend the hearing. The following sub-section may be added to section 176 :—

"(3) Where an inquiry is to be held under this section, the Magistrate shall, wherever practicable, inform such of the near relatives of the deceased whose names and addresses are known, and shall allow them to remain present at the inquiry.

Explanation—In this sub-section, the expression 'near relatives' means parents, children, brothers, sisters and spouse."

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[1] 37th Report, para. 519.

[2] *See* para. 14.10 above.

[3] 37th Report, para. 522.

CHAPTER XV

JURISDICTION OF CRIMINAL COURTS IN INQUIRIES AND TRIALS

A.—Place of inquiry or Trial.

Introductory—"Venue" in English common law.

15.1. Sections 177 to 189 lay down general principles for determining which shall be the proper Court to inquire into or try an offence. Following the old rule of English common law pertaining to the "venue" of a trial section 177, provides that every offence shall ordinarily be inquired into and tried by a court within the local limits of whose jurisdiction the offence was committed. In England this territorial principle of criminal law was closely connected with the institution of the grand jury who, as neighbours, gave their testimony concerning crimes committed in the locality. "Venue", as a term of law, originally meant the place where the jury was summoned to come for the trial of a case; and the jurors had to be from the same parish or neighbourhood where the crime had tken place. Apart from the fact that material witnesses might be expected to be available in that locality and consequently it would be convenient both to the prosecution and to the defence if the trial took place there, the sense of social security was better maintained by requiring the dispensation of criminal justice to be done in the vicinity of the crime.

Recent legislation in England as to venue.

15.2. Recent legislation, like the Indictments Act of 1915, the Criminal Justice Act of 1925, and the Magistrates' Courts Act of 1952, has, however, largely modified the common law rule in England. It is no longer necessary that the venue should be in the county or place where the indictable offence has been committed. Since the passing of the Criminal Justice Act, 1925, a person charged with an indictable offence may be proceeded against in any county or place in which he has been apprehended, or is in custody on a charge of the offence, or has appeared in answer to summons lawfully issued charging the offence, as if the offence had been committed in that county or place. For all purposes incidental to, or consequential on, the prosecution, trial or punishment of the offence, it is deemed to have been committed in that county or place.

Venue rules desirable in Indian conditions.

15.3. We do not think, however, that the rules relating to the proper place of inquiry and trial contained in this chapter should be dispensed with. Considering the size of the country, the distance of courts from the place of crime and difficulties of transport in the interior, it is, in our view, desirable that the inquiry and trial should ordinarily take place in the vicinity of the crime and some venue rules must be provided in the Code.

General rule in section 177 not exclusive.

15.4. As the word "ordinarily" used in section 177 of the Code indicates, the general rule laid down in this section is neither exclusive nor peremptory. In the subsequent sections alternative venues for inquiry and trial are provided for in regard to certain types of offences. Barring section 178 which empowers the State

Government to supersede the normal rule in regard to certain sessions trials, the other provisions supplement that rule and either authorise certain venues different from the place of commission of the offence even where it is known or can be determined, or authorise different venues where the place of commission of the offence is *prima facie* not determinable.

Some offences triable where accused is found.

15.5. A few offences of a predatory character like thuggery and dacoity are made triable by any court within whose local jurisdiction the offender may be found. The venue for an offence committed outside India is also naturally any place within India where the accused may be found according to section 188. Similar provisions constituting an exception to the general rule are to be found in some special laws e.g. section 7 of the Foreign Recruiting Act 1874, section 134(1) of the Railways Act 1890, Section 66 of the Inland Steam-vessels Act, 1917, and section 5 of the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948.

Charges in territorial jurisdiction of courts.

15.6. The rule laid down in section 177 has come up for consideration by the courts in connection with charges in the territorial jurisdiction of a court taking place after it has taken cognizance of an offence. Where such a charge was due to the transfer of territory from a British Indian Province to an Indian State,[1] or from one district in a Province to another district,[2] or from one State in the Union of India to another State[3], the Courts have held that it does not affect the jurisdiction of the court to continue to deal with the offence of which it has taken cognizance. In the case of transfer of territory from one State to another which could only be effected by an Act of Parliament, express provision is usually to be found in the Act itself in regard to the pending cases affected by the transfer. We do not consider that any general provision is necessary in the Code for this purpose.

Meaning of "ordinarily" explained by Supreme Court.

15.7. The rule is one of general application and governs all trials held under the provisions of the Code, including trials of offences punishable under local or special laws. It has been held by the Supreme Court[4] that, although the section uses the word "ordinarily", it means the same as except where otherwise provided in the Code itself or other law. The Court observed :—

> "There is no doubt that the State Legislature is competent to provide for the trial of offences created by its statutes otherwise than is prescribed by section 177 of the Code; but it must appear from the relevant provision of the special statute that a departure from the general principle prescribed by section 177 is intended."

In view of this ruling, it does not seem necessary to alter the wording of the section with a view to making it more definite and precise.

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[1] *Emp.* v. *Saheb Din* (1911) 12 Cr. L.J. 470;
Emp. v. *Ram Naresh*, (1911) I.L.R. 34 All. 188;
Emp. v. *Ganga*, (1912) I.L.R. 34 All. 45.

[2] *Emp.* v. *Saveruddin*, I.L.R. (1938) 2 Cal. 357.

[3] ..... I.L.R. (1952) Punj. 186.

[4] *Narumal* v. *State of Bombay*, A.I.R. (1960) S.C. 1329 at p. 1332.

Section 178.

15.8. Section 178 empowers the State Government to direct that any cases or class of cases committed for trial in any district may be tried in any sessions division. Now the combined effect of sections 177 and 206 is that a magistrate inquiring into an offence committed in his district has to commit the offender for trial to the Court of Session within whose jurisdiction that offence was committed, that is to say, the Court for the sessions division which comprised his district. But if there is a direction of the State Government under section 178 applicable to a particular case, it becomes triable in such other sessions division as is specified in the direction.

Extraordinary power seldom used.

15.9. Although this provision concerning an extraordinary power on the State Government has been in the Code since the beginning, it appears that occasion for its use has been rare. One instance,[1] apparently the latest, which came to our notice was a direction issued in 1951 by the Government of Uttar Pradesh to the effect "that all Special Police Establishment cases committed to the Court of Session in any district in Uttar Pradesh shall be tried in the Lucknow Sessions Division". At the same time the State Government found it necessary to give a supplementary direction under[1] sub-section (2) of section 193 (*sic*) of the Code that the Sessions Judge of Lucknow was to be an Additional Sessions Judge for all other sessions divisions in the State. This was apparently because while the first direction enabled the cases to be tried *in* the Lucknow sessions division, as provided for in section 178, it was not sufficient to confer jurisdiction on the sessions court of that division to try the cases. Strictly interpreted section 178 would not be sufficient authority for a magistrate to commit a case of the specified class for trial to the Court of Session for the specified sessions division.[3]

Retention recommended.

15.10. The power conferred by section 178 is an extraordinary power intended to be used only when some consideration of public interest (*e.g.*, maintenance of public order during the trial of a sensational case) justifies the holding of a sessions trial in a different sessions division. We have, after due consideration, come to the conclusion that, despite its infrequent use and seemingly arbitrary character, the provision should remain in the Code. Although the section is expressed to override only section 177, it is obviously intended to override also the other venue provisions and should be placed later after section 184.

Amendment of proviso.

15.11. In the proviso, the references to section 15 of the Indian High Courts Act, 1861, section 107 of the Government of India Act, 1915, and section 224 of the Government of India Act, 1935, are obsolete and should be omitted. The references to article 227 of the Constitution and section 526 of the Code do not exhaust the legal provisions under which the High Court could issue directions of the same nature. It is also necessary to cover

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[1] *Haridas Mundhra* v. *The State of U.P.*, A.I.R. 1959, All. 82.

[2] This citation, taken from the judgment appears to be erroneous. Sub-section (4) of section 9 is the relevant provision.

[3] *Queen Empress* v. *Nga Tha Moung*, (1884) I.L.R. 10 Calcutta, 643.

the possibility of previous directions issued by the Supreme Court. We recommend that the proviso may read :—

"Provided that such direction is not repugnant to any direction previously issued by the High Court *or the Supreme Court under the Constitution, this Code or any other law.*"

Sections 179, 180 and 182—formal amendments proposed.

15.12. Sections 179, 180 and 182 (somewhat illogically separated by section 181 dealing with particular offences) enumerate a few general principles for determining the venue for inquiry or trial in the case of certain kinds of offences with reference to their nature and characteristics. The first two sections adopt different wording to express the same idea for which there does not appear to be any need or justification. Thus in section 179 there is no need to refer to any person who is accused of the commission of an offence when the intention is to describe the kind of offence, as is done in section 180. Then, while section 179 simply says "such offence may be inquired into or tried", section 180 refers to "a charge of the first mentioned offence". We recommend that these verbal discrepancies should be removed and the wording of the two sections assimilated as follows —

"179. When *an act is an offence* by reason of *a* thing which has been done and of *a* consequence which has ensued, *the* offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued.

180. When an act is an offence by reason of its relation to *another* act which is also an offence or which would be an offence if the doer were capable of committing an offence x x x the first mentioned offence may be inquired into or tried by a Court within whose local jurisdiction either act was done."

section 181(1).

15.13. Section 181 consists of four sub-sections, each dealing with a group of offences under the Indian Penal Code and prescribing the venue for the inquiry and trial. Sub-section (1) covers the offences of being a thug, being a thug and committing murder or rather murder committed by a thug, dacoity, dacoity with murder, belonging to a gang of dacoits and escaping from custody, and lays down that any of these offences may be inquired into or tried by a court within the local limits of whose jurisdiction the person charged is. It is noticeable that, differing from the other three sub-sections, sub-section (1) does not expressly mention the place of commission of the offence as an alternative venue, but obviously the intention is not to exclude that venue. In fact, the rules laid down in sections 177 to 184 are not mutually exclusive but cumulative in effect and intended to facilitate the prosecution of offenders by providing a wider choice of courts for initiating the inquiry or trial. Though no practical difficulty has arisen in the application of sub-section (1) of section 181 by the absence of a reference to the place of commission of the offence, it is desirable for the sake of consistency to introduce it in this sub-section also. The sub-section may be revised to read :—

"(1) *Any* offence of being a thug, *of murder committed by a thug,* of dacoity, of dacoity with murder of *belonging*

to a gang of dacoits, or of *escaping* from custody may be inquired into or tried by a Court within whose local jurisdiction the *offence was committed or the accused person is found.*"

Section 181(2).

15.14. Sub-setion (2) of section 181 indicates the possible venues for the offences of criminal misappropriation of property and criminal breach of trust. Besides the local area where the offence was committed the venue may be laid in any area within which the property which was the subject of the offence was either received or retained by the accused person.

Breach of trust—two types.

15.15. As defined in section 405 of the Indian Penal Code, the offence of criminal breach of trust may be one of two types. The first occurs when the trusted person dishonestly misappropriates or converts to his own use the property in question; and the second, when he dishonestly uses or disposes of that property in violation of :—

(a) any direction of law prescribing the mode of discharge of the trust, or

(b) any legal contract, express or implied, which he has made touching the discharge of the trust.

The place of commission of the offence in the first type is the place where the accused dishonestly misappropriate the property or converted it to his use, and in the second type, it is the place where he dishonestly used or disposed of the property in violation of law or contract.

Place where offence is committed often doubtful.

15.16. Doubt exists in many cases as to the exact manner, point of time and place where the dishonest misappropriation, conversion, use or disposal was effected. Since these matters are within the special knowledge of the accused, the complainant is unable to adopt the jurisdiction with which the offence has been committed. Though no such doubts ordinarily arise in regard to the place or places where the property in question was received or retained by the accused, these places are not always suitable for launching the prosecution.

Place of accounting as venue.

15.17. The question has accordingly arisen in a number of reported cases whether these offences can be inquired into or tried by a court within whose jurisdiction the accused was bound, by law or contract, to render accounts or to return the entrusted property but failed to discharge that obligation. The decisions of High Courts on this point are conflicting.

Calcutta view.

15.18. In an early Calcutta case,[1] Mukerji J. of the Calcutta High Court took the view :—

> "If there is a contract that the accused is to render accounts at a particular place and fails to do so as a result of his criminal act in respect of the money, he can, without unduly straining the language of the section, be said to dishonestly use the money at that place as well in violation of the express contract and

[1] *Gunananda Dhone* v. *Santi Prakash Nandy*. A.I.R. 1925 Cal. 615.

so commits the offence of criminal breach of trust at that place also."

In a later case[1], Rankin C.J. of the same High Court dissented from this view in the following terms :—

> "I am bound to say that, while I must appreciate the great convenience that will arise if this view is accepted, I doubt extremely whether the learned Judge is right in saying that this does not unduly strain the language of section 405, I.P.C.******The fact that a man fails to account in Calcutta does not seem to me to be the same thing as that he honestly uses the money in Calcutta or that he dishonestly disposes of the money in Calcutta."

At about the same time two other Judges of the Calcutta High Court, relying more on the English common law rule relating to the venue for cases of embezzlement than on the Code, held[2] :—

> "If there is evidence apart from the fact of non-accounting to show where the misappropriation was committed, the venue must be laid either in that place or in the place where the property was received or retained. If there is no evidence to show where the misappropriation was committed other than the fact of non-accounting, then the venue may be laid in the place where the accused failed to account, because that is where the offence was committed within the meaning of section 181(2)."

Bombay view.

15.19. In *re Jivandas Savchand*,[3] a full Bench of the Bombay High Court came to the conclusion that section 179 of the Code has no application at all to cases of criminal breach of trust and also completely dissented from the views taken by the Calcutta High Court in *Gunanda Dhone's* case. Beaumont C.J. stated :—

> "With very great respect to the learned Judges who decided that case, I am quite unable to follow the line of reasoning. It seems to me to involve a confusion between the place where the offence was committed and the place where the complainant first acquired evidence that the offence had been committed. I can see nothing in section 405 of the Indian Penal Code to justify the contention that when a man in Rangoon delivers false accounts in Bombay, he is thereby making a dishonest use in Bombay of money or property which has never left Rangoon."

Allahabad view.

15.20. In a somewhat later case,[4] Sulaiman C.J. and Bennet J. of the Allahabad High Court came to the following conclusion :—

> "Where there is a violation of a direction of law or a legal contract, the proof of that violation may be by negative evidence that the direction of law or the contract

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[1] *Pascal* v. *Raj Kishore Mathur*, A.I.R. 1951 Cal. 521.
[2] *Paul De Flonder* v. *Emp.* A.I.R. 1931 Cal. 523.
[3] A.I.R. 1930 Bom. 490.
[4] *Mohru Lal* v. *Emp.* A.I.R. 1936 All. 193.

has not been fulfilled. We are of opinion that where the direction of law or the contract required that the accused should dispose of the property at a particular place, then the court having jurisdiction at that place will have jurisdiction to try the offence of the second part of section 405 of the Indian Penal Code where there is a charge that the accused has failed to comply with the direction of law or the legal contract and has failed to carry out his duty at that place. Where it is alleged that the accused has failed to account for the property, then the second part of section 405 will apply and jurisdiction exists at the place where the property should have been delivered by the accused."

Applicability by section 179.

15.21. In some early decisions the Courts considered the rule in section 179 applicable and held that the place where the complainant suffered loss "in consequence of" the accused person's act could be the venue for his trial on a charge of criminal breach of trust. The following extract from a judgment of the Allahabad High Court[1] typifies this line of reasoning :—

> "The consequence which ensued here is that money was taken out of the pocket of a British India subject. That man suffered in Allahabad from the consequence of the applicant's supposed guilt. Section 181(2) of the Code does not in any way modify the provision of section 179."

Most High Courts, however, have taken the view that loss to any person caused by the misappropriation is not an ingredient of the offence, that the offence is complete as soon as there is appropriation, conversion or use with a dishonest intention and that section 179 has no application whatever in regard to this offence.

Applicability of section 182.

15.22. Where it is doubtful whether the misappropriation took place at A or at B, the first clause of section 182 ("when it is uncertain in which of several local areas an offence was committed") is applicable and it has been held by the Supreme Court[2] that the offence may be tried at either place. The provisions of section 182 are supplemental to those contained in the last five words of section 181(2) ("or the offence was committed") and the latter does not exclude the former.

English law.

15.23. The law[3] in England is stated in the following terms :—

> "The embezzlement is committed in the place where the accused person has refused to account, or, if there is no evidence of fradulent embezzlement except of non-accounting in the place where he ought to have accounted and failed to do so, or has accounted falsely, or in the place where he received and misappropriated the property in question."

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[1] *Mohammed Rashid* v. *Emp.*, A. I. R. 1926 All. 466.

[2] *State of Madhya Pradesh* v. *K. P. Ghiara*, A. I. R. 1957 S.C. 196.

[3] Halsbury's Laws of England (3rd Edn.) Vol. 10, para. 1523 at page 788.

Amendment of sub-section (2) recommended.

11.24. In view of the conflicting decisions noted above, we recommend that sub-section (2) of section 181 should be amended to read :—

> "(2) Any offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within whose local jurisdiction *the offence was committed* or any part of the property which is the subject of the offence was received or retained, *or was required to be returned or accounted for,* by the accused person."

We do not think it necessary to limit the additional alternative venue, namely, the local area where the property was required (by law or contract) to be returned or accounted for by the accused person, to cases where there is no evidence of the offence other than the failure to return or account for the property.

Section 181(3).

15.25. Sub-section (3) of section 181 provides alternative venues for two categories of offences, namely, (i) theft and any offence which includes theft and (ii) any offence which includes the possession of stolen property. The first category includes the aggravated forms of theft like theft in a building theft by a servant, etc., and also robbery and the aggravated forms of robbery involving theft, but not extortion and its aggravated forms. The second category, however, comprises all offences which include the possession of stolen property. As defined in section 410 of the Penal Code, stolen property includes not only property the possession of which has been transferred by theft or robbery, but also property the possession of which has been transferred by extortion and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed.

Amendment of 1923.

15.26. The sub-section was given its present form by the Amendment Act of 1923. Originally, it only referred to "the offence of stealing or any offence which includes stealing". The Lowndes Committee which examined the Amendment Bill accepted the proposal to replace "stealing", by the technical term "theft" and, furthermore, enlarged the enumeration of offences to include the possession of stolen property. Their Report added somewhat cryptically :—

> "This will cover the case of extortion; see the definition in section 410 I. P. C."

Further amendments recommended.

15.27. It is clear, however, that the revised sub-section does not cover the offence of extortion or any offence which includes extortion. We see no reason why it should not. It would indeed be convenient in many cases of extortion if the alternative venues provided in sub-section (3) for theft and robbery were available. We recommend that the sub-section should be split into two sub-sections : one dealing with the offences of theft, extortion and robbery, including their aggravated forms, and the other dealing with offences which include the possession of stolen property. These sub-sections may be as follows :—

> "(3a) Any offence which includes theft, *extortion or robbery* may be inquired into or tried by a Court within

whose local jurisdiction *the* offence was committed or the *stolen property which is the subject of the offence* was possessed by *any person committing it* or by person who received or retained *such property* knowing or having reason to believe it to be stolen *property.*

(3b) Any offence which includes the possession of stolen property may be inquired into or tried by a Court within whose local jurisdiction *the* offence was committed or the *stolen property* was possessed by any person who received or retained *it* knowing or having reason to believe it to be stolen *property.*"

15.28. It will be noticed that under the second sub-section, the venue for an offence punishable under section 411, 412, 413 or 414 I. P. C. does not include the jurisdiction within which the stolen property was possessed by the person committing the original offence. Since, however, under section 180—*vide* illustration (b)—the venue could be laid in the jurisdiction within which the original offence was committed, the position for all practical purposes would remain the same.

Section 181(4)

15.29. In regard to the offences of kidnapping or abducting a person, sub-section (4) of section 181 provides that the venue may be laid either in the jurisdiction where the offence was committed or where the kidnapped or abducted person was conveyed or concealed or detained. While the provision is adequate and does not require any change of substance, we recommend a slight change of wording to improve its form.[1]

Venue for cheating in certain types of cases.

15.30. Controversial questions have frequently arisen in regard to the venue for the offence of cheating where the fraudulent or dishonest misrepresentation is made by post, telegram or long distance telephone and where the property of which the person deceived is cheated is delivered to a common carrier or other agent at one place and received by the cheat at another place. In the absence of special provisions similar to these contained in section 181, such questions have necessarily to be decided with reference to the general principles laid down in sections 177, 179 and 182. Different views have been expressed by the High Courts in applying these principles to the facts of the particular cases before them.

Both section 179 and 182 held applicable.

15.31. In an early Bombay case,[2] both sections 179 and 182 were held to be applicable. The High Court observed that the act of deceiving and the act of inducing delivery of the property, were composite acts which began, in the particular case, with the delivery of the parcels to the post office at Panvel. This was an essential part of the offence and, although the consequent delivery of the property took place at Poona, section 179 of the Code applied to the case. Alternatively, the High Court held, the offence was committed partly in Panvel by the posting of the parcels and partly in Poona where the money was paid by the

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[1] *See* para 15.38 below.

[2] *Gafur Karimbax* v. *Emp.*, A. I. R. 1930 Bom. 358. *See* also *Yusuf Ali* v. *Wahajuddin*, A. I. R. 1914 All. 373; *Girdhar Das* v. *King Emp.* A. I. R. 1924. All. 77.

addressees to the post office. Either the second clause or the fourth clause of section 182 was applicable and the case could be tried by the Panvel court.

Posting held one of series of acts.

15.32. In another Bombay case,[1], where the accused had sent from Nandurbar letters by post to various merchants in Bombay ordering goods and promising to pay on receipt of the goods, but absconded after obtaining delivery, the High Court held that the posting of the orders by the accused at Nandurbar was one of the series of acts which went to make up the offence of cheating, and the Magistrate at Nandurbar had jurisdiction under section 182 to try the offence.

Offence committed wholly at complainant's end.

15.33. But in a Madras case,[2] where the accused at Mangalore sent by value-payable post parcel bogus lottery tickets to the complainant living in Trichur (Cochin State) and the latter paid a certain sum on delivery of the parcel, the Madras High Court held that the deception was practised at Trichur, the delivery of property also took place there, and consequently, the offence was committed in Trichur, and not in Mangalore. The post office was held to be the agent of the accused both for delivering the packet to the complainant and for receiving the money from him.

Patna and Lahore views.

15.34. In a Patna case[3] the view was taken that the offence of cheating could be tried at the place from which the accused made the false representation by sending a cheque which was dishonoured, but in a Lahore case,[4] where the accused in district B sent a letter to his creditor in district G and falsely insured it for a certain sum with the intention of relying on the postal receipt of the letter as proof of discharge of his debt, it was held that the court in district G had jurisdiction under section 179 of the Code to try offence of cheating.

Supreme Court's analysis.

15.35. The Supreme Court, however, in the case of *Mobarik Ali Ahmed* v. *State of Bombay*,[5] has decided the question entirely under section 177 of the Code and analysed the position as follows :—

> "The offence of cheating under section 420 of the Penal Code as defined in section 415 of the Code has two essential ingredients, *viz.*, (1) deceit *i.e.*, dishonest or fraudulent misrepresentation to a person, and (2) the inducing of that person thereby to deliver property. In the present case, the volume of evidence set out above and the facts found to be true show that the appellant, though at Karachi, was making representation to the complainant through letters, telegrams and telephone talks, sometimes directly to the complainant and sometimes through Jasawalla, that he had ready stock of rice, that he had reserved shipping space and that on receipt of money he would be in a position to ship the rice forthwith.

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[1] *In re Hormasji*, A.I.R. 1943 Bom. 183.
[2] *In re Antony D. Silva*, A.I.R. 1949 Mad. 3.
[3] *Matcalfe* v. *Watson*, A.I.R. 1924 Pat. 708.
[4] *Narain Das* v. *Prem Chand*, AIR 1931 Notes 25f (Lahore).
[5] A.I.R. 1957 S.C. 857, 867-868, 23.

"These representations were made to the complainant at Bombay, notwithstanding that the appellant was making the representations from Karachi. The position is quite clear where the representations were made through the trunk phone. The statement of the appellant at the Karachi-end of the telephone becomes a representation to the complainant only when it reaches cognition of the complainant at the Bombay-end. This indeed has not been disputed.

"It makes no difference in principle if the representations have in some stages been conveyed by telegrams or by letters to the complainant directly or to some one of the appellant's agents including Jasawalla in that category. There is also no question that it is as a result of these representations that the complainant parted with his money to the tune of about Rs. 5½ lakhs on three different dates.

"On these facts it is clear that all the ingredients necessary for finding the offence of cheating under section 420 read with section 415 have occurred at Bombay. In that sense the entire offence was committed at Bombay, and not merely the consequence, *viz.*, delivery of money, which was one of the ingredients of the offence."

Special provision recommended.

15.36. On the strength of this analysis, it might be argued in comparable cases that no part of the offence of cheating and dishonestly inducing delivery of property takes place at the accused person's end and the entire offence is committed at the deceived person's end. The application of either section 179 or section 182 might be regarded as of doubtful validity. There should, however, be no objection in principle to the person accused of cheating from a distance being triable for the offence, not only at the place where his victim was deceived and/or made to part with property, but also at the place from where the accused has been carrying on his dishonest practices and reaping the benefit. We therefore recommend that a special provision should be made in section 181 on the following lines :—

"Any offence which includes cheating may, if the deception is practised by means of letters or telecommunication messages, be inquired into or tried by any Court within the local limits of whose jurisdiction such letters or messages were sent or were received; and any offence of cheating and dishonestly inducing delivery of property may be inquired into or tried by any Court within the local limits of whose jurisdiction the property was delivered by the person deceived or was received by the accused person."

special provision as to venue for bigamy.

15.37. In the absence of a special provision, the offence of bigamy can be inquired into or tried only at the place where the offence is committed. This fact, coupled with the statutory restriction[1] that a complaint by the aggrieved wife or husband is necessary for initiating proceedings against the bigamist, places undue obstacles in the way of prosecuting the latter. It makes it easy for that person to go to a distant place, perhaps in another

[1]*See* section 198 of the Code.

State, get the second marriage performed, return with impunity to his or her usual place of residence and live with his or her second spouse in the same neighbourhood as the first. In other countries where the law of monogamy is traditional and is enforced with greater rigour, such conduct would not be possible. Since bigamy is conceived as an offence against the institution of marriage in which society is concerned, we consider that practical opportunity to bring offenders before the courts should not be denied by restricting the venue to the local areas where the bigamous marriage was actually performed. It should, in our opinion, be extended to the local area where the offender last resided with his or her lawfully married spouse. We recommend that a new sub-section should be included in section 181 on the following lines :—

"Any offence punishable under section 494 or section 495 of the Indian Penal Code may be inquired into or tried by any Court within the local limits of whose jurisdiction the offence was committed or the offender last resided[1] with his or her spouse by the first marriage."

Section 181 as revised.

15.38. In the light of the above recommendations, section 181 may be amplified and revised to read as follows :—

Place of trial in case of certain offences.

"181. (1) Any offence of being a thug, of murder committed by a thug, of dacoity, of dacoity with murder, of belonging to a gang of decoits, or of escaping from custody may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the accused person is found.

(2) Any offence of kidnapping or abducting a person may be inquired into or tried by a Court within whose local jurisdiction that person was kidnapped or abducted or was conveyed or concealed or detained.

(3) Any offence of theft, extortion or robbery may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the stolen property which is the subject of the offence was possessed by any person committing it or by any person who received or retained such property knowing or having reason to believe it to be stolen property.

(4) Any offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or any part of the property which is the subject of the offence was received or retained, or was required to be returned or accounted for, by the accused person.

(5) Any offence which includes the possession of stolen property may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the stolen property was possessed by any person

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[1] Compare section 488(8), Cr. P.C.

who received or retained it knowing or having reason to believe it to be stolen property.

(6) Any offence which includes cheating may, if the deception is practised by means of letters or telecommunication messages, be inquired into or tried by any Court within whose local jurisdiction such letters or messages were sent or were received; and any offence of cheating and dishonestly inducing delivery of property may be inquired into or tried by any Court within whose local jurisdiction the property was delivered by the person deceived or was received by the accused person.

(7) Any offence punishable under section 494 or section 495 of the Indian Penal Code may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the offender last resided with his or her spouse by the first marriage."

Section 182.

15.39. Section 182 does not require any modification, but as it lists in general terms four types of cases where different alternative venues are permissible it would be more appropriate to place the section immediately after 177 as section 178 and put the existing 178 after section 183.

Section 183 incorrect wording.

15.40. Proceeding to section 183, we notice an inconsistency between the wording of the opening part and that of the concluding part which appears to have escaped judicial attention or comment. The section deals with "an offence committed whilst *the offender* is in the course of performing a journey or voyage", but prescribes that the venue may be laid in any local areas through or into which either "the offender *or* the person against whom, or the thing in respect of which, the offence was committed, passed in the course of *that journey* or *voyage*". The last four words could only mean the journey or voyage which the *offender* was in the course of performing when he committed the offence. If strictly interpreted in this manner, the section would seem to be of little or no practical application to the common type of cases which it is obviously intended to cover.

Amendment recommended.

15.41. X is travelling by train from Bombay to Calcutta and at some place not definitely known is killed and robbed. The offender is traced but it cannot be said that he was performing any journey when he committed the offence. He might have got into the train at one station, committed the offences and got out of the train at the same or the next station. While the apparent intention of section 183 is to enable the inquiry or trial in such a case being held in any local area between Bombay and Calcutta, the wording will stand in the way as it cannot be shown that the accused was performing any journey. We recommend that the section should be redrafted on the following lines :—

"*When* an offence is committed whilst *the person by or against whom, or the thing in respect of which, the offence is committed* is in the course of performing a journey or voyage, *the offence* may be inquired into or

tried by a court through or into whose local jurisdiction *that person* or thing passed in the course of that journey or voyage."

Scope of section 183 not widened by s. 180.

15.42. In a recent reported case,[1] some articles were stolen from a passenger travelling by train from one place to another in Rajasthan. Subsequently these articles were recovered from different persons at different places outside that State. When these persons were prosecuted for the offence of receiving stolen property in a Rajasthan court, the Rajasthan High Court decided that section 183 had no application, since the offence was certainly not committed during the train journey of the complainant and that if section 180—*vide* illustration (b)—was relied on, the offender could be tried only by a court within whose jurisdiction the theft was actually committed. This appears to us to be correct position and does not require any change.

Corresponding provision in England.

15.43. Incidentally, we notice that the corresponding provision in England is to the effect[2] that "where an offence has been committed on any person, or on or in respect of any property, in or on a vehicle or vessel engaged on any journey or voyage through two or more local jurisdictions, the offence may be treated, for the purposes of the preceding provisions of this Act, as having been committed in any of those jurisdictions". This is somewhat narrower in scope and effect than the provision in section 183 of the Code or the formally revised provision suggested above.

Section 184 unnecessary.

15.44. Section 184 provides that "all offences against the provisions of any law for the time being in force relating to railways, telegraphs, the post office or arms and ammunition may be inquired into or tried in a presidency-town whether the offence is stated to have been committed within such town or not, provided the offender and all the witnesses necessary for the prosecution are to be found within such town." The section was taken from section 238 and 239 of the Presidency Magistrates' Courts Act, 1877. Even if it served some useful purpose in those days it does not appear to have been resorted to or found useful in any appreciable number of cases in recent times. The proviso seems to look only to the convenience of prosecution in requiring the presence in the presidency-towns of all the witnesses for the prosecution. There appears to be no good reason for this special provision applying only to the three presidency-towns and in respect of only four Central Acts. The section should be omitted.

Venue in case of joinder of charges and joint trials.

15.45. It will be convenient at this stage to consider the problem of venue in relation to joinder of charges and joint trials for which provision is made in sections 234, 235, 236 and 239 of the Code. Except as provided in these sections there has to be a separate charge for every distinct offence of which any person is accused and every such charge has to be tried separately under section 233. When under section 234, 235 or 236 an accused person may be charged with and tried at one trial for all or more offences, it is but reasonable to assume

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[1] *Munna Lal* v. *State*, A.I.R. 1964 Raj. 118.

[2] Section 3(3) of the Magistrates' Courts Act, 1952.

that the venue for the trial can be laid in any local jurisdiction within which any of those offences may be inquired into or tried under the provisions of Chapter XV of the Code. Similarly when under section 239 two or more persons may be charged with and tried together for different offences, the prosecution has a similar choice of venue for the trial.

Decisions of Supreme Court in cases of criminal conspiracy.

15.46. This question has, however, been frequently raised in the courts in regard to a criminal conspiracy. It has now been held by the Supreme Court[1] that the court having jurisdiction to try the offence of criminal conspiracy, even if those offences were committed outside the jurisdiction of the court, as the provisions of section 239 are not controlled by section 177. It was observed in that decision, that "there is no reason why the provisions of sections 233 to 239 may not also provide exceptions to section 177, if they do permit the trial of a particular offence along with others in one court." In another decision,[2] the Supreme Court has also held that a court having jurisdiction to try the offences committed in pursuance of the conspiracy can try the main offence of conspiracy, even if it was committed outside the jurisdiction of the court.[3]

Express provision recommended.

15.47. However, since there appears to be a lacuna in the venue provisions and this has led to controversies in the court proceedings, we recommend that an express provision should be made on the following lines :—

"184. *Place of trial for offences triable together.*—Where—

(a) the offences committed by any person are such that he may be charged with and tried at one trial for, each such offence by virtue of the provisions of section 234, 235 or 236 or

(b) the offence or offences committed by several persons are such that they may be charged and tried together by virtue of the provisions of section 239,

the offences may be inquired into or tried by any court competent to inquire into or try any of the offences."

This provision would only be giving effect to a view accepted by the Supreme Court as right and proper and would not, in our opinion, be prejudicial to the accused in any way.

Section 185.

15.48. Provision is made in section 185 for deciding any question arising as to the court which "ought to inquire into or try an offence". This formula was adopted in sub-section (1) of the section when it was revised by the Amendment act of 1923 to make it clear that, in deciding the question, the High Court could take into account, not only the convenience of the prosecution or the defence, but also the competence of the forum. The High Court.....however, cannot decide a question under this

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[1] *Purushottam Das Dalmia* v. *State of West Bengal*, (1962) 2 S.C.R. 106; A.I.R. 1961 S.C. 1589.

[2] *L. N. Mukherjea* v. *State*, (1962) 2 S.C.R. 116; A.I.R. 1961 S.C. 1601.

[3] *See* also *R. K. Dalmia* v. *Delhi Administration*, (1963) 1 S.C.R. 253; A.I.R. 1961 S.C. 1821.

section unless the matter is brought to its notice with the proper records. As was suggested by the Calcutta High Court in *State* v. *Sadananda Darji*,[1] it would be convenient if the High Court made rules laying down the procedure to be followed by subordinate courts in making a reference under this section.

Power should be with High Court.

15.49. With reference to sub-section (1) we considered a suggestion that it should be amended so as to provide that the court which first took cognizance should try the offence, thereby saving the time of the High Court. Reference was made to the analogous provision in section 10 of the Civil Procedure Code, but different considerations must apply to criminal proceedings where the question of proper forum could be of importance, both to the prosecution and the defence. Where, for instance, proceedings for the same offence against different persons are instituted in different courts, one on complaint and the other on police report, the court which first took cognizance may not be the proper forum, and the power to decide the question should be with the High Court.

Modification of of sub-section (1) suggested.

15.50. It will be noticed that the wording of sub-section (1) is wide enough to permit a reference being made by a subordinate court which has first taken cognizance of an offence even where no other court subordinate to the same High Court has taken cognizance of that offence. For a reference under sub-section (2), however, the requisite condition is that two or more courts not subordinate to the same High Court should have taken cognizance of the same offence. While this difference in approach appears to have been deliberate and for fairly obvious reasons, we feel that no harm would be done by bringing sub-section (1) into line with sub-section (2) in this respect. Even where the question of forum concerns only one High Court it need be referred to it for decision only when two or more subordinate courts have taken cognizance of the offence.

Criticism of sub-section (2).

15.51. Sub-section (2) of section 185 is curiously ambivalent in its approach. The first High Court may only decide that the trial may proceed in the court subordinate to it. It cannot decide that the trial should not proceed in that court but in the court subordinate to another High Court. When one High Court decides that the trial should proceed within its appellate jurisdiction, the other proceedings have to be discontinued. The rationale of this cumbrous and dilatory provision in regard to a matter of urgent importance to the accused person is difficult to understand. We recommend that it should be made as clear-cut and simple as the provision in sub-section (1).

Revision of section 185—recommended.

15.52. The section should be consolidated and revised on the following lines :—

"185. Where two or more courts have taken cognizance of the same offence and the question arises as to which of them ought to inquire into or try that offence, the question shall be decided,—

(a) if the courts are subordinate to the same High Court, then by that High Court and

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[1] A.I.R. 1952 Cal. 563.

(b) if the courts are not subordinate to the same High Court, then by the High Court within the local limits of whose Appellate criminal jurisdiction the proceedings were first commenced; and thereupon all other proceedings in respect of that offence shall be discontinued".

Not necessary to bring in the Supreme Court.

15.53. In this connection we considered whether it would be desirable to vest in the Supreme Court the power now vesting in the High Courts under sub-section (2), in view of the fact that more than one High Court is concerned and the power to transfer cases from a court subordinate to one High Court to a court subordinate to another High Court is vested in the Supreme Court under section 527 of the Code. We however, came to the conclusion that the question of proper forum is not of such difficulty or importance as to merit a direct reference to the Supreme Court under the law. It can be adequately dealt with by the High Court within whose appellate jurisdiction the proceedings in respect of the offence were first commenced. Even in the extremely unlikely case of three courts in three different States taking cognizance of the same offence at about the same time, there is no reason why the first High Court should not be empowered by law to decide which of them should continue with the proceedings.

Section 186.

15.54. Section 186 confers on certain magistrates a power to initiate action against any person within their jurisdiction who is reasonably suspected to have committed an offence triable by a court outside that jurisdiction. Though the magistrate does not take cognizance of the offence in the technical sense, he is empowered by the section to inquire into it as if it had been committed within his jurisdiction, compel the person to appear before him and bind him to appear before a magistrate who will have jurisdiction to inquire into the offence. The power is available whether the offence is cognizable or non-cognizable.

Amendment of sub-section (1) suggested.

15.55. Since the proceedings under this section are of a judicial character, it is not necessary that District Magistrate and Sub-divisional Magistrates should have the power to take action. On the other hand, all Judicial Magistrates of the first class may be authorised to take action without being specially empowered by the State Government to do so. We recommend that the opening words of sub-section (1) may be revised to read, "When a Magistrate of the first class sees reason to believe" etc.

Section 187—omission recommended.

15.56. Section 187 prescribes the procedure to be followed after a person has been arrested on a warrant issued by a Sub-divisional Magistate or Magistrate of the first class. The Magistrate is required to send the person to the District Magistrate or the Sub-divisional Magistrate to whom he is subordinate unless there is already a warrant for that person's arrest issued by the Magistrate having jurisdiction to try the offence. It is then provided in sub-section (2) that this procedure will not be necessary if the arrested person is to be sent under section 186 to the court of a competent Magistrate in the same district. We consider that all these controls and dilatory procedure are unnecessary and the provisions of section 186 (amended as proposed above) can be

safely left to their operation. We recommend that section 187 should be omitted.

Section 188—Procedural counter-part of section 4, I.P.C.

15.57. The main provision in section 188 is that "when an offence is committed by—

(a) any citizen of India in any place without and beyond India; or

(b) any person on any ship or aircraft registered in India wherever it may be,

he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found." This furnishes the necessary procedural counter-part to those substantive penal laws which have extra-territorial application. Thus, under section 4 of the Indian Penal Code, the provisions of that code apply also to any offence committed by—

(1) any citizen of India in any place without and beyond India; or

(2) any person on any ship or aircraft registered in India wherever it may be.

It is explained in the section itself that the word "offence" includes every act committed outside India which, if committed in India, would be punishable under the Penal Code. To make the position clearer still, section 3 provides that any person liable by any Indian law to be tried for an offence committed beyond India shall be dealt with according to the provisions of this Code for any act committed beyond India in the same manner as if such act had been done within India.

Extra-territorial offence.

15.58. The word "offence" is also defined[1] in the Criminal Procedure Code to mean any act or omission made punishable by any law for the time being in force. Though the words "in India" are not in the definition at the end, there can hardly be any doubt that they have to be understood; and when section 188 refers to the commission of an offence without and beyond India, the act done or omitted to be done in foreign territory or on the high seas constituting the offence has to be punishable as such by an Indian law. In other words, in order to attract this procedural provision, the relative penal law must also have express extra-territorial application on lines similar to section 4 of the Indian Penal Code.

Anomalous position of Jammu and Kashmir.

15.59. We have already noticed in Chapter I that by virtue of the definition of "India" in section 4(1)(j) of the Criminal Procedure Code, any place in the State of Jammu and Kashmir is a "place without and beyond India". The result is that if a citizen of India, whether he is a resident of that State or of some other State in India, commits an offence in Jammu, he may be dealt with at any place in any other State of India where he may be found, but before the charge is inquired into at the latter place, the sanction of the State Government will be required (there being no Political Agent for the State of Jammu and Kashmir).[2] This is indeed an anomalous and unsatisfactory situation. Parliament's

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[1] *See* section 4(1)(o).

[2] *State* v. *Om Parkash*, 1966 Cr. L.J. 366.

power to legislate for the State does not at present extend to items 1 and 2 of the Concurrent List, relating, respectively, to criminal law and criminal procedure. We have recommended above[1] that the anomaly should be removed by first suitably amending the Constitution (Application to Jammu & Kashmir) Order, 1950, under article 370 and then extending the two Codes to the State.

Amendment of clause (a) to remove doubt.

15.60. The use of the word "place" in clause (a) of section 188 may give rise to a doubt whether the section applies where a citizen of India commits an offence on the high seas, or while on board a foreign vessel, or in air space over foreign territory or the high seas while on board a foreign aircraft. The wording of the first proviso to the section also does not help resolve this doubt. It was decided in a Bombay case[2] that the proviso does not apply to an offence committed on a ship on the high seas since there is no "territory", and no Political Agent for the "territory", in which the offence is committed. It is desirable to amend clause (a) as well as the first proviso so as to make it clear that the section applies when an offence is committed outside India by any citizen of India, whether on the high seas or elsewhere.[3]

Amendment of main paragraph recommended.

15.61. An offence falling within clause (b) of section 188 is extra-territorial only when the Indian ship or aircraft is outside India including its territorial waters. To this extent, the expression "wherever it may be" is not precise. Clause (b) need not also refer to all persons on an Indian ship or aircraft since citizens of India are already covered by clause (a). The main paragraph of the section may be revised to read :—

"When an offence is committed outside India—

(a) by a citizen of India, whether on the high seas or elsewhere; or

(b) by a person, not being such citizen, on any ship or aircraft registered in India;

he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found."

First Proviso.

15.62. The first proviso to section 188 requires to be simplified and recast in view of the political changes that have taken place in the last 20 years. It was originally framed with the object of controlling the prosecution and trial in British India of persons accused of committing offences in the former Indian States. There were a number of Political Agents of the Government of India appointed regionally for groups of these States to look after the political relationship between the rulers and the paramount power. When a British Indian subject was alleged to have committed an offence in an Indian State, the charge as to such offence could not be inquired into in a British Indian province unless the Political Agent for that State certified that it ought to be inquired into there. Where the offence was committed

[1] *See* para 1.9 above.

[2] *Manuel Philip* v. *Emp.*, A.I.R. 1917 Bom. 280.
See also Po Thaung v. *Emp.*, (1911) 12 Cr. L.J. 198.

[3] Article 1 of the Convention on the Seas, 1958, defines the term "high seas" to mean all parts of the sea that are *not* included in the territorial sea or in the inland waters of a State.

outside India altogether, the previous sanction of the Provincial Government was required under the proviso.

Non obstante clause.

15.63. The *non obstante* clause which was inserted in the proviso by the Amendment Act of 1923 could also be traced to the same political considerations. The Select Committee, while reporting on this particular amendment, said :—

> "Certain decisions of the Madras High Court seem to make it doubtful whether section 188 is subject to the provisions of sections 179 to 184 and we think it is desirable to clear this up. We are not satisfied that this was the intention of section 188, and in our opinion it is safer, when a man is tried in British India in respect of an offence committed in a Native State, to require the Political Agent's certificate in every case. The amendment which we propose will make this clear."

Sanction should be of Central Government.

15.64. Since the section now applies mainly to offences committed by Indian citizens in foreign countries or by foreigners on Indian ships or aircraft, it would be appropriate to provide for the previous sanction of the Central Government, rather than that of the State Government. From the practical point of view the existing provision requiring a certificate from the Indian envoy in the foreign country appears to be unnecessary. It is also likely to lead to undue delay in initiating proceedings. It could be left to the Central Government to consult its envoy in the foreign country to such extent as it deems fit and proper.

Meaning of "charge as to" offence.

15.65. The proviso refers to a "charge as to" the extra-territorial offence being inquired into in India. This has led to a needless controversy as to the stage when the Political Agent's certificate or the State Government's sanction has to be obtained and produced before the court. While one view is that it is sufficient to do so some time before the charge is framed against the accused, some courts have held that it is a condition precedent to the inquiry by the court into the offence. This controversy will be avoided by providing "that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government."

Amendment o proviso recommended.

Second proviso.

15.66. The second proviso is obscurely worded. The intention is apparently to import the principle laid down in section 403 of the Code and make it applicable in relation to further proceedings under the Extradition Act in a foreign country for the same offence. If the proceedings taken against a person under section 188 for an extra-territorial offence have resulted in a trial of that person by a court of competent jurisdiction in India and upon such trial the person is convicted or acquitted or discharged of the offence, section 403 will be directly applicable and will debar his trial in India once again for the same extra-territorial offence. This being so, it is difficult to give meaning to the periphrasis "bar to subsequent proceedings against such person for the same offence if it had been committed in India". Section 403 applies equally to an offence committed in India and to an offence committed outside India.

Provision should be made in the Extradition Act 1962.

15.67. We think that in so far as any such provision is required in the statute book, it should find a place in the Extradition Act, 1962, rather than in the Code. What is required in that Act is a provision to the effect that—

(a) while proceedings under section 188 of the Code are pending against any person in respect of any offence, no proceedings for extraditing him from India shall be taken in respect of the same offence either in India or outside India; and

(b) if in such proceedings, the person is convicted, acquitted or discharged of the offence by a competent court, no extradition proceedings shall be taken against him in respect of the same offence either in India or outside India.

We recommend that the second proviso to section 188 should be omitted.

Suggestion to extend section 188 to corporations.

15.68. We considered a suggestion that section 188 should be made applicable to Indian companies and corporations in the same way as it applies to Indian citizens. This would, in our opinion, be a case of putting the cart before the horse. It is only when a substantive penal law applies also to Indian companies in respect of offending acts committed by them outside India that a corresponding provision on the lines of section 188 will be required. The Indian Penal Code, for instance, does not envisage the commission of offences by Indian companies outside India. If in the case of some special law *e.g.,* the Foreign Exchange (Regulation) Act, 1947, it is felt that Indian companies contravening its provisions outside India should be liable to be tried in India, it would be as easy, as it would be appropriate, to make a special provision in that law itself. As a general provision, section 188 does not, in our opinion, require extension to corporate bodies.

Is previous trial in foreign country bar to proceedings under section 188.?

15.69. The question may arise whether an Indian citizen who has been tried by a court of competent jurisdiction in a foreign country for an offence can be proceeded against for the same offence when he is found in India, assuming of course that the act committed by him is an offence punishable under an Indian law having extra-territorial application. Section 403 of the Code will not in terms apply to such a case and it is a moot point whether article 20(2) of the Constitution (which lays down that "no person shall be prosecuted and punished for the same offence more than once") will of itself operate as a bar to the proceedings under section 188. Since, however, the Government before giving its sanction is bound to take into account this fact and all the circumstances of the trial in the foreign court, we do not consider it necessary to suggest any change in the section from this point of view.

Section 188 as revised.

15.70. In the light of the above discussion section 188 may be revised to read :—

"188. When an offence is committed *outside India*—

Offence committed outside India.

(a) *by a* citizen of India, *whether on the high seas or elsewhere;* or

(b) *by a person*, not being such citizen, on any ship or aircraft registered in India;

he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found :

Provided that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into *or tried* in India *except with the previous sanction of the Central Government.*"

Section 189.

15.71. Section 189 needs one or two consequential and minor changes. Although the opening words "whenever any such offence as is referred to in section 188 is being inquired into or tried" are comprehensive, the section applies only where an extra-territorial offence is alleged to have been committed in a foreign country. In order to make this clear it would be desirable to amend the opening words. Since the sanctioning authority under the first proviso to section 188 is to be the Central Government, the reference to the state Government in section 189 should be replaced by the Central Government. And since the expression "Political Agent" as defined in the General Clauses Act, 1897, means the principal officer representing India in the foreign country, we recommend that it should be replaced by "a diplomatic or consular representative". Section 189 may accordingly be revised to read :—

Power to direct copies of depositions and exhibits to be received in evidence.

"189. *When any offence alleged to have been committed in a territory outside India* is being inquired into or tried *under the provisions of section* 188, the *Central* Government may, if it thinks fit, direct that copies of depositions made or exhibits produced before a judicial officer in or for *that* territorry *or before a diplomatic or consular representative of India in or for that territory* shall be received as evidence by the Court holding such inquiry or trial in any case in which such Court might issue a commission for taking evidence as to the matters to which such depositions or exhibits relate."

B : *Conditions requisite for Initiation of Proceedings.*

Section 190.

15.72. The group of sections, from section 190 to section 199B, describes the methods by which, and the limitations subject to which, various Criminal Courts are entitled to take cognizance of offences.

Section 190 first mentions the classes of Magistrates entitled to take cognizance, and then says that cognizance may be taken—

"(a) upon receiving a complaint of acts which constitute such offence;

(b) upon a report in writing of such facts made by any police officer;

(c) upon information received from any person other than a police officer or upon his own knowledge or suspicion that such offence has been committed."

15.73. Clause (c) is of limited practical importance as resort to it is not had in many cases. Leaving that alone, and speaking broadly, the cases fall into two categories :— Two main categories of cases.

(1) those started on complaint; and

(2) those started on a police-report.

A "complaint" is defined in section 4(1)(h) as not including the "report of a police officer". It seems to us, however, that there is no practical advantage in distinguishing a case started on a complaint from a case started on "the report of a police officer" which is not given under section 173. In Chapter XXI of the Code, where two different procedures are laid down for the trial of two different kinds of cases, the point of distinction is whether the case was instituted on a "police report" or not, and the expression "the report of a police officer" is not used. The same is the case in Chapter XVIII.

15.74. At first sight, of course, the difference in meaning between a "police report" and the "report of a police officer" may seem slight, but authoritative decisions show that the expression "police report", which was in fact the expression used in clause (b) of section 190(1) before 1923, has a technical connotation, limited to a report made by an investigating officer under section 173 of the Code. Such an investigation can only be of a cognizable offence, or if made into a non-cognizable offence, it must be with the permission of a Magistrate required by section 155. We, therefore, consider it important that Magistrates should be readily able to distinguish a case instituted on a "police report" from any other kind of case; and to facilitate this, we propose, that the expression "police report" should be clearly defined in the Code itself, and the definition should follow the judicial decisions, limiting it to a report made under section 173. For the same reasons, we propose that clause (b) of section 190, sub-section (1) should mention only a "police report", leaving other kinds of reports by a police officer to be treated as complaints. We have already proposed the necessary verbal alteration in the definition of "complaint" now contained in section 4. "Police report" to be defined and used in clause (b).

15.75. These proposals, we hope, will do away with the controversy whether the present wording of section 190(1)(b) does or does not include a report made regarding a non-cognizable offence investigated by a police officer without the orders of a Magistrate, which on occasions has arisen. At the same time, there will be a clear-cut division between cases properly investigated by the police and others, and the distinction between cases instituted on a police report and other cases will be easy to make. Object of proposals.

15.76. Section 190 authorises only a Presidency Magistrate, a District Magistrate or a Sub-divisional Magistrate to take cognizance of offences, and leaves any other Magistrate to be specially empowered in that behalf, so that a first class Magistrate cannot, without such special power, take cognizance. We find no great advantage in this scheme, as most of the cases have to be handled by first class Magistrates and, in practice, we gather, all first class Magistrates have to be so empowered. We feel that all first class First class magistrates need not be specially empowered.

magistrates can be safely entrusted with this power, and the formal step of specially empowering them can be done away with. We therefore propose to mention all first class Magistrates in the section itself, leaving magistrates of the second class to be specially empowered. We assume, of course, that first class powers are conferred on magistrates only when they are experienced enough to exercise them.

Amendment of opening words.

15.77. There remain two small matters about this section. It opens with the words "Except as hereinafter provided", while in fact the provisions that follow are not in a strict sense "exceptions", but only additional requirements for initiating proceedings. It would in our view, be more appropriate to use the words "subject to the provisions of this Chapter".

Amendment of clause (c).

15.78. Clause (c) of sub-section (1) authorises a magistrate to take cognizance of an offence not only on his own knowledge, but also on suspicion that an offence has been committed. We recognize that a police officer can, in certain circumstances, act on suspicion—(reasonable of course)—that an offence has been committed;[1] but we do not think it wise to place such a responsibility on a judicial officer, and we therefore propose to delete that provision from the clause.

Meaning of "may take cognizance."

15.79. Before concluding we would like to mention one aspect of section 190 which has been discussed in the courts but which does not seem to require any change in its wording. It will be noticed that section 190 provides that certain magistrates "may" take cognizance of offences if certain conditions are satisfied. It has at times been argued in court and the argument accepted, that, despite the use of the word "may" a magistrate is bound to take cognizance of an offence if there is before him a proper complaint, or a proper police report. At other times, as in a recent case in the Supreme Court, it has been observed that a Magistrate has ample discretion in this respect and if on looking at a police report he finds that there has not been a thorough investigation he can, without taking cognizance, order further investigation. We take it, therefore, that a magistrate has certain discretion in this connection but as this discretion is judicial in nature, it is limited in its scope, and that is how it should be. We, therefore, do not propose to disturb the language of the section.

section 190 as revised.

15.80. We would accordingly revise the section to read as follows :—

"190. Cognizance of offences by Magistrate.—(1) Subject to the provisions of this Chapter, any Presidency Magistrate or Judicial Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf *under* sub-section (2), may take cognizance of any offence—

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a *police report of such facts;*

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[1] *Cf.* Section 54.

(c) upon information received from any person other than a police-officer, or upon his own knowledge,.. ..... that such offence has been committed.

(2) *The Chief Judicial Magistrate* may empower any Magistrate of the second class to take cognizance under sub-section (1) *of such offences as are within* his competence to inquire into or try.

Section 191.

15.81. Since clause (c) of section 190(1) contemplates the possibility that cognizance of an offence may have been taken by a Magistrate because of his own knowledge or his own information, a safeguard has been provided in section 191 that in such a situation the accused must be told, "before any evidence is taken," that he is entitled to have the case tried by another court and if he so chooses, "the case shall be committed to the Court of Session or transferred to another magistrate". This rests on the view that administration of justice should always appear to be unbiased. As the provision now stands, however, it is possible that a magistrate may, in spite of the accused's previous object, go on with the inquiry in order to commit him to the Court of Session. The proper and dignified course for a magistrate would, in our opinion, be to make over the case to another magistrate as soon as an objection is raised. This procedure would be fairer to the magistrate as well as the accused. If cognizance is taken by a magistrate under clause (c) and the accused objects to the magistrate hearing the case, the case must at once be made over to another magistrate competent to inquire into or try it. No mention of the Court of Session would then be necessary in the section. We recommend that it should be modified as follows :—

"191. When a Magistrate takes cognizance of an offence under clause (c) of sub-section (1) of section 190, the accused shall, before any evidence is taken, be informed that is entitled to have the case *inquired into or* tried by another *Magistrate,* and if the accused, or any of the accused if there be more than one, objects to *further proceedings before the Magistrate taking cognizance, the case shall be transferred to such other Magistrate as may be specified by the Chief Judicial Magistrate* in this behalf."

Section 192.

15.82. Section 192 has two sub-sections. The first empowers a Chief Presidency Magistrate, a District Magistrate or a Sub-divisional Magistrate to transfer a case after taking cognizance of it, to another magistrate subordinate to him. This is a necessary power for the proper arrangement of criminal work and the object is that senior magistrates may find it convenient to look at most of the cases in the first instance but after taking cognizance send them for disposal to their subordinates. The second sub-section enables a District Magistrate to clothe a first class Magistrate with powers like his own under sub-section (1). This again is useful in order to relieve the District Magistrate of unnecessary burden.

To cover cases concerning offences only.

15.83. Section 192 is placed with other sections which deal with cognizance of offences by criminal courts and, as far as the express provisions of the Code are concerned, they speak of cognizance only of offences. Section 192(1), however, speaks of

"any case of which he (*i.e.* the Magistrate) has taken cognizance". The Courts have therefore been persuaded to hold that the power of transfer mentioned in section 192(1) includes the power to transfer all kinds of cases under the Code, and not only cases concerned with offences. In concrete terms, the decisions hold that not only an ordinary case under the Indian Penal Code can be thus transferred but also proceedings under section 107 or 133 or 145 of the Criminal Procedure Code. We take no exception to this interpretation. We feel, however, that it is a bit inconguous that this kind of power of transferring proceedings under section 107, Cr. P.C. should be included in a provision which in its proper context should deal only with "offences" and their cognizance. The power of transferring other proceedings necessary as it may be—should be mentioned in a more suitable context. The language of section 192 should be changed to make it clear that it has nothing to do with transfer of a case other than a case involving an offence. The provision for transferring other kinds of cases will be placed in the Code elsewhere.

Revision recommended.

15.84. We recommend that section 192 should be revised as follows :—

"192. *Making over of cases to Magistrate.*—(1) Any *Chief Judicial Magistrate may, after taking* cognizance of an offence, *make over* the case for inquiry or trial to any *competent* Magistrate subordinate to him.

(2) *Any Magistrate of the first class empowered in this behalf by the Chief Judicial Magistrate may, after taking cognizance of an offence, make over*[1] the case for inquiry or trial to *such other competent Magistrate as the Chief Judicial Magistrate may, by general or special order, specify.*"

Section 193.

15.85. Sub-section (2) of section 193 provides that Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the State Government may direct them to try or as the Sessions Judge of the division may make over to them for trial. It appears unnecessary to bring the State Government into what is, mainly, a matter of distribution of work among the courts in district, a matter of day to day control of the work of the courts which, as pointed out by the Supreme Court,[2] must rest with the High Court. In Bombay, the power of the State Government to issue directions under this provision is exercisable only in consultation with the High Court. Even this restricted power need not be retained with the State Government. As it is, the distribution of cases is mainly attended to by the Sessions Judges and they should continue to do so under the overall control of the High Court. We recommend that the sub-section may be amended to read—

"(2) An Additional Sessions Judge or Assistant Sessions Judge shall try such cases only as the Sessions Judge of the division, by general or special order, may make over to him for trial or as the *High Court, by special order may direct him to try.*"

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[1] *Cf.* section 528, (2) and (4).

[2] *State of Assam* v. *Ranga Muhammed*, A.I.R. 1967 S.C. 903.

Section 194 original jurisdiction of High Courts.

15.86. Section 194 deals with the cognizance of offences by the High Court. We have discussed above in Chapter III the question whether the ordinary original criminal jurisdiction of the Calcutta High Court requires to be retained, and recommended that it should be abolished and that the City Sessions Court in Calcutta should have the same complete jurisdiction with regard to criminal cases as in Bombay and Madras. Since the other High Courts do not exercise ordinary original jurisdiction there is no need for sub-section (1) of section 194.

Section 194(2).

15.87. Sub-section (2) of section 194 deals with a special procedure known as "information by the Advocate General". It provides that the Advocate General may exhibit information against persons to the High Court for all purposes for which Her Majesty's Attorney General may exhibit information on behalf of the crown in the High Court of Justice in England. This special procedure has been considered in England as too dilatory and too inconvenient to afford any satisfactory remedy[1] and seems to have been used but rarely. The last such case[2] to be filed in England was in 1910 in respect of a libel on the king. The procedure has since been abolished altogether.[3]

Special procedure found unsuitable in India.

15.88. In India also the procedure has seldom been used. The last case under this provision seems to be one filed in the Patna High Court in 1930. In that case,[4] where information was exhibited against certain person for fabricating and giving false evidence on a capital charge, it was observed by the Privy Council that the procedure adopted "of an ex-officio information was unfortunate and undoubtedly prejudicial to the accused", and further that the case "did not differ from other cases of perjury and conspiracy which have been tried by the ordinary procedure and its result, it is to be hoped, will be to discourage the recourse to unusual procedure in similar cases in future". In two other cases,[5] both involving contempt of court, references were made to section 194(2) as contentions were raised in both cases that the proper procedure to be adopted for initiating contempt of court proceedings was the one prescribed in section 194(2). In both cases the Courts held that the procedure under section 194(2) is not to be preferred. This procedure which is not necessary and has so little to commend it need not be retained, especially as the corresponding provision in English law on which it was modelled has been abolished.

Repeal of section 194.

15.89. We would therefore recommend that section 194 be repealed.

15.90. Section 195 deals with prosecution for three different groups of offences. viz. contempt of lawful authority of public servants, certain offences against public justice and certain offences relating to documents given in evidence. The second and third groups are connected in that both of them affect the

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[1] *R.* v. *Davies* (1906) IKB page 41.

[2] *R.* v. *Mylius* (1910).

[3] The Criminal Law Act 1967 (C58) Section 6(6).

[4] *Dwarkanath* vs. *Emp.* A.I.R. 1933 P.C. 124.

[5] *In re an Advocate of Allahabad*, A.I.R. 1935 All. 1;
In re Tushakant Ghosh, A.I.R. 1935 Cal. 419.

administration of justice. Clause (a) of sub-section (1) and sub-section (5) concern public servants, clause (b) and (c) of sub-section (1), sub-section (2) and sub-section (3) concern the Courts, and sub-section (4) relates to both. It would, in our opinion, be conducive to clarity if the two subjects are dealt with in separate sections. We recommend that section 195 may be split up on the lines indicated above.

Revised section relating to public servants.

15.91. The first section may be as follows :—

"194. Prosecution for contempts of lawful authority of public servants.—(1) No Court shall take cognizance—

(a) of any offence punishable under sections 172 to 188 of the Indian Penal Code, or

(b) of any abetment of, or attempt to commit such offence, or

(c) of any criminal conspiracy to commit such offence,

except on the complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate.

(2) Where a complaint has been made by a public servant under sub-section (1), any authority to which he is subordinate may order the withdrawal of the complaint and send a copy of such order to the Court; and upon its receipt by the court no further proceedings shall be taken on the complaint."

Section 195(1) clauses (b) and (c).

15.92. Under clauses (b) and (c) of section 195(1), the complaint of the civil, revenue or criminal court concerned is necessary for any criminal court to take cognizance of certain offences against public justice or certain offences relating to documents given in evidence. As observed in a Madras case,[1] "this salutary rule of law is founded on common sense. The dignity and prestige of Courts of law must be upheld by their presiding officers, and it would never do to leave it to parties aggrieved to achieve in one prosecution gratification of personal revenge and vindication of a Court's honour and prestige. To allow this would be to sacrifice deliberately the dispassionate and impartial calm of tribunals and to allow a Court's prestige to be the sport of personal passions".

Clause (c) should apply to witnesses also.

15.93. It will be noticed that while clause (b) applies when any of the specified offences is committed in, or in relation to, any proceeding in any Court, clause (c) applies only when the offence of forgery etc. is "alleged to have been committed by a party to any proceeding in court in respect of a document produced or given in evidence in such proceeding". An important point that has to be considered here is whether the restriction of the application of the section to a party to the proceeding should be retained. The purpose of the section is to bar private prosecutions where the course of justice is sought to be perverted, leaving it to the Court itself to uphold its dignity and prestige. On principle, there is no reason why the safeguard in clause (c) should not apply to offences committed by witnesses[2]

[1] *Ramaswamy* v. *P. Mudaliar* A.I.R. 1938 Mad. 173, 174.

[2] An illustration of forgery by a witness is furinshed by the facts i *Dr. S. Dutt* v. *State of U.P.*, A.I.R. 1966 S.C. 523.

also. Witnesses need as much protection against vexatious prosecutions as parties and the Court should have as much control over the acts of witnesses that enter as a component of a judicial proceeding, as over the acts of parties. If, therefore, the provisions of clause (c) are extended to witnesses, the extension would be in conformity with the broad principle which forms the basis of section 195.

Applicability to abetments.

15.94. Another question which arises in this connection is whether persons who abetted the offence but are not parties to the proceeding come within the purview of clause (c). It would seem that their case is covered by sub-section (4) by which the provisions of sub-section (1) are made applicable to abetment.

In an old case,[1] the Bombay High Court took the view that if a criminal court were to try the abettors it would in fact be taking cognizance of the principal offence committed by the party without a complaint from the court which is specifically forbidden by section 195(1)(c). They also observed that sub-section (4) of section 195 "appeared to lend countenance" to this view.

Many High Courts, however, have taken the contrary view that in the case of persons who are not parties to the proceeding and are alleged to have abetted the commission of forgery by a party, a complaint by the court is not necessary for prosecuting them. This leads to the somewhat incongruous situation that while the main offender could not be prosecuted without sanction, any minor aiders, or abettors or accessories of his could be so prosecuted.

When offence is committed by several persons.

15.95. Another controversial point is, where an offence specified in clause (c) is alleged to have been committed by several persons of whom only one is a party to the court proceeding, can the others be prosecuted without a complaint from the court, and also, can the court make a complaint against those persons who are not parties? Different views have been expressed by the High Courts on both these questions.

Scope of clause (c) to be enlarged.

15.96. Taking an over-all view of the matter and keeping in mind the object of the section, we consider that the scope of clause (c) should not be restricted to offences committed by parties to the court proceeding. The clause should apply when any of the specified offence is alleged to have been committed by any person in respect of a document produced or given in evidence in any proceeding. It should also apply, as provided in sub-section (4), to criminal conspiracies, abetments and attempts to commit any such offence in respect of any such document.

"Produced or given in evidence".

15.97. Though the question has occasionally arisen whether and when a particular impugned document was actually "produced or given in evidence in such proceeding", the expression is clear enough and we do not consider it necessary to alter it.

Distinction between courts and quasi-Judicial tribunals.

15.98. Sub-section (2) of section 195 defines the term "court" where it occurs in clauses (b) and (c) of sub-section

[1] *In re Narayan Dhonddev Risbud*, (1910) 12 Bom. L.R. 383.

(1) as including a civil, revenue or criminal court but not including a registrar or sub-registrar under the Indian Registration Act, 1877. (This reference is now to be read as a reference to the Indian Registration Act, 1908). In the Code as enacted in 1898, the definition used the word "means" instead of "includes". The latter word was substituted by the Amending Act of 1923. This naturally raises the question what else, besides civil, revenue and criminal courts, is covered by the generic term "court". As observed by the Supreme Court in *Virinder Kumar Satyawadi* v. *The State of Punjab*.[1]—

> "It is familiar feature of modern legislation to set up bodies and tribunals and to entrust to them work of a judicial character but they are not courts in the accepted sense of that term. * * * * It may be stated broadly that what distinguishes a Court from a quasi-judicial tribunal is that it is charged with a duty to decide disputes in a judicial manner and declare the rights of parties in a definitive judgment. To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it. And it also imports an obligation on the part of the authority to decide the matter on a consideration of the evidence adduced and in accordance with law. When a question therefore arises as to whether an authority created by an Act is a Court as distinguished from a quasi-judicial tribunal, what has to be decided is whether having regard to the provisions of the Act it possesses all the attributes of a Court."

Recommendation regarding tribunals.

15.99. In any concrete case this question is bound to raise difficult and complex issues. Consequently we have a long series of cases over the years deciding what tribunals and officers acting in a judicial capacity should be regarded as courts and what should not be so regarded. The substitution of "includes" for "means" in the definition has, if anything, added to the difficulties of the problem. We consider that for the purpose of clauses (b) and (c), "court" should *mean* a civil court or a revenue court or a criminal court properly so called, but where a tribunal created by an Act has all or practically all the attributes of a court, it might be regarded as a court only if it is declared by that Act to be a court for the purposes of this section. This would make the position clear to all concerned, and particularly to criminal courts when required to take cognizance of offences falling within the scope of clause(c). They would then be left with the comparatively easy question whether the judicial body or authority before which the document was produced or given in evidence was a civil court or a revenue court or a criminal court.

Exclusion of registrars and sub-registrars.

15.100. The present definition of "court" specifically excludes registrars and sub-registrars functioning under the Indian Registration Act. This appears to have been done in 1898 in order to settle controversy as to whether these officers when acting in a quasi-judicial manner in connection with the registration of documents should be regarded as courts for the purposes of section 195(1) of the Code. The view of the Bombay High Court[2] was that they were not courts since section 84 of the

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[1] (1955) 2 S.C.R. 1013, 1018.
[2] *Q. E.* v. *Tulja*, I.L.R. 12 Bom. 36.

Indian Registration Act did not mention section 195 of the Code while declaring for what purposes they should be deemed to be public servants and the proceedings before them should be deemed to be judicial proceedings. A full bench of the Madras High Court[1] held the contrary that the registrar who has the power under section 75 of the Act to summon and enforce the attendance of witnesses and to compel them to give evidence "as if he were a civil court" is in all essentials a court. The Allahabad High Court dissented from this view and observed[2] :—

> "The word "court" must be taken in its ordinary sense, and the word would not in ordinary language be one used of the Registrar. Throughout the Indian Registration Act, the Registrar is described as an officer and his place of business as an office. When it is necessary to invest him with the powers of a court the language used is language which clearly implies that he is not a court. Section 75 of Act III of 1877 makes use of the expression 'as if he were a civil court'. In section 483 of the Code of Criminal Procedure he is to be deemed a civil court for special purposes."

We consider that the specific exclusion of registrars and sub-registrars is unnecessary, as they cannot be regarded as civil courts for the purposes of section 195.

> "In clauses (a) and (b) of sub-section (1), the term 'court' *means* a civil, revenue or criminal court, and includes a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a court for the purposes of this section."

Section 195 as revised.

15.101. Section 195 in so far as it applies to prosecution for certain offences against public justice may accordingly be revised as follows :—

Prosecution for offences against public justice and offence relating to documents given in evidence.

"195. (1) No Court shall take cognizance—

(a) of any offence punishable under any of the following sections of the *Indian Penal Code,* namely, sections 193 to 196, 199, 200, 205 to 211 and 228 when such offence is alleged to have been committed in, or in relation to, a proceeding in any Court, or

(b) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the same Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding *in any Court,*

except on the complaint in writing of that Court, or of some other Court to which *that* Court is subordinate.

(2) In clauses (a) and (b) of sub-section (1), the term "Court" *means* a civil, revenue or criminal court *and includes a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a Court for the purposes of this section.*

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[1] *Atchayya* v. *Cangayya,* I.L.R. 15 Mad. 138.

[2] *Q. E.* v. *Ram Lal,* I.L.R. 15 All. 141, 143.

(3) For the purposes of this section, a court shall be deemed to be subordinate to the court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of civil court from whose decrees no appeal ordinarily lies, to the principal court having ordinary original civil jurisdiction within the local limits of whose jurisdiction such civil court is situate :

Provided that—

(a) where appeals lie to more than one court, the appellate court of inferior jurisdiction shall be the court to which such court shall be deemed to be subordinate; and

(b) where appeals lie to a civil and also to a revenue court, such court shall be deemed to be subordinate to the civil or revenue court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed.

(4) The provisions of sub-section (1) shall apply also to any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence *specified therein* as they apply to such offence.

Section 196—Prosecution of offences against the State.

15.102. Under section 196 a complaint made by order of, or under authority from, the State Government or some officer empowered by the State Government is necessary to initiate proceedings for a variety of non-cognizable offences punishable under different sections of the Indian Penal Code. First come all the offences against the State punishable under sections 121 to 130, except section 127 which relates to receiving property taken by war or depredation against any power in alliance or at peace with the Government of India. Though all these offences (except two) are triable only by a Court of Session and the minimum punishment is imprisonment for seven years or more, the offences are non-cognizable under the Second Schedule to the Criminal Procedure Code and, at the same time, private complaints are shut out by section 196 of that Code. The object of this section which provides an exception to the general rule that a criminal prosecution can be initiated at the instance of any person is to prevent unauthorised persons from intruding in matters of State by instituting prosecutions and to secure that such prosecutions shall only be instituted under the authority of Government.[1] We do not find any good reason for excluding only section 127 of the Penal Code from the purview of this section. Further, it seems to us that, in addition to the State Government, the Central Government also should have the authority to initiate prosecutions by ordering a complaint. It is conceivable that in some circumstances the Central Government might be more concerned with prosecuting the offender than a State Government. We note that until 1937 this authority was vested in the Governor-General in Council, the Local Government or some officer empowered by the Governor-General in Council.

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[1] See *Bal Gangadhar Tilak*, I.L.R. 22 Bom. 112(125).

Prosecution of election offences—history.

15.103. The second group of offences covered by section 196 are the offender, punishable under Chapter IXA of the Indian Penal Code except section 171F so far as it relates to personation. This Chapter was inserted in the Indian Penal Code by the Indian Election's Offences and Inquiries Act, 1920, and for the first time made various corrupt and illegal acts committed during elections, likely bribery, undue influence, making false statements, personation etc., punishable offences. A wide definition of election as denoting an election for the purpose of selecting members of any legislature, municipality or other public authority of whatever character was inserted by the same Act in section 21[1] of the Penal Code. It was felt that the purity of all elections should be maintained by penalising various corrupt and illegal practices but at the same time in order to allay the apprehensions of several local governments that the new penal provisions were likely to be abused, specially in rural areas, for putting one's personal enemies into trouble by foisting false cases on them after an election, reference to this Chapter of the Penal Code was included in section 196 of the Criminal Procedure Code. It was thought that this would give some discretion to the Government to determine whether criminal proceedings were warranted in the circumstances of each case so that vexatious proceedings instituted solely on the basis of political animosity by private individuals could be avoided. This secondary object was certainly achieved but it is doubtful whether the penal provisions ostentatiously put in the Penal Code, but effectively blunted by section 196 of the Procedure Code, helped to maintain the purity of elections to any appreciable extent.

Personation excluded from section 196 in 1951.

15.104. This difficulty was realised in some provinces in regard to the offence of personation punishable under section 171F of the Penal Code. Even a person blatantly committing this offence at the polling booth could not be arrested or otherwise proceeded against on the spot since the offence was non-cognizable and the complaint of an empowered officer was required for prosecuting the offender in court. The Criminal Procedure Code was locally amended by four provinces excluding this offence from the scope of section 196 and making it cognizable. This lead was followed up in the Representation of the People Act, 1951, and the amendment became applicable throughout India.

Exclusion of all election offences recommended.

15.105. The experience of the last 20 years in the field of countrywide democratic elections shows that unless these impediments to prosecution are removed, the mere fact that bribery, undue influence, character assassination etc., are punishable on conviction by a criminal court, makes little difference and these corrupt practices are indulged in with impunity. The number of complaints lodged by the Government or empowered officers in regard to election offences (apart from personation) is naturally very small. Under the party system of government prevalent throughout the country it will, no doubt, be embarrassing for the State Government to decide in the first instance whether a complaint ought to be lodged in a particular case. Whichever way it decides this question it is most likely that political motives and prejudices will be attributed to it. It is possible that if the bar

[1] *See* Explanation 3. Section 6 makes the definition applicable to Chapter IXA of the Code also.

contained in section 196 of the Code is removed there will be a spate of private complaints, including quite a few vexatious ones for the sake of harassment, but we feel that this possibility must be faced in the interest of free and fair elections. We recommend that all election offences should be excluded from the purview of section 196. We would also recommend that neither illegal payments in connection with an election nor failure to keep election accounts need be offences punishable under the Penal Code and accordingly sections 171 H and 171 I of that Code be repealed.

Abetment of extra-territorial offences.

15.106. The third item in section 196 is any offence punishable under section 108A of the Indian Penal Code. This section does not exactly create an offence but only explains that a person abets an offence who, in India, abets the commission of an act outside India which, if committed in India, will constitute an offence. It is a form of abetment which along with other forms is punishable under different sections of the Indian Penal Code. An abetment of the nature described in section 108A is congnizable or non-cognizable according as the offence abetted is cognizable or non-cognizable. The object of a provision in section 196 that a court shall take congnizance of such abetment only on complaint made by order of the State Government appears to be to keep under control prosecutions which might impinge on foreign relations in general, and relations with the former Indian States in particular. (Incidentally, it should be noticed that when a person in Punjab abets the commission of an offence in Kashmir, the abetment falls under section 108A of the Penal Code and consequently attracts section 196 of the Criminal Procedure Code. In view of the external affairs aspect of the matter, proceedings for abetment of extra-territorial offences should, in our opinion, require a complaint made by order of the Central Government or of the State Government.

Sections 153A, 295A and 505, I.P.C.

15.107. The offences under section 153A, section 295A and section 505 of the Penal Code continue to be non-cognizable, though by an amendment of that Code in 1961 the maximum punishment has been increased to three years. We recommend that, in regard to these offences also, proceedings should require a complaint made by order either of the Central Government or of the State Government.

Keeping lottery office.

15.108. Section 294A of the Indian Penal Code makes it an offence to keep an office for, or to publicise, any unauthorised lottery and the offence is non-cognizable. We see no reason why private complaints in respect of this offence should be shut out and recommend that the section should be left out of section 196.

Latter part of section 196 to be simplified.

15.109. The latter part of section 196 is unnecessarily complicated. The complaint necessary for initiating proceedings may be made "by order of, or under authority from, the State Government or some officer empowered by the State Government in this behalf." We recommend that this should be simplified to complaint made by order of the Central Government or of the State Government. A simple provision of this type would avoid the time-consuming controversies that are frequently raised in the courts as to whether the officer has been duly empowered by the State Government, whether the authority to lodge the parti-

cular complaint has duly emanated from that officer or from the Government and so on.

Criminal conspiracies also to be covered.

15.110. Finally, we propose that any criminal conspiracy to commit any of the offences covered by section 196 should also be covered by that section, instead of by clause (1) of section 196A as at present.

Section 196 as revised.

15.111. Section 196 may accordingly be revised to read :—

"196. No court shall take cognizance of—

Prosecution for the offences against the State.

(a) any offence punishable under Chapter VI, section 153A, section 295A or section 505 of the Indian Penal Code, or

(b) any criminal conspiracy to commit such offence, or

(c) any such abetment as is described in section 108A of the Indian Penal Code,

except upon complaint made by order of the Central Government or of the State Government."

Section 196A.

15.112. Section 196A was inserted in the Criminal Procedure Code by the Criminal Law Amendment Act, 1913, which made criminal conspiracy as such an offence by inserting sections 120A and 120B (Chapter V-A) in the Indian Penal Code. It was apparently felt that, in the case of petty conspiracies made punishable for the first time by sub-section (2) of section 120B, private complaints should not be freely allowed and prosecutions should be instituted only when necessary in the public interest. The section classifies such criminal conspiracies in two groups and makes a fine distinction as to the manner of initiating proceedings. There seems to be no point in this refinement.

It has been authoritatively held by the Supreme Court[1] that when the object of the conspiracy is to commit a cognizable offence, such as cheating and dishonestly inducing delivery of property, and other non-cognizable offences such as forgery were also committed as steps for effecting this object, the consent of the State Government or District Magistrate is not required under clause (2) of section 196A. In view of this decision, we do not consider that any clarification is necessary in the section.

15.113. Section 196A may accordingly be simplified and revised as follows :—

Prosecution for certain classes of criminal conspiracy.

"196A. No Court shall take cognizence of *any* criminal conspiracy punishable under section 120B of the Indian Penal Code, other that a criminal conspiracy to commit a cognizable offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, unless the State Government or the District Magistrate has consented in writing to the initiation of the proceedings :

Provided that where the criminal conspiracy is one to which the provisions of section 194, section 195 or

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[1] *Bhanwar Singh* v. *State of Rajasthan*, A.I.R. 1968 S.C. 709.

section 196 apply, no such consent shall be necessary."

Section 196B.

15.114. Section 196B provides that in the case of any offence in respect of which the provision of section 196 or section 196A apply, a District Magistrate or Chief Presidency Magistrate may, "Notwithstanding anything contained in those sections or in any other part of this Code" order a preliminary investigation by a police officer not being below the rank of Inspector. The object of such an investigation can only be to enable the competent authority to decide whether it should order a complaint under section 196 or give consent to the initiation of proceedings under section 196A. We, therefore, recommend that the section should be amended vesting the power to order investigation in that authority and making it clear that such investigation will take place before the complaint is ordered or the consent is given. The words "notwithstanding anything contained in those sections or in any other part of this Code" are clearly unnecessary and should be omitted. The section may be revised to read :—

Preliminary investigation in certain cases.

"196B. The Central Government or the State Government before ordering complaint to be made under section 196, and the State Government or the District Magistrate before giving consent under section 196A, may order a preliminary investigation by a police officer not below the rank of Inspector, in which case such police officer shall have the powers referred to in sub-section (3) of section 155."

Section 197—its object.

15.115. Under section 197 the previous sanction of the appropriate Government is necessary when a judge or a Magistrate or a public servant, not removable from his office save by or with the sanction of Government, is to be prosecuted for an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty. Substantially similar provisions have found a place in the Code since 1861, the object being to enable the more important categories of public servants performing onerous and responsible functions to act fearlessly by protecting them from false, vexatious or *mala fide* prosecutions.

History of the section.

15.116. As originally enacted, section 197(1) read :—

"When any Judge, or any public servant not removable from his office without the sanction of the Government of India or the Local Government is accused as such Judge or public servant of any offence, no court shall take cognizance of such offence except with the previous sanction of the Government having power to order his removal, of some officer empowered in this behalf by such Government or of some Court or other authority to which such Judge or public servant is subordinate, and whose power to give such sanction has not been limited by such Government."

It was subsequently noticed that the section did not give protection to officers not removable from their office except by or with the sanction of the Secretary of State, nor to Magistrates as such while acting in their non-judicial capacities. It was also felt that the phrase "accused as such Judge or public servant of any off-

ence" was not sufficiently precise. Accordingly, the section was amended by the Amending Act of 1923 to read :—

> "When any person who is a Judge within the meaning of section 19 of the Indian Penal Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a Local Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government."

Protection reinforced by Government of India Act, 1935.

15.117. The protection against prosecution thus given to certain public servants was placed on a constitutional footing by section 271 of the Government of India Act, 1935. Sub-section (1) of this section provided that "no Bill or amendment to abolish or restrict the protection afforded to certain servants of the Crown in India by section 197 of the Indian Code of Criminal Procedure shall be introduced or moved in either chamber of the Federal Legislature without the previous sanction of the Governor General in his discretion." Sub-section (2) of the same section further provided that "the powers conferred upon a Local Government by the said section 197 with respect to the sanctioning of prosecutions and the determination of the Court before which, the person by whom and the manner in which, a public servant is to be tried, shall be exercisable only—

(a) in the case of a person employed in connection with the affairs of the Federation, by the Governor-General exercising his individual judgement; and

(b) in the case of a person employed in connection with the affairs of a Province, by the Governor of that Province exercising his individual judgement."

Following this latter provision, the words "except with the previous sanction of the Local Government in section 197(1) of the Code were replaced by the Adaptation of Indian Laws order of 1937 with the words "except with the previous sanction—

(a) in the case of a person employed in connection with the affairs of the Federation of the Governor-General exercising his individual judgment; and

(b) in the case of a person employed in connection with the affairs of a Province, of the Governor of that Province exercising his individual judgment."

Subsequent Adaptation Orders made necessary formal changes in the section without altering its substance.

Analysis of the section.

15.118. The section now applies to three classes of public servants, namely :—

(i) any person who is a Judge within the meaning of section 19 of the Indian Penal Code;[1]

[1] This section states :—"The word Judge denotes not only every person who is officially designated as a Judge but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which if not appealed against, would be definitive or a judgment which, if confirmed by some other authority, would be definitive or who is one of a body of persons, which body of person is empowered by law to give such a judgment";

(ii) any Magistrate; and

(iii) any public servant who is not removable from his office save by or with the sanction of a State Government or of the Central Government.

Such a public servant is protected against a prosecution only if the offence is alleged to have been committed by him while acting or purporting to act in the discharge of his official duty. The protection consists in the prosecution having to obtain the previous sanction of the Central Government if the person is employed in connection with the affairs of the Union, and of the State Government if he is employed in connection with the affairs of a State.

Does section offend article 14 of the Constitution?

15.119. The Supreme Court has held[1] that "Article 14 (of the Constitution) does not render section 197, Criminal Procedure Code, *ultra vires as* the discrimination is based upon a rational classification. Public servants have to be protected from harassment in the discharge of official duties while ordinary citizens not so engaged do not require this safeguard". In this case, however, the Supreme Court did not consider whether any unconstitutional discrimination was involved in the section extending its protection to a few categories of public servants and not to every public servant as defined in section 21 of the Indian Penal Code. The judgement states[2], "if the Government gives sanction against one public servant but declines to do so against another, then the Government servant against whom sanction is given may possibly complain of discrimination. But the petitioners who are complainants cannot be heard to say so, for there is no discrimination against any complainant. The discrimination will be patent in a case where a senior officer removable from his office only by the State Government and a subordinate officer removable from his office by a lesser authority are sought to be prosecuted in connection with their official duty, and the State Government considers it proper to refuse sanction in respect of the senior officer but has no voice as to the prosecution of the subordinate. It will be a nice point of law to determine whether the classification adopted in section 197 of public servants removable from office only by or with the sanction of the Government and other public servants is "rational" having regard to the objective of the safeguard. It has, however, been laid down by the Supreme Court[3], while explaining the scope of article 14, that "the Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest." It can, therefore, be argued that Parliament considers that the need of superior Government servants to protection under this section is the clearest and does not consider it necessary to extend the protection to lower groups of Government servants and that in this view, the section does not offend article 14.

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1 *Mata Jog Dubey* v. *H. C. Bhari* (1955) 2 S.C.R. 925, 931.

2 *Ibid.* p. 932.

3 *Ram Krishna Dalmia* v. *Justice Tandolkar*, A.I.R. (1958) S.C. 538, 548.

Suggestion to remove discrimination.

15.120. It has been suggested by a State Government that this discrimination, whether unconstitutional or not, should be removed by making section 197 applicable to all public servants irrespective of the authority competent to remove them from their office. Activities of the Government have greatly increased and a public servant at the lowest rung of the ladder is also called upon to perform duties likely to prejudice the interest of certain individuals though the same may be in the larger interest of the society. It is not always possible for the superior officer to perform the duties himself and on a number of occasions he has to get things done by his subordinates. It is said that this situation has led to an increased number of fictitious and frivolous proceedings against public servants who are not protected by section 197 of the Code, but we have no definite information in support of this statement.

Widening scope of section to cover all public servants not recommended.

15.121. However that may be, we do not think it would be proper or prudent to widen the scope of the section so as to cover all public servants irrespective of their grade or rank which goes, *pari passu,* with the importance of the duties they have to perform. The definition of "public servant" given in section 21 of the Indian Penal Code, particularly clause twelfth, is very comprehensive. It includes, besides government servants proper, "every person in the service or pay of a local authority or of a corporation established by or under a Central, Provincial or State Act or of a Government company as defined in section 617 of the Companies Act, 1956". The public servants now protected by section 197 are, broadly speaking, those government servants in the higher grade with more responsible and onerous duties to perform and hence requiring to be protected from vexatious prosecutions which would be highly detrimental to the administrative work of Government. There is, in our opinion, no need to extend this protection to other categories of government servants.

Procedural details under the section.

15.122. The meaning of the word "acting or purporting to act" in section 197 has been well settled by a string of decisions[1] of the Federal Court, the Privy Council and the Supreme Court. Any difficulty that may be felt lies in the actual application of the principles laid down in these decisions to the facts and circumstances of particular cases. The section does not prescribe any particular form of sanction, but Courts usually insist on being satisfied that the sanctioning authority has applied its mind to the facts of the case before granting sanction, and that the sanction is not arbitrary[2]. The sanction need not specify the offences as precisely as a charge[3], and omission to mention a particular section of the law also does not seem to preclude the pro-

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[1] *Hari Ram* A.I.R. 1939 F.C. 43, 46;
H. H. B. Gill, A.I.R. 1948 P.C. 128;
T. A. Menon, A.I.R. 1950 P.C. 19;
Mathum, A.I.R. 1954 S.C. 455;
Bishwabhusan v. *The State,* A.I.R. 1954 S.C. 359;
Satwant Singh v. *The State of Punjab* (1960) 2 S.C.R. 89; A.I.R. 1960 S.C. 266;
Indu Bhusan v. *The State,* A.I.R. 1958 S.C. 148;
Baijnath v. *The State,* A.I.R. 1966 S.C. 220; (1966) 1 S.C.R. 210.

[2] *Gokal Chand Dwarka Das,* (1948) 75 Indian Appeals 30. 37; A.I.R. 1948 P.C. 82;
Jawant Singh v. *The State of Punjab* (1958) S.C.R. 762, 765.

[3] *Emperor* v. *Jehangir Cama,* A.I.R. 1927 Bom. 501, 503.

secution from proving the relevant facts[1]. Though prosecutions sometimes fail because of defects in the sanction, it does not appear to be necessary to insert any provision in the Code as to what the sanction should contain.

Section to apply to public servant after retirement also.

15.123 Section 197, as it now stands, applies to a public servant of the specified category only when he is holding office as such public servant. It does not apply to him after he has retired, resigned or otherwise left the service[2]. As interpreted by the Supereme Court, the section requires that the person charged must be a public servant not only at the time when the offence was alleged to have been committed but also when he "is accused" of the offence[3]. It appears to us that protection under the section is needed as much after retirement of the public servant as before retirement. The protection afforded by the section would be rendered illusory if it were open to a private person harbouring a grievance to wait until the public servant ceased to hold his official position, and then to lodge a complaint[4]. The ultimate justification for the protection conferred by section 197 is the public interest in seeing that official acts do not lead to needless or vexatious prosecutions. It should be left to the Government to determine from that point of view the question of the expediency of prosecuting any public servant.

Reference to section 19, I.P.C. unnecessary.

15.124. Sub-section (1) refers to "a Judge within the meaning of section 19 of the Indian Penal Code". Even without these words, the position will be the same in view of section 4, sub-section (2), of the Code of Criminal Procedure. In fact, section 556 of this Code, while referring to the Judge, does not refer to section 19 of the Indian Penal Code. As regards Magistrates, however, the definition in section 19 of the Indian Penal Code may not cover Magistrates while exercising non-judicial functions or even when holding certain inquiries. It is necessary to refer to Judges and Magistrates explicitly since not all of them fall under the category of public servants not removable from their office save by or with the sanction of the Government.

Sub-section (2) of section 197 may be retained.

15.125. Sub-section (2) empowers a Government not only to determine the person by whom the manner in which, and the offence or offences for which, the prosecution of the public servant is to be conducted, but also to specify the Court before which the trial of the public servant is to be held. It is presumably to ensure that the dignity of high-placed government servant is maintained and that he is not compelled to undergo the embarassment of a trial by junior and inexperienced magistrates. There appears to be no harm in retaining the sub-section without any modification.

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[1] *Maj. J. Phillips* v. *The State*, A.I.R. 1957, Cal. 12, 25.

[2] *Keshavlal* v. *The State*, A.I.R. 1961 S.C. 1395; (1962) 1 S.C.R. 451 (Section 197);

In re S. A. Venkataraman, (1958) S.C.R. 1037 (section 6, Prevention of Corruption Act, 1947).

[3] *Emperor* v. *P. A. Joshi*, A.I.R. 1948 Bom. 248 (Reviews cases).

[4] *Cf.* the observations in *In re S. Y. Patil* A.I.R. 1937 Nag. 293 (now overruled by Keshavlal's case, supra).

15.126. In the light of the above discussion, sub-section (1) of section 197 may be revised as follows : Sub-section (1) revised.

> "(1) When any person who is *or was* a Judge x x x or Magistrate or a public servant not removable from his office save by or with the sanction of the Central Government or of a State Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction—
>
> (a) in the case of a person who is employed, *or as the case may be was at the time of commission of the alleged offence employed,* in connection with the affairs of the Union, of the Central Government;
>
> (b) in the case of a person who is employed, *or as the case may be was at the time of commission of the alleged offence employed,* in connection with the affairs of a State, of the State Government."

15.127. Section 197A was inserted by the Amendment Act of 1951 which extended the Code to all Part B States. It confers on the Rulers of the Former Indian States a protection similar to, but wider than, that conferred on public servants by section 197. Sub-section (2) of section 197A debars criminal courts from taking cognizance of any offence alleged to have been committed by any such Ruler except with the previous sanction of the Central Government. Under clause (a) of sub-section (1), the Central Government has notified 284 former Indian States; and every person who is for the time being recognized by the President as the Ruler of any of these States is entitled to protection under the section. Section 197A.

15.128. During the British regime, the Rulers of Indian States in political alliance with the paramount power were treated as sovereign within their respective territories and, consequently, they enjoyed the absolute privileges enjoyed by independent sovereigns and their ambassadors in the courts in England in accordance with the principles of international law. In British India also, so far as the criminal courts were concerned, they were not amenable to their jurisdiction at all on the principle which is stated in a classic judgement[1] on the subject as follows :— Absolute privilege enjoyed by the rulers during British regime.

> "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

[1] *The Parlement Belge,* (1880) 5 P.D., 197, 214, 215.

Continuance of privilege under the Constitution.

15.129. When after Independence, the process of integrating the former Indian States with the rest of the country began, guarantees were "given to the Rulers under the various Agreements and Covenants for the continuance of their rights, dignities and privileges. The rights enjoyed by the Rulers vary from State to State and are exercisable both within and without the States. They cover a variety of matters ranging from the use of red plates on cars to immunity from civil and criminal jurisdiction and exemption from customs duties. Even in the past it was neither considered desirable nor practicable to draw up an exhaustive list of all these rights. x x x Obviously, it would have been a source of perpetual regret if all these matters had been treated as justiciable. Article 363 has, therefore been embodied in the Constitution which excludes specifically the Agreements of Merger and the Covenants from the jurisdiction of Courts except in cases which may be referred to the Supreme Court by the President. At the same time, the Government of India considered it necessary that constitutional recognition should be given to the guarantees and assurances which the Government of India have given in respect of the rights and privileges of Rulers. This is contained in Article 362, which provides that in the exercise of their legislative and executive organs of the Union and States will have due regard to the guarantees given to the Rulers with respect to their personal rights, privileges and dignities."[1]

Limited protection under section 197A.

15.130. The enactment of section 197A in the Code of Criminal Procedure was intended to give effect to this directive in so far as criminal prosecutions of ex-rulers were concerned. Having regard, however, to the changed circumstances, the section did not confer on them an absolute immunity from prosecution for any offence, but only a limited protection in the shape of a previous sanction by the Central Government to the prosecution. No amendment is required in this section.

Section 198—deletion of reference to Chapter XIX of I.P.C. recommneded.

15.131. Section 198 deals with the cognizance of offences falling under section 491, sections 493 of 496 and sections 500 to 502 of the Indian Penal Code. These three groups of offences have nothing in common, but under section 198, proceedings can be initiated only on complaint made by some person aggrieved by the offence. The first offence mentioned in the section, namely, breach of contract to attend on or to supply demands to helpless persons, hardly ever comes before the courts. It seems to us to be wholly unnecessary to hedge it in with the procedural restriction that only some person aggrieved by the offence can lodge a complaint against an offender. We recommend the deletion of the reference to Chapter XIX of the Indian Penal Code in section 198.

Offences against marriage — consolidation of provisions in sections 198, 199 199A and 199B.

15.132. The second group of offences covered by the section are the first four offences in Chapter XX of the Indian Penal Code. The other two offences in the same Chapter, namely, adultery and enticing or taking away a married woman with criminal intent, are dealt with mainly in section 199. Certain procedural aspects which are common to sestions

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[1] White paper on Indian States (Revised Edition). 1950, pp 125126, paragraph 240.

198 and 199 are dealt with in sections 199A and 199B. It would be conducive to clarity and ease of reference if the cognizance of all offences relating to marriage (sections 493 to 498 of the Indian Penal Code) and matters connected therewith are dealt with in a single section. A draft is proposed below.

New section to apply to attempts and abetments.

15.133. In this draft section, we have made two minor modifications of substance. There is at present a conflict of decisions as to whether sections 198 and 199 apply to attempts and abetments of the offences. One view is that any abetment or attempt to commit the offence, say of bigamy, could be regarded as an offence "falling under" section 494 of the Penal Code. The proposed draft makes this clear.

Modifications relating to serving soldiers.

15.134. Clause (b) of the second proviso to section 198 and the second proviso to section 199 which are in identical terms, relate to offences under sections 494, 497 and 498 of the Penal Code. In the circumstances envisaged in the proviso, it hardly seems necessary that the person duly authorised by the husband serving in the Armed Forces should be required to obtain leave of the Court to make the complaint on his behalf. There is also no reason why the proviso should not apply to the other offences relating to marriage in the same Chapter.

Revised section 198.

15.135. The revised section 198 dealing with prosecutions for offences against marriage may be as follows : —

Prosecution for offences against marriage.

"198. (1) No court shall take cognizance of an offence *punishable under Chapter XX of the Indian Penal Code* except upon a complaint made by some person aggrieved *by the* offence :

Provided that—

(a) Where *such* person is under the age of eighteen years, or is an idiot or a lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who according to the *local* customs and manners, ought not to be compelled to appear in public, some other person may with the leave of the Court, make a complaint on his or her behalf;

(b) where *such person* is the husband and he is serving in any of the armed forces of the Union under conditions which are certified by his commanding Officer as precluding him from obtaining leave of absence to enable him to make a complaint in person, some other person authorised by the husband in accordance with the provisions of sub-section (4) may.... make a complaint on his behalf;

(c) where the person aggrieved by an offence punishable under section 494 of the Indian Penal Code is the wife, complaint may be made on her behalf by her father, mother, brother, sister, son or daughter or by her father's or mother's brother or sister.

(2) *For the purposes of sub-section* (1), *no person other than the husband of the woman shall be deemed to*

be aggrieved by any offence punishable under section 497 *or section* 498 *of the said code* :

Provided that, in the absence of the husband, some person who had care of the woman on his behalf at the time when such offence was committed *may,* with the leave of the Court, *make a complaint on his behalf.*

(3) When in any case falling under *clause* (*a*) *of the proviso to sub-section* (1)..... the complaint is sought to be made *on behalf of a* person under the age of eighteen years or of a lunatic *by a person who* has not been appointed or declared by a competent authority to be the guardian of the person of the minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, the *Court shall,* before granting the application for leave, *cause notice to be given* to such guardian and give him a reasonable opportunity *of being heard.*

(4) The authorisation *referred to in clause* (*b*) *of the proviso to sub-section* (1) shall be in writing, shall be signed or otherwise attested by the husband, shall contain a statement to the effect that he has been informed of the allegations upon which the complaint is to be founded, shall be *countersigned by his Commanding Officer,* and shall be accompanied by a certificate signed by that officer to the effect that leave of absence for the purpose of making a complaint in person cannot for the time being be granted to the husband.

(5) Any document purporting to be such an authorisation and complying with the provisions of sub-section (4), and any document purporting to be a certificate required by that sub-section shall, unless the contrary is proved, be presumed to be genuine and shall be received in evidence.

(6) *The provisions of this section apply to the abetment of or attempt to commit, an offence as they apply to the offence.*"

New section regarding prosecution for defamation.

15.136. So far as offences falling under Chapter XXI of the Indian Penal Code, *ie.* defamation, are concerned, the provision in section 198 may be put in a new section 198AA consisting only of the main clause and the first proviso. The provision contained in section 199A is hardly necessary in defamation cases and can safely be dispensed with. The section will read as follows :—

Prosecution for defamation.

"198AA. No Court shall take cognizance of an offence punishable under Chapter XXI of the Indian Penal Code except upon a complaint made by some person aggrieved *by the* offence :

Provided that where *such person* is under the age of eighteen years, or is an idiot or lunatic, or is from sickness or infirmity unable to make a complaint, or is a woman who, according to the *local* customs and manners, ought not to be compelled to appear in public, some other person may, with the leave of the Court, make a complaint on his or her behalf."

Section 198A—omission of spent clause.

15.137. Section 198A lays down a rule of limitation in regard to the offence of rape where it consists of sexual intercourse by a man with his own wife, the wife being under fifteen years of age. Clause (ii) of the section is obviously spent and may be omitted. The revised section will read :—

Prosecution for offence of martial misbehaviour.

> "198A. No Court shall take cognizance of an offence under section 376 of the Indian Penal Code, where such offence consists of sexual intercourse by a man with his own wife, the wife being under fifteen years of age, if more than one year has elapsed from the date of the commission of the offence."

Section 198B—Introduction.

15.138. Section 198B, which was introduced by the Amendment Act of 1955, deals with prosecution for the offence of defamation where such offence is committed against certain high dignitaries and public servants in respect of their conduct in the discharge of public functions. The section lays down a special procedure for such cases. The Court of Session is empowered to take cognizance of such offence, without the accused being committed to it for trial, upon a complaint in writing made by the Public Prosecutor. It is not necessary[1] for the aggrieved person to sign the complaint under this section, but the complaint has to be made with the previous sanction of a specified authority. There are also distinctive features which will be discussed below.

Legislative history.

15.139. The legislative history of the section is interesting and instructive. In the Code of Criminal Procedure (Amendment) Bill of 1954 as introduced in Parliament, it was proposed that the offence of defamation of public servants should be made cognizable on the ground that[2] "often grossly improper, unfounded and defamatory allegations and charges are made against public servants in regard to their actions in the discharge of their official duties. It is desirable, in the public interest, that inquiries should be made into such charges. Therefore, such cases are being made cognizable, so that they may be brought before a court by the police after proper investigation. Such cases are being made triable exclusively by a Court of Session."

Views of the Press Commission.

15.140. There was strong opposition to this proposal, particularly from the Indian Federation of Working Journalists. The Press Commission[3] which reported on 12th July, 1954, made the following points against the Bill :—

> "We think that it would not be altogether safe to make such offences cognizable with all the consequences flowing from such a provision. It would enable the police to arrest the alleged offender without a warrant, to take preventive action contemplated under Chapter XIII of the Criminal Procedure Code and to conduct searches under sections 165 and 166 of the Criminal Procedure Code. The defamatory

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[1] P. C. Joshi, A.I.R. 1961 S.C. 387; (1961) 2 S.C.R. 63. *See* also sub-Sec. (14) inserted by Act 40 of 1964.

[2] Statement of Objects and Reasons attached to the Bill : note on clause 25.

[3] Report of the Press Commission (12 July, 1954) paragraph 172 to 175.

allegation may be so vague that it would be impossible to secure a conviction. These allegations may vary in gravity; some may be serious while others may be so inconsequential that no one would take serious notice of them. Yet to invest police officers with power to take action in all these cases might well constitute an instrument of oppression. x x x x it would depend upon the subjective appreciation by the police officer as to what constitutes defamation. x x x Even if ultimately no case is sent up by the police, the ignominy involved in an arrest is not wiped out.

On the other hand, we realise that there would be some cases where serious allegations are made which would require police investigation. There may also be public servants, perhaps with guilty conscience who would not be willing to bring cases into courts and to clear themselves of the defamatory allegations. The police cannot take any action because the offence is a non-cognizable one, and under section 198 of the Criminal Procedure Code, no court can take cognizance of the offence of defamation (an offence falling under Chapter XXI of the Indian Penal Code) except upon a complaint made by a some person aggrieved by such offence. A procedure has therefore, to be devised which will strike a balance between those two considerations, *viz.*, (1) frivolous action by the police and the consequent harassment of the alleged offender, and (2) the desirability of police investigation or magisterial inquiry in some cases where it is necessary that the public servant should clear himself of the defamatory allegations."

Recommendation of the Press Commission.

15.141. The Press Commission recommended an addition to section 198 as follows :—

"Provided further that where the person aggrieved under Chapter XXI of the Indian Penal Code is a public servant within the meaning of section 21 of the Indian Penal Code, by reason of allegations made in respect of his conduct in the discharge of his public duties, the magistrate with jurisdiction may take cognizance of the offences upon a complaint made in writing by some other public servant to whom he is subordinate."

It also recommended an addition to section 202 to the effect that "where the complaint is in respect of defamation of a public servant in the discharge of his duties the Magistrate shall make the inquiry himeslf or direct an inquiry or investigation into the complaint as aforesaid."

Final views of the Joint Committee.

15.142. The Joint Committee which considered the Bill of 1954 agreed[1] that "the offence of defamation against the President, Governor or Rajpramukh of a State, Minister, or other public servant should not be made cognizable." They omitted the clause by which section 198 was amended and recommended as follows :—

"Instead, the Committee have inserted a new section 198B in the Criminal Procedure Code. In drafting this sec-

[1] Joint Committee's Report, para 18 on clause 25.

tion, the Committee have taken into consideration the recommendations of the majority of the members of the Press Commission and the evidence tendered by the representatives of Indian Federation of Working Journalists. While the Committee consider that dafamation of a public servant should not be made a cognizable offence, they are of the opinion that there should be an independent authority apart from the person aggrieved to set the law into motion. The Committee are of the view that the procedure laid down in sub-section (2) of section 194 is cumbersome, and might prove expensive. The Committee consider that the Public Prosecutor should have the right to launch a prosecution in all such cases by a written complaint which should be filed before the Court of Session. The Court of Session may take cognizance of the offence upon such complaint without the accused being committed to it for trial, and it shall try the case following the procedure prescribed for warrant cases. The Public Prosecutor, however, shall have no right to make a complaint except with the previous sanction of the person specified in sub-section (3) or section 198B. Such a complaint should set forth such particulars as may be reasonably sufficient to give notice to the accused of the offence alleged to have been committed by him, and should be filed within six months from the date on which the offence is alleged to have been committed."

Section designed to protect Government's reputation.

15.143. Section 198B thus emerged in its present form after much deliberation and discussion. It was substantially different from the original clause in the Bill, and also from the provision suggested by the Press Commission. It brings in the Public Prosecutor, who is expected to make the complaint made with the Government's approval and to conduct the trial before the Court of Session. It puts the whole weight of the Government against the accused, in what would otherwise have been a private litigation between the accused and the public servant. This intervention of the State can be justified only on the ground that the Government has an interest in protecting its reputation when it is likely to be tarnished if an attack on its officers goes unchallenged, or in other words, the defamation, besides causing harm to the individual, has caused appreciable injury to the State.

Sub-section (1)—unnecessary to cover all public servants.

15.144. The primary object behind section 198B is to provide a machinery enabling Government to step in to maintain confidence in the purity of administration when high dignitaries and other public servants are wrongly defamed. We think that to achieve this object, it is unnecessary to cover all Government servants irrespective of their position. Government servants in general, can seek permission of the Government and approach the Courts for vindicating their official conduct.[1] The special provision is needed only for the high dignitaries who really constitute the Government itself. We think that it should be confined to the President and the Vice-President of India, the Governors of States, Administrators of Union Territories and Ministers, whether of the Union or of a State.

Details as to the number and nature of the prosecutions launched under section 198B since 1955 which were furnished to

[1] *Cf.* Rule 19, Central Civil Services' Conduct Rules.

us by the Courts of Session show that a comparatively large number of cases were on behalf of the subordinate ranks of Government servants. For example, during the period 1955 to 1967, only twenty-five cases were instituted under this section in Punjab, out of which 2 related to Class I officers, 8 related to class II officers and 15 related to other Government servants such as sub-Inspectors of Police, Registration Clerk, Accountants, Peons etc. The Total number of prosecutions in any year was very small.

We are of the view that the provisions of the section, exceptional as they are, should be confined to the high dignitaries of the State mentioned above. In the case of defamation of other public servants, the ordinary provisions of section 198 should be enough, so far as the Code is concerned.

Defamation of ex-ministers.

15.145. In a case[1] decided by the Allahabad High Court, the question arose whether section 198B applied when the person defamed was a Minister of the State Government but had ceased to hold that office at the time when he was defamed. The High Court held in the affirmative stating that publication of the defamatory article, apart from being defamatory of the ex-minister in his personal capacity, "was also a defamation of a Minister of the U.P. State. It was, therefore, the State which suffered the injury along with the individual and the responsibility for initiating prosecution for defamation, therefore, lay with the State of U.P. irrespective of the fact whether the particular Minister remained in the State as such at the time the article was published or when sanction to prosecute the accused was obtained or not."

We are somewhat doubtful whether, strictly as a matter of interpretation, this view of sub-section (1) is correct. Looking to the main object of the section, however, we consider that the section should apply only when the person defamed holds, at the time of the defamation, an office mentioned in that sub-section. In the case of a Minister, for instance, the defamation must be of a person who, on the date of the defamation, is actually a Minister. In our opinion, it is not necessary that the State should have the power to initiate prosecutions under this section for alleged defamation of ex-ministers.

Sub-section (1) revised.

15.146. Sub-section (1) of section 198B may accordingly be revised as follows :—

> "(1) Notwithstanding anything contained in this Code, when any offence falling under Chapter XXI of the Indian Penal Code is alleged to have been committed against *a person who, at the time of such commission,* is the President *of India,* the Vice President of *India,* the Governor of a State, *the Administrator of a Union Territory, or a Minister of the Union or of a State or of a Union Territory,* x x x in respect of his conduct in the discharge of his public functions, a Court of Session may take cognizance of such offence, without *the case being committed to it,* upon a complaint in writing made by the Public Prosecutor."

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[1] *Ramesh Sinha* v. *Public Prosecutor,* A.I.R. 1960 All. 763, 768.

Sub-section (3) revised.

15.147. Sub-section (3) which requires the Public Prosecutor to obtain the previous sanction of the Government concerned in the case of public servants and of some particular secretary to the Government in the case of the President, Vice-President, Governor or Minister, appears to be unnecessarily complicated. In the case of the Governor of a State, for instance, a Secretary to the Government authorised by the Governor in this behalf has to apply *his* (the Secretary's) mind to the facts of the case and give *his* previous sanction to the Public Prosecutor lodging the complaint. This may place him in an awkward and embarrassing position if the Governor himself has suggested taking action under the section. It would be simpler and more straightforward to provide for the previous sanction of the Government concerned in all cases. The sub-section may be revised as follows :—

"(3) No complaint under sub-section (1) shall be made by the Public Prosecutor except with the previous sanction—

(a) of the State Government, in the case of the Governor of a State or of a Minister of the State Government; and

(b) of the Central Government in any other case."

Sub-section (5) revised.

15.148. Sub-section (5) lays down that the Court of Session taking cognizance of an offence under sub-section (1) shall try the case without a jury and follow the same procedure as a Magistrate is required to follow in trying a warrant case instituted on complaint. Since Jury trials are to be abolished and the procedure for sessions trial in general is to be simplified, it will be sufficient to provide that the Court of Session may try a case under this section as if it had been committed to it by the Magistrate on a complaint. The sub-section may be revised as follows :—

"(5) A Court of Session taking cognizance of an offence under sub-section (1) shall try the case as if it had been committed to it by a Magistrate taking cognizance of the offence upon a complaint :

Provided that the person against whom the offence is alleged to have been committed shall, unless the Court of Session, for reasons to be recorded, otherwise directs, be examined as a witness for the prosecution."

The latter half of the sub-section which has been put in the form of a proviso in the above redraft is intended to avoid abuse of the procedure or any suspicion of it. Ordinarily, there could not be a fair trial in a case of defamation without the person who claims to have been defamed entering the witness box and standing cross-examination. In order to maintain public confidence, the sub-section rightly provides that, even where the aggrieved person is a high dignitary, he must give evidence in person.

Compensation under sub-section (6) to (11).

15.149. Sub-sections (6) to (11) provides for the payment of compensation in any case where the court acquits or discharges the accused and is of the opinion that the accusation against him was false and either frivolous or vexatious. Cases where the

aggrieved person is the President or the Vice-President of India or the Governor of a State are, however, taken out of the purview of these sub-sections. This leaves the cases where the person against whom the offence of defamation is alleged to have been committed is a Minister or other public servant. Though that person may not have expressly given his consent to the complaint lodged by the Public Prosecutor, the Court is required to call upon that person (and not the Public Prosecutor) to show cause why he should not pay compensation to the accused.[1] In practice, however, the complaint would not have been sanctioned by the Government in the case of defamation of a Minister unless the Minister himself had initiated the prosecution or, at any rate, given his personal consent to it. We have recommended above that the scope of this section need not extend to cases of defamation of ordinary public servants. Where defamation of a Minister is alleged and not proved and the complaint is found to have been filed without reasonable cause, it is but proper that, as provided in sub-section (6), the Court should ask the Minister to show cause why he should not pay compensation to the accused.

Sub-sections (6) and (7) amended.

15.150. Sub-sections (6) and (7) may be amended to read as follows :—

"(6) If, in any case instituted under this section, the Court of Session x x x discharges or acquits all or any of the accused and is of opinion *that there was no reasonable cause for making the acquisition against them* or any of them, *it may,* by its order of discharge or acquittal, direct the person against whom the offence was alleged to have been committed, *where such person was at the time of such commission a Minister,* to show cause why he should not pay compensation to such accused or to each or any of such accused, where there are more than one.

(7) The Court of Session shall record and consider any cause which may be shown by the person so directed, and if it is satisfied that *there was no reasonable cause for making* the accusation, it may, for reasons to be recorded, direct that compensation to such amount not exceeding one thousand rupees, as it may determine, be paid by such person to the accused or to each or any of them."

Sub-sections (8) to (11).

15.151. Sub-sections (8) to (11) do not require any change of substance.

Sub-section (12) omitted.

15.152. Sub-section (12) makes the section applicable to the High Courts at Calcutta and Madras in the exercise of their original criminal jurisdiction. But so far as Madras is concerned, Madras Act 34 of 1955 has omitted sub-section (12), and it is only the City Sessions Court which has jurisdiction under the section in the Presidency-town. In view of our proposal to abolish the ordinary original jurisdiction of the High Court at Calcutta, the sub-section may be omitted.

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[1] It may be noted that the provision regarding compensation was not recommended by the Joint Committee which considered the Amendment Bill in 1954 though it was suggested by one of its members in a dissenting note. It came in later by means of an amendment moved in the Lok Sabha while considering the Bill as revised by the Joint Committee.

Effect of Sub-section (13).

15.153. Sub-section (13) states that "the provisions of section 198B shall be in addition to, and not in derrogation of, those of section 198". The precise meaning and effect of this sub-section was a matter of controversy until it was settled by the Supreme Court.[1] The sub-section is "enacted with a view to state *ex abundanti cautela* that the right of a party aggrieved by publication of a defamatory statement to proceed under section 198 is not derrogated by the enactment of section 198B. The expression 'in addition to' and 'not in derrogation of' mean the same thing, that section 198B is an additional provision and not intended to take away the right of a person aggrieved, even if he belongs to the specified classes and the offence is in respect of his conduct in the discharge of his public functions, to file a complaint in the manner provided by section 198". The Supreme Court thus negatived the contention that, in every case falling under section 198B, besides the complaint filed by the Public Prosecutor, there must also be a complaint by the aggrieved person.

Sub-section (14) added in 1964.

15.154. Presumably with a view to making this position clear, sub-section (14) was added to section 198B by the Anti-Corruption Laws (Amendment) Act, 1964. This sub-section states that "where a case is instituted under this section for the trial of any offence, nothing in sub-section (13) shall be construed as requiring a complaint to be made also by the person aggrieved by the said offence". The correct position appears to be that the remedies available to the aggrieved person under the two sections are not mutually exclusive but are parallel to, and independent of, each other. Where the aggrieved person and the Government concerned have decided to proceed under section 198B, it is clear that the complaint need not comply with the condition laid down in section 198. This idea could be readily brought out by inserting the usual saving provision in section 198, *e.g.*, the words "save as otherwise provided in section 198B". If this was done, the only point to make clear in section 198B would be that the right of the aggrieved person to bring forward a complaint on his own in the Court of a Magistrate in accordance with section 198 was not in any way affected.

Revised sub-section in place of sub-sections (13) and (14).

15.155. We accordingly propose that in place of the existing sub-sections (13) and 14), the following sub-section may be put in section 198B :—

> "(13) Nothing in this section shall affect the right of the person against whom the offence referred to in sub-section (1) is alleged to have been committed, to make a complaint in respect of that offence before a Magistrate having jurisdiction or the power of such Magistrate to take cognizance of the offence upon such complaint."

Inclusion of part of section in Chapter XXIII recommended.

15.156. Sub-sections (1), (2), (3), (4), (13) and (14) of this section are properly within the scope of this Chapter since they deal with the conditions required for initiation of proceedings in a certain category of cases. The other sub-sections, however, are special provisions governing the trial of these cases by the Court of Session, and, as such, it will be more appropriate to put them in Chapter XXIII below.

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[1] *P. C. Joshi* v. *State of U.P.*, A.I.R. 1961 S.C. 387, 390.

CHAPTER XVI

COMPLAINTS TO MAGISTRATES

General scheme of chapter.

16.1. Chapter XVI of the Code deals with complaints to Magistrates and contains only four sections. One of these, section 201, merely provides that if a complaint is made to a Magistrate who is not competent to deal with it, he must, if it is in writing, return it with an endorsement that it should be presented to the proper court, and if it is an oral complaint, direct the complainant to the proper court. The other three sections describe how a competent Magistrate should deal with complaints. The scheme is simple enough. The Magistrate must first examine the complainant and, if there are any witnesses present, they too must be examined and a record of such examination made. If the Magistrate finds that there is substance in the complaint and he ought to proceed further, he can, of course, summon the accused. The formal power in that respect is contained in section 204. In case, however, he is not satisfied after hearing the complainant and the few witnesses, the Magistrate can postpone the issue of process against the accused, and for satisfying himself, either—

(a) inquire into the case himself, or

(b) send it for inquiry to a subordinate Magistrate, or

(c) send it for investigation to a police officer, or

(d) send it for investigation to some other person.

This inquiry or investigation is, according to section 202, for the purpose of "ascertaining the truth or falsehood of the complaint". The section further requires the Magistrate to record his reasons for ordering such an inquiry or investigation. The next section provides that if after such investigation or inquiry the Magistrate finds that there is no justification for proceeding further and summoning the accused, he may dismiss the complaint after recording his reasons.

Provisions sound.

16. 2. We are satisfied that the general policy underlying these provisions is sound. Every-day experience of the courts shows that many complaints are ill-founded, and it is necessary therefore that they should at the very start be carefully considered and those which are not on their face convincing, should be subjected to further scrutiny so that only in substantial cases should the court summon the accused person. We are not therefore proposing any change of substance.

Section 200-omission of "at once".

16.3. There are, however, some details which admit of improvement. Section 200 requires that the magistrate must examine the complainant "at once" in order to emphasise that such examination is, in every case, the first step to be taken. It can, however, lead to a futile controversy about the effect of some time interval between the receiving of a complaint and the complainant's examination, which we would like to avoid. We have therefore deleted the expression "at once", as we have no doubt that the mandate of the law is otherwise sufficiently clear.

16.4. The proviso to section 200 says, among other things, that a presidency magistrate may or may not administer oath to the complainant, and further, in the case of a written complaint he need not make such a full record of the examination as other magistrates are required to do. We find no proper justification, these days, to make a distinction between a presidency magistrate and other competent magistrate, and have removed the distinction. Proviso-clause (b) omitted.

16.5. One question for our consideration was whether a complainant must always appear in court to support his complaint, unless the complainant be a court or a public servant already excepted by section 200, or whether he can be permitted to be examined on commission and perhaps, send his written complaint to the court through post. We are clear that the making of a complaint is a formal act with legal consequences and it must be done formally in person or through properly appointed counsel and the complainant must be ready to support it with his sworn statement in court. The provision for a commission is contained in section 503 of the Code and it contemplates only the witnesses' examination on commission. Although therefore some courts have at times allowed a commission to be issued for the examination of a complainant, we are not in favour of encouraging such a practice. Examination of complainant on commission under section 200.

16. 6. In the light of the above discussion, section 200 may be revised to read as follows :— Revision of section 200.

"200. A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate : Examination of the complainant.

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses—

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192;

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them."

16.7. We recommend a formal redraft of section 201, without making any change of substance, as follows :— Redraft of section 201.

"201. If the complaint is made to a Magistrate who is not competent to take cognizance of the offence, he shall— Procedure by Magistrate not competent to take cognizance of the case.

(a) if the complaint is in writing, return it for presentation to the proper court with an endorsement to that effect, and

(b) if the complaint is not in writing, direct the complainant to the proper Court."

Section 202 (1)-recording of reasons not necessary.

16.8. Section 202(1) requires a Magistrate to record his reasons in case he postpones the summoning of the accused and orders an inquiry or investigation into the complaint. It has been forcefully represented to us by the Chief Justice of a High Court that Magistrates find it difficult at that stage to record their reasons. We are inclined to agree. One reason why a Magistrate may be reluctant to issue process against the accused can be that he feels doubtful about the value of the complainant's statement, and the few witnesses if any, produced by him. It would be clearly embarrassing for him to say so in writing at that stage. Nor do we see any real purpose that can be served by any expression of judicial opinion at that stage. We therefore propose to do away with the requirement.

Object of inquiry or investigation.

16.9. Section 202 says in terms that the further inquiry or investigation is intended for the purpose of "ascertaining the truth or falsehood of the complaint". We consider this inappropriate, as the truth or falsehood of the complaint cannot be determined at that stage; nor is it possible for a magistrate to say that the complaint before him is true when he decides to summon the accused. The real purpose is to ascertain whether grounds exist for "proceeding further", which expression is in fact used in section 203. We think therefore that the language of section 202 should correspond to the language of section 203, and we have accordingly made suitable verbal alterations.

Inquiry by subordinate magistrate not desirable.

16.10. When a magistrate decides to postpone the issue of process under section 202, he can make an inquiry into the case himself or have an inquiry made by a subordinate magistrate. Finally, however, the case has to be decided by himself. A inquiry is a proceeding in court involving the hearing of evidence, and if that evidence is to be finally weighed by a particular magistrate, it is, we think, proper that it should be heard by the same magistrate. The delegation of a part of the task—possibly a tedious part—to another judicial functionary can well lead to avoidable delay. Nor is the division of responsibility, implied in the present scheme, wholly desirable. We are, therefore, suggesting the deletion of this power from the provision.

Complaints of offences triable exclusively by the Court of Session.

16.11. We are recommending in a subsequent chapter[1] the abolition of commitment inquiries. This necessitates certain amendments in the procedure to be followed in an inquiry into complaints where the offence complained of is one triable exclusively by the Court of Session. We recommend that the Magistrate who takes cognizance of such offence on complaint must himself make an inuiry into the complaint, and call upon the complainant to produce all his witnesses and examine them on oath. Further, in such cases the Magistrate should not direct an investigation by a police officer or other person. For this purpose, we propose two amendments of section 202 in the form of another proviso to sub-section (1) and a proviso to sub-section (2).

[1] Chapter 18.

16.12. The section may be amended to read as follows :—

Postponement of issue of process.

"202. (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding :

Provided that no such direction for investigation shall be made—

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In any inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath :

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant."

Section 203—"May dismiss the complaint".

16.13. Section 203 provides that if the Magistrate dealing with a complaint finds no sufficient cause for proceeding with the case even after considering the evidence of the complainant and his witnesses and the result of the inquiry or investigation made under section 202, he "may" dismiss the complaint. It is difficult to imagine what other course is possible in such circumstances, and the direction of law for the dismissal of such a complaint might as well be plainer. We propose, therefore, to put in "shall" in place of "may". Reasons have, of course, to be recorded for the dismissal of the complaint, as the order is subject to scrutiny by the District Magistrate and the Sessions Judge, and is revisable by the High Court. These are necessary safeguards against the arbitrary dismissal of a complaint.

Fresh complaint after dismissal of previous complaint admissible only in exceptional circumstances.

16.14. Further, in law, a second complaint after the dismissal of a similar complaint is competent. Quite obviously, however, if a Magistrate has dismissed a complaint after careful consideration of the material before him, he is unlikely to find "sufficient cause for proceeding" with it on the second occasion; and even if the magistrate who deals with the second complaint is different, the likelihood of his proceeding with it is not increased. Only in exceptional circumstances will a second complaint be proceed-

ed with. The law is in accordance with these exceptions. In a recent decision[1], the Supreme Court has held :—

> "An order of dismissal under section 203, Criminal Procedure Code is no bar to the entertainment of a second complaint on the same facts, but it will be entertained only in exceptional circumstances like when the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish, or where new facts which could not with reasonable diligence have been brought on the record in the previous proceeding, have been adduced."

Legislation not recommended.

16.15. It was suggested to us that the enumeration of the special circumstances by the Supreme Court should be accepted as exhaustive and the law should provide that, barring those circumstances, no second complaint on the same facts would be competent. We are not convinced that the circumstances mentioned by the Supreme Court exhaust the category of special circumstances in which a court would, and in our opinion, should, entertain a new complaint, but leaving that alone, it is clear that the enumeration is largely in abstract terms, which can be of little assistance in practice. In the very case before the Supreme Court[1], although the facts were not disputed, there arose in the Supreme Court itself, a sharp difference of opinion regarding the existence of special circumstances. Two Judges held that in the circumstances of the case the entertainment of the complaint was an abuse of the process of the court and could not be permitted; while one Judge found that the second complaint was a step in the furtherance of justice. It seems to us, therefore, that legislation in this respect is not called for, there being no doubt about the law itself.

Revised section 203.

16.16. Section 203 speaks of the Magistrate dealing with the case as "the Magistrate before whom a complaint is made or to whom it has been transferred". This we consider unnecessarily lengthy and indirect, as the context leaves no doubt that the power of dismissal is given to the very same magistrate who has dealt with it, under section 200 and 202. We propose that section 203 may be revised as follows :—

Dismissal of complaint.

> "203. If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of the opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint. In every such case he shall briefly record his reasons for so doing."

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[1] *Pramatha Nath Talukdar and another* v. *Saroj Ranjan Sarkar*, (1962) Suppl. 2 S.C.R. 297; A.I.R. 1962 S.C. 876.

CHAPTER XVII

COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES

Scheme of Chapter.

17.1. This Chapter consists of two sections, one dealing with the issue of process, and the other with the power to dispense with the personal attendance of the accused at the commencement of proceedings before the Magistrate.

Section 204 (1)—issue of summons or warrant.

17.2. Section 204(1) refers to the Second Schedule and to the division made in the fourth column of that Schedule between cases where a summons is to issue in the first instance and cases where a warrant is to issue. While in the former case the Magistrate has to issue a summons (unless he proposes to issue a warrant under section 90), in the latter case, "he may issue a warrant, or, if he thinks fit, a summons for causing the accused to be brought or to appear" before the Magistrate.

Omission of 4th column in 2nd Schedule recommended.

17.3. An analysis of the fourth column of the Second Schedule shows that a summons is to issue in the first instance for every summons case with the exception of the following thirteen offences under the Indian Penal Code, namely :—

(i) Offence under section 153, 357, 374, 417, 434, 448, 482, 508 or 509, punishable with one year's imprisonment,

(ii) offence under section 138 or 225B, punishable with 6 months' imprisonment,

(iii) offence under section 292, punishable with 3 months' imprisonment, and

(iv) offence under section 510, punishable with imprisonment for not more than 24 hours.

On the other hand, a warrant is to issue in the first instance in every warrant case except in regard to offences under the following sections of the Indian Penal Code :—

(i) section 326 (imprisonment for life),

(ii) section 376 (10 years' imprisonment),

(iii) section 325 (7 years' imprisonment),

(iv) section 335 (4 years' imprisonment),

(v) sections 161, 162, 164, 165, 167, 324, 344, 347, 348, 484, 485 and 487 (3 years' imprisonment), and

(vi) section 169, 177, 189, 217, 223, 225A, 229, 270, 295, 338, 342, 345, 346 and 355 (2 years' imprisonment).

These few exceptions do not appear to be based on any logical principle or practical consideration. The law may well be simplified by omitting the fourth column from the Second

Schedule and by relating sub-section (1) of section 204 about issue of process to summons cases and warrant cases.

Simplification of sub-section (1).

17.4. A suggestion has been received that if the case is one relating to an offence punishable with imprisonment of less than three years, a summons should issue in the first instance. There are not many offence under the Indian Penal Code which are punishable with imprisonment which may extend to two years, and even in these cases, the Magistrate has full discretion under section 204 to issue a summons in the first instance. This provision is sufficient for all practical purposes, and we recommend that sub-section (1) of section 204 be simplified as follows :—

> "(1). If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be a *summons-case,* he shall issue his summons for the attendance of the accused. If the case appears to be a *warrant-case,* he may issue a warrant, or if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has not jurisdiction himself) some other Magistrate having jurisdiction."

Section 205.

17.5. Section 205 empowers a Magistrate to dispense with the personal attendance of the accused whenever he issues a summons for the appearance of the accused. It may be noticed that the power is not confined to summons-cases, but extends also to warrant-cases where the Magistrate issues a summons in the first instance. The Courts have taken the view that the power to dispense with the personal attendance of the accused under this section is limited to the first issue of process and that it cannot be exercised at any later stage. If the Magistrate finds it necessary at a later stage to dispense with the personal attendance of the accused, he will have to act under and in accordance with the provisions of section 540A. The two complementary provisions appear to be adequate and do not require any change.

Plea of guilty in absentia in petty cases.

17.6. The Law Commission in its Fourteenth Report recommended[1] that a provision similar to that contained in section 130 of the Motor Vehicles Act, 1939, enabling the accused to plead guilty without appearing in Court and to remit the predetermined fine should be made applicable to the trial of petty offences, particularly those under special and local laws. It pointed out that "there are a large number of petty offences mostly of a technical kind, in which the imposition of a fine as penalty would meet the ends of justice. In those cases, where there is every likelihood of the accused pleading guilty, the need for the examination by the courts of a large number of witnesses; often public servants, may be avoided if the above procedure is employed".

Special procedure recommended.

17.7. We consider that this procedure could be adopted with advantage in regard to any offence punishable only with fine not exceeding one thousand rupees. The prosecution may indicate in the police report or complaint whether the case is regarded

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[1] 14th Rep. Vol. 2, page 786, para. 24.

as a fit one for applying this procedure : and if the Magistrate taking cognizance of the offence agrees he may indicate in the summons that if the accused desires to plead guilty to the charge without appearing in Court, he may transmit his plea and the stipulated fine, either by post or by messenger. It should, however, be provided in the law that the amount of fine that might be specified in the summons should not exceed one-hundred rupees. The new provision should not apply to any offence under any special or local law which, like the Motor Vehicles Act, 1939, contains a provision for convicting the accused in his absence on a plea of guilty and sentencing him to pay a fine.

17.8. We accordingly recommend adding in Chapter XVII of the Code a new section as follows :— New sections 205A and 241A.

Special summons in case of petty offence.

"205A. (1) If, in the opinion of a Magistrate taking cognizance of a petty offence, the case may be summarily disposed of under section 241A, the Magistrate may issue summons to the accused requiring him *either* to appear in person or by pleader before the Magistrate on a specified date, *or* if he desires to plead guilty to the charge without appearing before the Magistrate to transmit before the specified date, by post or by messenger, to the Magistrate, the said plea in writing and the amount of fine specified in the summons which shall not exceed one-hundred rupees.

(2) For the purposes of this section, 'petty offence' means any offence punishable only with fine not exceeding one thousand rupees, but does not include any offence so punishable under the Motor Vehicles Act, 1939, or under any other law which provides for convicting the accused person in his absence on a plea of guilty."

In Chapter XX, which deals with the trial of summons cases by Magistrates, another new section should be inserted as follows :—

Conviction in absence of accused on plea of guilty.

"241A. (1) Where a summons has been issued under section 205A and the accused desires to plead guilty to the charge without appearing before the Magistrate, he shall transmit to the Magistrate by post or by messenger, a letter containing his plea and also the amount of fine specified in the summons.

(2) The Magistrate may thereupon convict the accused in his absence on his plea of guilty and sentence him to pay the fine specified in the summons, and the amount transmitted by the accused shall be adjusted towards that fine."

17.9. While considering section 173, we have recommended[1] that the duty cast on the police by sub-section (4) of supplying to the accused copies of statements and documents mentioned therein should be transferred to the Magistrate taking cognizance. Apart from changes consequential on this altered arrangement, the only change of substance which is proposed is that where a

Supply of copy of police report and other documents to the accused—new section 205B.

[1] *See* paragraph 13 above.

document is voluminous, the Magistrate may allow the accused or his pleader to inspect it instead of causing a copy to be furnished. The new section providing for the supply of copies and for the matters connected therewith may be as follows :—

Supply of copy of police report and other documents to the accused.

"205B. In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused free of cost a copy of each of the following :—

(i) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (4) of section 173;

(iv) the confessions and statements, if any, recorded under section 164; and

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (4) of section 173 :

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in item (iii) above and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused;

Provided further that if the Magistrate is satisfied that any document referred to in item (v) above is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

Supply of copies of statements etc. in complaint case triable by Court of Session.

17.10. Where the Magistrate issues process under section 204 on complaint and the offence is triable exclusively by the Court of Session, the Magistrate should grant to the accused copies of the statements of all persons examined by the Magistrate, and other material on which the prosecution relies in order that the accused may get adequate information about the charge against him and prepare for his defence. This is all the more necessary since commitment proceedings are to be abolished. The new section may be as follows :—

Supply of copies of statements and documents to the accused in complaint case triable by Court of Session.

"205C. Where in a case instituted on a complaint it appears to the Magistrate issuing process under section 204 that the offence is triable exclusively by the Court of Session, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following :—

(i) the statements recorded under section 200 or section 202 of all persons examined by the Magistrate;

(ii) the confessions and statements, if any, recorded under section 164; and

(iii) any documents produced before the Magistrate on which the prosecution proposes to rely :

Provided that if the Magistrate is satisfied that any such document is voluminous, he shall, instead of furnishing the accused with a copy thereof, driect that he will only be allowed to inspect it either personally or through pleader in Court."

Commitment of case to Court of Session—new section 205D.

17.11. Where the case (whether instituted on a police report or on complaint) relates to an offence triable by the Court of Session, the Magistrate has to send up the case to the Court of Session. Since an inquiry by the Magistrate is not contemplated in the scheme which we propose in regard to such offences, the provision in this respect can take a simple form and can be placed in this Chapter as forming part of the commencement of proceedings before magistrates. It will be convenient to refer to this process as "commitment of the case to the Court of Session", although the procedure is radically different from the commitment proceedings at present provided in Chapter 18. The new section may be as follows :—

Commitment of case to court of Session when offence is triable exclusively by it.

"205D. When in a case instituted on a police report or on a complaint, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the case is triable exclusively by the Court of Session, he shall—

(a) commit the case to the Court of Session;

(b) if the accused is in custody, forward him to that Court, and, if he is not in custody, take bail from him for appearance before that Court;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence; and

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session."

CHAPTER XVIII

INQUIRY INTO CASES TRIABLE BY THE COURT OF SESSION OR HIGH COURT

Nature of committal proceedings until 1955.

18.1. Chapter 18 prescribes the procedure for the preliminary inquiry before a Magistrate where the case is triable exclusively by a Court of Session or a High Court or, in the opinion of the Magistrate, ought to be tried by such Court. Committal proceedings, as these inquiries are commonly called, have been a distinct feature of the Code from the beginning. Ordinarily, a Court of Session or High Court may take cognizance of an offence and try the case only on the basis of a committal made to it by a Magistrate under the provisions of this Chapter. Until 1955, the procedure for the committal inquiry was the same, whether the proceedings had been instituted before the Magistrate on a police report or on a complaint or in any other manner. He was required to take all the evidence—oral and documentary—that may be produced in support of the prosecution, or on behalf of the accused, or that may be called for by the Magistrate himself, examine the accused and satisfy himself that there was sufficient ground for committing the accused to the Court of Session. If he was so satisfied, he framed a charge or charges against the accused, bound over the witnesses, committed the accused and sent up the case to the Court of Session. If he was not so satisfied, he discharged the accused.

Main object not attained in practice.

18.2. The main object of the committal proceedings was to ensure that innocent persons alleged to have committed grave offences were not harassed by being made to face a sessions trial straightaway and that only those persons against whom a *Prima facie* case was made out before a Magistrate underwent that ordeal. But, to quote from the Statement of Objects and Reasons appended to the Amendment Bill of 1954,—

> "Experience, however, has shown that Magistrates commonly commit practically all the persons brought before them by the police. The proportion of persons discharged at this stage does not exceed 2% or thereabouts. These commitment proceedings, however, are made extremely lengthy, involve many adjournments and cause not only the prosecution, but the accused as well, trouble and heavy expense. Even after the commitment, the sessions trial may not commence for some months. The result is that persons guilty (*sic*) of extremely grave offences have to remain in suspense for more than a year or so."

Proposal in 1954 to abolish committal proceedings in police cases not accepted.

18.3. It was accordingly proposed in that Bill that, in all cases instituted on a police report, committal proceedings should be abolished and the accused should be put up by the Magistrate directly before the Court of Session for undergoing trial. These proceedings were, however, retained for cases initiated by

private complaints on the ground that "the safeguards to the accused which become available in cognizable cases through police investigation are non-existent." This proposal did not find favour with Parliament which eventually adopted a *via media* in the shape of a slightly abbreviated form of committal proceedings in police report cases. The procedure was set out in a comprehensive new section 207A consisting of sixteen sub-sections, and the old sections 208 to 220 in the Chapter were made applicable to cases instituted otherwise than on a police report. It should be borne in mind that such cases are very few indeed as compared to the cases instituted on a police report.

Present position—main differences between procedure in police cases and complaint cases.

18.4. The main differences between the two procedures may be briefly noted. In a police case, the accused has to be furnished with a copy of the police report, of the statements of prosecution witnesses as recorded by the police and of all documents on which the prosecution relies. The Magistrate is required to satisfy himself that this has been done at the commencement of the committal proceedings. (This innovation introduced in 1955 applies equally to warrant cases tried by Magistrates). In a complaint case, this is of course not possible and hence not required.

In a police case, the Magistrate is required "to take the evidence of such persons, if any, as may be produced by the prosecution as witnesses to the actual commission of the offence alleged". While he has a discretion to take the evidence of other prosecution witnesses if he considers it necessary in the interests of justice, he is not expected to take the evidence of any defence witness. In a complaint case, on the other hand, the Magistrate has to take "all such evidence as may be produced in support of the prosecution or on behalf of the accused".

In a police case, the Magistrate proceeds to frame a charge against the accused if, on the basis of the statements of witnesses recorded by the police under section 161(3) and those recorded by himself, he "is of opinion that the accused should be committed for trial". In a complaint case, the Magistrate frames a charge when he "is satisfied that there are sufficient grounds for committing the accused for trial". This difference in wording suggests a higher standard for the prosecution evidence in complaint cases.

The difference is somewhat more noticeable in regard to the circumstances in which the Magistrate is expected to discharge the accused. In a police case, he may do so only "if he is of opinion that (the) evidence and documents (before him) *disclose no grounds* for committing the accused person for trial". In a complaint case, he may do so "if he finds that there are *not sufficient grounds* for committing the accused person for trial".

These differences, however, are not very material, nor of any great consequence since, as mentioned above, the number of sessions cases instituted otherwise than on a police report is very small. We may accordingly concentrate attention on section 207A under which most committal inquiries are now conducted by Magistrates.

Controversy over revised procedure

18.5. The purpose of providing a shorter procedure in police cases was, of course, to speed up the committal proceedings and to avoid, as far as possible, a duplication of the taking of evidence, first, by the committing Magistrate and then, by the Court of Session. Ever since its introduction, the new procedure has been a subject-matter of controversy. Even in 1958, the Law Commission noted in the earlier Report that "the views expressed x x x before us were sharply divided on this question. One view supported the abolition of the committal stage altogether so that the Sessions Court may be seized straightaway of these police report cases. On the other hand, a large section of opinion emphatically supported a reversion to the old full committal procedure. There was little support for the continuation of the present shortened committal procedure."[1] While taking the view that the abolition of committal proceedings altogether will not be justified, the Commission at that time felt "that it would not be right to reach definite conclusions on this question in view of the fact that the amended committal procedure has been in operation only for a little over two years. Greater experience of its working has to be gained before a decision is reached to make radical changes in legislation so recently enacted."[2] For the time being, the Commission only recommended two amendments in section 207A,[3] one in sub-section (4) so that all witnesses to the commission of the crime and all other important witnesses should be examined in the committal proceedings, and the other in sub-section (6) changing "disclose no grounds" to "there are not sufficient grounds".

High Courts, Bar Associations and State Governments consulted.

18.6. When the revision of the Code was taken up in 1960 and suggestions were received from the public, they were found to be of the same conflicting nature as before in regard to the utility of committal proceedings. In view of the importance of the subject, the Commission decided to ascertain in greater detail the views of those who were competent to speak on it, and addressed a letter[4] to the High Courts, the leading Bar Associations and the State Governments soliciting their views specially on the following questions :

(1) Are commitment proceedings under section 207A of the Code an improvement over the pre-1955 position from the point of view of securing a speedy and fair trial for the accused?

(2) If not, should the pre-1955 position be restored in respect of commitment proceedings by repealing section 207A and making suitable modifications in the other sections ?

(3) Do commitment proceedings serve any useful purpose at all and would it be better to dispense with such proceedings?

(4) Will an authority similar to the Director of Public Prosecutions in England be useful and effective in

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[1] 14th Report, Vol. II, p. 793, para. 10.
[2] *Ibid*, p. 797. para. 18.
[3] *Ibid*, p. 797, para. 19.
[4] Letter dated 23rd August, 1968.

> Indian conditions, particulraly in regard to the prosecution of sessions cases?

One or more Members of the Commission also held discussions on these points at various places with Judges, members of the Bar Associations and others.[1] As was only to be expected, the views expressed in the replies to the Commission's letter and at the personal discussions revealed a sharp difference of opinion.

English procedure for trial of felonies.

18.7. Before considering the arguments for and against the abolition of committal proceedings, it will be useful to refer to the evolution of the English procedure for the trial of felonies or indictable offences. As stated by Holdsworth[2],—

> "Early law did not contemplate any preliminary enquiry into the guilt or innocence of an accused person. Criminals were presented for trial either by the jury of presentment, or in consequence of the finding of the coroner's inquest. If they were taken in the act, they were generally executed out of hand. x x x In fact, in the seventeenth century, the examination conducted by the magistrates was of an inquisitorial nature. The prisoner was closely examined. The witnesses for the prosecution were not examined in his presence. Their evidence was only for the information of the court. Even as late as 1823 it was stated to the grand jury that, when a magistrate was conducting this preliminary examination, he was acting inquisitorially and not judicially; that such proceedings might and ought to be conducted in secret; and that information so ascertained might be communicated to the prosecutor but not to the party accused. In 1836, the Prisoners' Counsel Act allowed accused persons to inspect all depositions taken against them. In 1848, it was enacted that the witnesses for the prosecution should be examined in the presence of the accused. The accused person was allowed to make any statement he pleased or to call any witnesses he pleased; but he was not to be obliged to do either; and the Magistrate must inform him about this. The preliminary examination before the Magistrates was thus made an entirely judicial proceeding."

The pattern thus set in England for the trial of serious offences—a preliminary judicial inquiry before magistrates followed by a full-fledged jury trial before the court of assize or quarter sessions—was copied while codifying the law of criminal procedure in British India.

Change made by the Criminal Justice Act of 1967.

18.8. Recently, however, an important change has been made in England by the Criminal Justice Act, 1967 in respect of proceedings before examining justices. It has introduced a new type of "committal for trial without consideration of the evidence". Under the ordinary procedure, examining justices are obliged to consider the evidence, which must be adduced orally

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[1] *See* Introduction to this Report.

[2] Holdsworth, *History of English Law* (1922), Vol. I, pp. 295 to 297.

before them, and any statement of the accused. They cannot accept written statements as evidence and must satisfy themselves that there is sufficient evidence to place the accused upon his trial. The Act of 1967 enables them to admit as evidence, subject to certain safeguards, written statements of witnesses to the same extent as oral evidence to the like effect. A learned writer in a Law Review comments on the new procedure as follows[1] :—

> "Committal proceedings have long been recognised as time-consuming and potentially productive of a sense of unfairness and of risk of prejudice for the defence when reported in the press. Witnesses did not come up to proof and thus counsel's opening speech was sometimes unwittingly inaccurate; evidence was admitted at committal proceedings but rejected as inadmissible at the trial; only the prosecution case was given at committal and the press report was necessarily one-sided, and often haphazard and fortuitous; at the trial the Judge always had to warn the jury to put out of their minds anything they had read about the case. Accordingly a new simplified committal procedure and restrictions on reporting, while retaining the essential principle that the accused is entitled to know in advance the case he has to meet at the trial, and to have press publicity if he wishes, are very welcome. Where the accused is legally represented, committal may now take place formally by consent on the basis of written statements, served on the defence before the hearing, which will not even be read out aloud in court nor even read by the magistrates, if the defence does not wish the prosecution witnesses to be called."

No committal proceedings in Scotland.

18.9. In Scotland there are no committal proceedings at all. The Lord Advocate and the Crown Office staff in Edinburgh are responsible for deciding whether the evidence justifies prosecution, the offence to be charged and the Court in which the prosecution is to be brought. The procurator-fiscal in a county (corresponding to our Public Prosecutor in a district) has a wide discretion as to the prosecution of lesser offences and receives guidance from the Crown Office regarding more serious crimes. He sends to the Crown Office "pre-cognitions" (*i.e.*, the statements of witnesses recorded before trial) and reports of crime received from the police and from private individuals. Each prosecution witness is precognised privately, the accused being neither present nor represented by counsel. The function of the procurator-fiscal corresponds more to the investigating judge in continental procedure than to magistrates conducting a preliminary inquiry in England. It is his duty to ensure that pre-cognitions are as full as possible and faithfully represent the evidence of witnesses.

Main features of Scottish procedure.

18.10. It is a rule of Scottish procedure[2] "that every indictment must have appended to it a list of all productions which are to be used as evidence by the Crown at the trial and of all Crown witnesses with their addresses. The indictment is served upon the accused not less than six clear days before the first diet, that is, the sitting of the Court at which the accused is called on to plead 'guilty' or 'not guilty'. If the accused does not plead guilty, the trial takes place at the second diet, which must be not less than

[1] A. Samuels in the *Modern Law Review* (1968) at p. 17.
[2] W. G. Normand, 'The Public Prosecutor in Scotland', (1938) 54 *L.Q.R.*, p. 353.

nine clear days after the first diet. There is therefore a minimum of fifteen clear days between the date when the accused person first receives the list of the witnesses and of the productions which may be used against him and the date of trial. In practice the time is usually considerably longer." The defence is also obliged to provide a list of its witnesses to the prosecutor who may precognise them. The pre-cognitions, however, are merely aids to the examination of the witnesses in Court. They are not disclosed to the Judge or jury.

Procedure in Israel.

18.11. Another country which does not have committal proceedings for the trial of grave offences is Israel. Under a recent law, it has dispensed with such proceedings. The law provides that the accused person may at any reasonable time inspect a copy of the investigation material in the possession of the prosecutor and that the prosecution may not produce any evidence in court or call any witness unless the accused has been given a reasonable opportunity to inspect and copy the evidence or statement of the witness during the investigation. The procedure is thus similar to that obtaining in India for the trial of warrant cases before Magistrates under section 251A of the Code.

Procedure in some Australian Provinces.

18.12. Some of the Australian Provinces which have been following the traditional English system of a preliminary inquiry by a Magistrate followed by a jury trial before a Judge in the case of all serious offences have been feeling the delay, expense and inconvenience involved in the committal proceedings. They have recently been amending their laws so that such proceedings are shortened, particularly where the accused has pleaded guilty. As in England, statutory declarations are made admissible in lieu of oral evidence in these proceedings.

Committal proceedings not essential for a fair trial.

18.13. We have mentioned these few foreign instances only to show that committal proceedings are by no means an essential part of a fair trial which a person accused of a grave crime has a right to expect. They are more in the nature of a convenience from the point of view of the prosecution as well as of the defence, especially in places where trial by jury is prescribed by law. A jury trial has necessarily to be concentrated into as short a period as possible and carried on without a break. Committal proceedings help in presenting the evidence of the prosecution and the defence in an organised manner before the jury, besides, of course, affording a protection to the individual against having to face a jury trial when the evidence to support the charge against him is insufficient. With the abolition of jury trials, these advantages have lost much of their importance.

Committal proceedings dispensed with by law in certain cases.

18.14. It should also be noticed that the Indian Legislature has occasionally provided for the direct trial of the accused person by the Sessions Court without any committal proceedings before a Magistrate. Section 198B of the Code, for example, dispenses with such proceedings when the prosecution is for defaming the President or Vice-President of India, the Governor of a State, a Minister of the Union or of a State, or other public servant employed by Government. Under the Prevention of Corruption Act, Sessions Judges, appointed as Special Judges, take direct cognizance of certain serious offences involving bribery and corruption and try them more or less according to warrant-case

procedure. Special courts and tribunals have also been established from time to time for the trial of persons charged with grave offences without the case being committed to them after a magisterial inquiry. In all these cases, the avowed object of the special provision or law is to avoid the delay inherent in committal proceedings and expedite the trial of the offence. At the same time, it cannot be contended that the law has in any way failed to secure the essentials of a fair trial for the accused.

18.15. The main object of Chapter 18 of the Code in interposing a judicial inquiry by a Magistrate as a preliminary to every sessions trial is to secure that a *prima facie* case is made out against the accused person to the satisfaction of the Magistrate, and that, where the Magistrate is not satisfied that there are sufficient grounds for committing the accused for trial, the latter is discharged and saved the trouble and expense involved in facing the Sessions Court. This would seem to be the only real justification for a procedure which involves the taking of the same prosecution evidence twice over, puts the State as well as the accused to additional expense and trouble and holds up the trial for a considerable period. Examination of the witnesses before the effective Court is postponed by weeks, sometimes months, because of this procedure. It would be well to remember in this connection Kātyāna's injunction to the Hindu kings of old :—

na kāla-haranam kāryam
rājnā sākshi-prabhāshṇe
mahān dosho bhavet kālāt
dharma-vyāvriti-lakshaṇah.

[No delay should be permitted by the king in getting witnesses to depose; for lapse of time leads to great evil, marked by their deviating from the lawful course.]

No effective screening of flimsy cases.

18.16. Even under the full committal proceedings in vogue before the amendment of 1955, it was noticed that the screening of flimsy cases, which these proceedings were designed to effect, was in fact not achieved. Subsequent to the amendment, the number of cases in which the committing Magistrates found it possible to discharge the accused because the evidence and documents produced by the prosecution "disclosed no grounds for committing the accused person for trial" was not unnaturally even smaller than before. The amendment might have reduced to a certain extent the time taken in the committal proceedings, since the prosecution witnesses actually put forward and examined by the Magistrate were fewer, but this gain in time was offset in quite a few States, particularly in Uttar Pradesh and Bihar, by the time taken *after* commitment for the case to be brought up before the Court of Session for trial. The Commission was informed that this interval, which ought not to be more than three or four weeks, was in many cases about a year in Uttar Pradesh and in Bihar according to recent statistics. There is also no doubt that in almost all States the time spent in committal proceedings themselves continues to be considerable in spite of the amendment of 1955.

Many of the arguments put forward in support of retaining committal proceedings are based on the assumption that they

effectively help in the screening of flimsy cases. For instance, when it is urged that evidence before committing magistrate often establishes that there is no *prima facie* case against the accused or some of the accused and they are saved the trouble and expense of a sessions trial, or that the committal stage operates as a check against innocent persons being brought before the Court of Session on the basis of defective police investigation, or that committal proceedings save the time of Sessions Judges and congestion in their Courts, the argument conveniently turns a blind eye to the fact that the number of cases resulting in discharge of any of the accused persons by the Magistrate is very small indeed. The advantage on this score is consequently negligible as compared to the magisterial time and public money wasted in the great majority of committal proceedings.

Committal proceedings not essential for giving accused clear picture of the case.

18.17. Another line of argument for retaining committal proceedings is that the accused must have a full and clear picture of the case against him before he is brought up before the Sessions Court and for this purpose it is essential that a Magistrate should record the statements on oath of all the prosecution witnesses, or, at any rate, of the "witnesses to the actual commission of the offence alleged". While one may readily agree that these depositions taken in his presence give the accused a better idea of the case against him than copies of their statements-recorded by the police under section 161(3) and of the other documents relied on by the prosecution, we do not think that they are essential for a fair trial of the accused. In order to prepare his defence, he has certainly a right to know the nature of the evidence which the prosecution has obtained against him, but this, in our opinion, is made available to him under section 173(4). It has to be remembered that what finally matters is the evidence before the Sessions Judge at the trial and not the statements recorded by the Magistrate or by the police in the first instance, and the longer the time taken in bringing the witnesses before the trial court, the better are the chances of their deviating from the truth.

Sessions Judge's evidence.

18.18. We may quote here a Sessions Judge[1] who writes from personal experience as follows :—

> "Another fact which I have noticed is that the commitment proceedings are unduly delayed and there are instances where the accused have been committed to the Court of Session after more than two years of the date of offence. Even in serious offences like murder, the commitment proceedings take quite a long time. This has a number of evils in its train. The main evil is that there is a lot of gap between the examination of the witnesses in the Court of Session and before the Magistrate, and again in the Court of Session and the date of occurrence, and the witnesses who are by a large number illiterate make discrepant statements on some matters and this furnishes an opportunity to the defence to confront the witness with his previous statement made in the committing court or before the police. Further if there is a delay in the trial of the case the witnesses are likely to be won over. In some cases I have found that due

[1] Shri Rajendra Nath Aggarwal, District & Sessions Judge, Simla.

to delay important witnesses disappear, and there is delay in the disposal of the trial. I have also found that when there is a delay in the trial of the case, important witnesses such as doctor, investigating officer, are transferred and sometimes it becomes difficult to procure their presence and this delays the finishing of the trial."

Similar views have been expressed by a number of other Sessions Judges with varying emphasis on the different points brought out in the above report.

Abolition of committal proceedings recommended.

18.19. After a careful consideration we are of the unanimous opinion that committal proceedings are largely a waste of time and effort and do not contribute appreciably to the efficiency of the trial before the Court of Session. While they are obviously time-consuming, they do not serve any essential purpose. There can be no doubt or dispute as to the desirability of every trial, and more particularly of the trial for a grave offence, beginning as soon as practicable after the completion of investigation. Committal proceedings which only serve to delay this step, do not advance the cause of justice. The primary object of protecting the innocent accused from the ordeal of a sessions trial has not been achieved in practice; and the other main object of apprising the accused in sufficient detail of the case he has to meet at the trial could be achieved by other methods without going through a very partial and ineffective trial rehearsal before a Magistrate. We recommend that committal proceedings should be abolished.

Independent authority to control public prosecutions.

18.20. We have mentioned above[1] that one of the connected questions on which informed opinion was sought by us was whether an authority similar to the Director of Public Prosecutions in England would be useful and effective in Indian conditions, particularly in regard to the prosecution of sessions cases. The opinions received by us were generally in favour of such an authority provided its independent character could be safeguarded and it was given an effective voice in advising whether the evidence collected by the investigating agencies was sufficient to put up the case before the Court of Session. Such an authority would doubtless be specially valuable after the abolition of committal proceedings.

Existing prosecuting agency in the districts.

18.21. We have now in every district an officer appointed by the State Government who is designated the Public Prosecutor and who, with the assistance of one or more additional Public Prosecutors, conducts all prosecutions on behalf of the Government in the Court of Session. These senior Public Prosecutors are under the general control of the District Magistrate. Prosecution in the magisterial courts is, generally speaking, in the hands of either the police officers or of persons recruited from the bar and styled Police Prosecutors or Assistant Public Prosecutors all of whom work under the directions of the Police Department.

Defects of the system pointed out in 14th Report.

18.22. In an earlier Report[2], the Law Commission analysed the defects of the existing system in the following passage :

"We have pointed out earlier that, in most of the States, the prosecutors in the Magisterial courts are either police

[1] *See* para. 18.6 above.
[2] 14th Report, Vol. II, pp. 769-770.

officers, who may or may not be legally qualified, or members of the Bar, but they all function as a part of the Police Department. However experienced the specially appointed police officers might be, want of legal knowledge or legal qualifications must affect adversely prosecutions conducted by them. On account of a lack of adequate knowledge of law, and particularly of case law and the law of evidence, such prosecuting officers are not capable of presenting their cases with ability and effectiveness. As compared with counsel appearing for the accused, who are all legally qualified and trained, their performance is bound to be inadequate. The burden of proving a case is upon the prosecution, and the prosecution ought to be represented by advocates, as able if not abler than the lawyers for the accused. In any case, there can be little dispute about the general principle, now largely accepted, that the prosecutors ought to be legally qualified persons and should be recruited from the Bar.

It must not also be forgotten that a police officer is generally one-sided in his approach. It is no reflection upon him to say so. The Police Department is charged with the duty of the maintenance of law and order and the responsibility for the prevention and detection of offences. It is naturally anxious to secure convictions. Not infrequently, relevant witnesses are kept back by the prosecution. Intimidation of defence witnesses is also not unusual. These are the results of an excess of zeal by the police officers and a want of a realization of their true function. But if the purity of judicial administration is to be maintained, such conduct must be sternly checked. We have also been told of police officers of the lower grade in charge of the prosecutions deliberately weakening their cases out of corrupt motives. It is obvious that by the very fact of their being members of the police force and the nature of the duties they have to discharge in bringing a case to court it is not possible for them to exhibit that degree of detachment which is necessary in a Prosecutor.

The Public Prosecutor is almost wholly occupied with the conduct of prosecutions in the Sessions Court and in appearing for the State in criminal appeals or revisions and like matters. Apart from such advisory functions as he may discharge when requested to do so by the District Magistrate or the District Superintendent of Police, he has no control over the cases before they come to the court. Even in the exercise of the power to withdraw from a prosecution, he is controlled to a large extent by the District Magistrate or the District Superintendent of Police. On account of the practice that has prevailed for a long time, the Public Prosecutor has come to occupy a subordinate position. Even when he is aware of the defects in the prosecution evidence, he is not in a position to influence the future course of the prosecution. He is rarely consulted at the crucial stages of investigation and has no opportunity of guiding the investigating agency in the matter of gathering relevant evidence.

A large number of complaints never come to court for the reason that the police after investigation report them to be not worth proceeding upon grounds of insufficient evidence or legal difficulties. It is true that in such cases, the complainant can himself directly file a complaint. The propriety of dropping the

prosecution in such cases is a matter that is at present examined only by the departmental officials. The Public Prosecutor is unable to interfere in any of these matters, being regarded more or less as a subordinate official under the control of the District Magistrate and the District Superintendent of Police."

Recommendation to make prosecuting agency independent of police department.

18.23. The Law Commission then suggested[1] "that the prosecuting agency should be separated from and made independent of its administrative counter-part, that is the Police Department, and that it should not only be responsible for the conduct of the prosecution in the court but it should also have the liberty of scrutinising the evidence particularly in serious and important cases before the case is actually filed in court. Such a measure would ensure that the evidence in support of a case is carefully examined by a properly qualified authority before a case is instituted so as to justify the expenditure of public time and money on it. It would also ensure that the investigation is conducted on proper lines, that all the evidence needed for the establishment of the guilt of the accused has been obtained. The actual conduct of the prosecution by such an independent agency will result in a fairer and more impartial approach by the prosecutor to the case."

Director of public prosecution for each district recommended.

18.24. As a first step towards improvement, the Law Commission proposed[2] that in every district a separate prosecution department should be constituted and placed in charge of an official who may be called a "Director of Public Prosecutions", and indicated[3] in some detail what his principal functions should be.

Public prosecutor to be of higher status with wider range of functions.

18.25. It is to be regretted that this recommendation has not been given any serious consideration by the State Governments and that there has been little improvement in the calibre of the prosecuting agencies in India and, consequently, in the level of efficiency in the conduct of prosecutions in the more important cases, whether before the Sessions Court or the Courts of Magistrates. We would therefore repeat the recommendation. Should the reluctance of the State Governments to move in this direction be to the creation of a new office with a high sounding designation, we would suggest that the objective could be achieved by giving the Public Prosecutor of the district a greater authority, a higher status and a wider range of functions than he has at present, and approximating to those envisaged for the Director of Public Prosecutions by the Law Commission in the earlier Report. These changes, substantial as they would be, would not require any radical amendment of the Code and could be effected by administrative action of the State Government.

Responsibility of public prosecutor in police report sessions cases.

18.26. With the abolition of committal proceedings, it will be the responsibility of the Public Prosecutor to scrutinise the police report (or "charge-sheet" as it is commonly called) before it is submitted to the Magistrate and to see that a case which, according to the police is exclusively triable by a Court of Session, is really so and that there is sufficient evidence to support it. This is said to be the practice even now, at least in important sessions cases, and there should accordingly be no difficulty in enforcing

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[1] 14th Report, Vol. II, p. 770, para 14.
[2] 14th Report, Vol. II, p. 770, para. 15.
[3] *Ibid*, p. 771.

it in all sessions cases. At this stage, the Public Prosecutor should have the authority to send the case back for further investigation and to modify the proposed charge whenever he finds it necessary to do so.

Sessions cases to continue to be instituted in Magistrates' Courts.

18.27. Though committal proceedings as such are to be abolished, we propose that the existing system under which Magistrates alone are competent to take cognizance of offences should be continued even in regard to cases triable exclusively by the Court of Session. Later in this Report,[1] we are recommending a considerable reduction in the number of offences under the Indian Penal Code which should be within the exclusive jurisdiction of the Sessions Court; but the cases partaining to such offences need not be instituted directly in that Court. Whether on a police report or otherwise, such cases will, as at present, be instituted in the Court of a competent Magistrate.

Magistrate's function in police report cases.

18.28. We have recommended in an earlier Chapter that the duty now cast on the police by section 173(4) to furnish copies of the police report statements of witnesses, and relevant documents to the accused should be shifted to the Magistrate taking cognizance of the offence.[2] When a sessions case is instituted before a Magistrate on a police report, he will first see to it that all these copies are furnished to the accused in good time and will also decide that, *prima facie*, the case is triable exclusively by the Court of Session.

Procedure in complaint cases.

18.29. As regards the small number of sessions cases that may be instituted on complaint, it would obviously be convenient if they were also brought before a Magistrate in the first instance; but we do not consider it necessary to retain the elaborate provisions contained in sections 208 to 220 which lay down the procedure for committing such cases to the Court of Session. The object of this procedure is to get all prosecution witnesses examined by the Magistrate *in the presence of the accused* in order that the accused may have a full idea of the case which is brought against him. We propose[3] that in such cases it will be sufficient if the Magistrate taking cognizance of the offence on complaint holds an inquiry under section 202 and examines the complainant and all his witnesses on oath, *but not in the presence of the accused*. If on the basis of such sworn statements he finds that there is "sufficient ground for proceeding" he should issue process to the accused as provided in section 204. He should then grant to the accused copies of the statements of all persons examined by the Magistrate and other material on which the prosecution relies in order that the accused may get adequate information about the charge against him and prepare for his defence.[4]

The combined effect of these two provisions will be to place a person accused of a grave offence by a private complainant in a somewhat better position than one charged with a similar offence on the basis of a police investigation. In the former case, a preliminary inquiry by a Magistrate into the truth of the complaint is made mandatory and takes the place of an investigation

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[1] *See* para. 47.10 below.
[2] *See* para. 14.21 above.
[3] *See* paras 16.11 and 16.12 above.
[4] *See* para 17.10 above.

by the police. The accused gets copies of the statements of all prosecution witnesses recorded by the Magistrate in the former case and the statements recorded by the police under section 161(3) in the latter case. With these safeguards which appear to us to be sufficient, we consider that committal proceedings could be dispensed with for complaint cases also.

Procedure for the sessions trial.

18.30. Although there will be no committal proceedings as such, in the sense of a judicial inquiry with the accused present, the Magistrate will, under the proposed scheme, be "committing the case to the Court of Session" whenever it appears that it is triable exclusively by that Court. The steps to be taken by him have been indicated[1] at the end of the last Chapter. The procedure for the sessions trial will broadly be the same as for the trial of a warrant case instituted on a police report. The statutory provisions in this respect are set out in a subsequent Chapter;[2] but we may mention here the main features of the trial before the Court of Session. The first hearing will be devoted to a statement of the case by the Public Prosecutor, consideration of the statements of witnesses and other documents on which he proposes to reply, framing of the charge against the accused, recording of his plea and other necessary preliminaries. An adjournment will be necessary at this stage in order to secure the attendance of all the prosecution witnesses and also to give the defence time to prepare for their examination in the light of the opening day's proceedings. The second stage will be the recording of the prosecution evidence which could, and should, go on *de die in diem*, followed by the examination of the accused. Another short adjournment will be necessary at this stage for the defence evidence and conclusion of the trial.

The proposed scheme for the sessions trial does involve two adjournments for 10 or 15 days each which are probably not required—in theory, at any rate—under the existing procedure. In practice, however, many sessions trials even now are not concluded at one continuous sitting and adjournments are found to be necessary for one reason or another. The inability of the prosecution to produce all its witnesses on the appointed days is said to be the main cause. Such delays can only be avoided if all concerned in the trial are imbued with a feeling of urgency and a desire for its speedy conclusion.

Omission of Chapter 18 recommended.

18.31. The whole of Chapter 18 of the Code may accordingly be omitted.

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[1] *See* para. 17.11 above.

[2] *See* para. 23.2 below.

CHAPTER XIX

THE CHARGE

19.1. Section 221 lays down the main requirement for the framing of a charge as regards the offence with which the accused is charged. Section 221.

Sub-section (6) provides that in the presidency-towns the charge shall be written in English and elsewhere it shall be written either in English or in the language of the Court. We see no justification at the present day to have a separate rule for presidency-towns and recommend that there also the charge should be written either in English or in the language of the Court. A suggestion has been received that the charge should be written in the language of the accused when it is not the language of the Court. The Code expressly provides[1] that in trials of warrant cases by magistrates as well as in sessions trials, the charge should be read and explained to the accused. These provisions are adequate to secure a fair notice to the accused and there is no need to add a reference to the language of the accused in sub-section (6). Language of charge.

19.2. Section 222(1) prescribes the important general rule that full particulars as to the time and place of the offence and as to the person against whom or the thing in respect of which the offence was committed should be given in the charge. Sub-section (2) of the section provides a limited relaxation of the rule in a case of criminal breach of trust or of dishonest misappropriation. In these two cases it is sufficient to specify the gross sum embezzled or misappropriated and the dates between which the offence was committed, subject to the limitation that the interval between the first and the last of such dates shall not exceed one year. The charge so framed shall be deemed to be a charge of one offence within the meaning of section 234. Section 222.

19.3. The combined effect of sections 222(2) and 234(1) is that a person accused of breach of trust may be charged with and tried at one trial for three such offences committed within the space of 12 months, and in regard to each such offence the relaxation as to stating particulars of time, place and amount may be availed of. But when the embezzlement has been going on for a long time, say three years, it is not permissible to rely on section 222(2) for grouping together each year's embezzlement as one offence and then rely on section 234(1) for trying the three charges at one trial. It is suggested that multiplicity of criminal proceedings is not avoided in such a case because both the sections have the same period limit of one year. By way of remedy the suggestion is made that the period mentioned in section 234(1) should be increased to two years and also that the number of charges that can be tried jointly may be increased from three to five or even six. We are unable to agree with either suggestion. We do not think it is desirable to permit generally the joinder of more Effect of sections 222(2) and 234(1).

[1] Sections 251A(4), 255(1) and 271.

than three offences of the same kind at one trial or to increase the period-limit to two years. Apart from embezzlement cases it would not be to the advantage of the prosecution or of the defence to deal with numerous different transactions spread over a long period at one trial. Even in embezzlement cases the limit of one year, set in both the sections, is not unreasonable and there is no good justification for increasing it.

Sections 223 to 230.

19.4. Sections 223, 224 and 225 do not call for any comments. In section 226 the special provision for the High Courts is not necessary and the words "or in the case of a High Court, the Clerk of the State" may be omitted. Similarly, since trial by jury is proposed to be abolished, in section 227(1) the latter part ("or in the case of trials by jury before the Court of Session or the High Court, before the verdict of the jury is returned") may be omitted. Sections 228, 229 and 230 also do not call for any comments.

Section 231—revision recommended.

19.5. Under section 231, whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused "shall be allowed" to recall or re-summon and examine, with reference to such alteration or addition, any witness already examined. Where an application is made for re-summoning of such witnesses, the court is bound to grant it, and cannot refuse it on the ground that the accused cannot be prejudiced[1] or even on the ground that the alteration is of such a nature that it cannot affect the evidence. Now, it may happen that the application for recalling and re-summoning the witness is made only for the purpose of vexation or delay or defeating the ends of justice. In such cases, the court should have a power to refuse the application. If the evidence of a witness is of a purely formal character and the other party merely desires to prolong the proceedings by taking advantage of the right given by the section, there is no reason why it should be mandatory for the court to re-summon the witness. We, accordingly, recommend that section 231 be revised as follows :—

"231. Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall *on application* be allowed—

(a) to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, *unless the court, for reasons to be recorded in writing, considers that such application is made for the purpose of vexation or delay or for defeating the ends of justice;*[2]

(b) to call any further witness whom the Court may think to be material."

Section 232 omitted and provisions included in section 535.

19.6. Section 232 deals with the effect of a material error in, or absence of, a charge which has misled the accused in his defence. It provides that in such a case the court of appeal, revision or confirmation shall direct a new trial upon a charge framed

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[1] *Ramalinga* v. *Emp.*, A.I.R. 1929 Mad. 200, 201; *Nagendra Nath* v. *Emp.*, A.I.R. 1932 Cal. 486, 487.

[2] Cf. Sections 251A(9) and 257(1).

in such manner as it thinks fit, or, if it is of opinion that on the facts proved in the case no valid charge could be preferred against the accused, it shall quash the conviction. This is hardly the proper place for such a provision. While the power of the superior courts to order retrial is referred to in subsequent sections like 376(b), 423(1) and 439(1), the effect of omission to frame a charge or an error in a charge is again provided for in sections 535 and 537(b). We consider that section 232 should be omitted and its provisions suitably modified and combined with the provisions in sections 535 and 537(b)[1].

Joinder of charges—general scheme.

19.7. The first requirement of a fair trial in criminal cases is a precise statement of the accusation. This requirement the Code seeks to secure, first by laying down in sections 221 to 224 what a charge should contain; next, by laying down in section 233 that for every distinct offence there should be a separate charge; and lastly, by laying down in the same section that (except in certain specified cases) each charge should be tried separately, so that what is sought to be achieved by the first two rules is not nullified by a joinder of numerous and unconnected charges.

These exceptions are based on some rational principle or other. In section 234, which permits a joint trial for offences of the same kind not exceeding three in number and committed within a period of twelve months, the principle is the avoidance of a multiplicity of proceedings. In section 235(1), the principle is the relation between offences forming part of the same transaction, separate trials whereof will naturally result in an incomplete comprehension of the totality of the crime even where they do not lead to conflicting judgments. The principle behind section 235(2) and section 235(3) is that if a criminal act has several aspects, all of them should be adjudged together. Sections 236 and 237 (which should be read together) provide for the not unusual type of case in which while broad facts concerning an offence are, or can be, established by the evidence, not all the incidents and circumstances are known. In such cases it is permissible to charge the accused with having committed all or any of different but connected offences, and also to convict him of an offence with which he has not been expressly charged but might have been charged. Lastly, section 239 permits a joint trial of several persons in specified cases because of some basic connection between the various offences committed by them.

Section 233 "distinct offence".

19.8. The meaning of the expression "distinct offence" in section 233 has been fully explained by the Supreme Court in a recent decision.[2] No changes are necessary in this section.

Section 234.

19.9. We considered the question whether there is any need to increase the period of twelve months mentioned in section 234(1) or the number of offences which are triable at one trial. We are of the view that either increase would embarrass the accused and hinder a smooth and fair trial.

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[1] *See* para. 45.9 below.

[2] *Banwari Lal* v. *The Union of India*, (1963) Suppl. 2 S.C.R. 338; A.I.R. 1963 S.C. 1620.

The principle laid down in section 234(2) as to when offences may be regarded as being "of the same kind" is, in our opinion, sound. The exception made by the proviso in regard to simple theft punishable under section 379 of the Penal Code and theft in a dwelling house etc., punishable under section 380 is also sound and the proviso does not require any addition, *e.g.*, theft after preparation for violence (section 382) or robbery involving theft (section 392).

Section 235–Joinder of charges of misappropriation and falsification of accounts.

19.10. The application of section 235, particularly in relation to conspiracies, has been dealt with in a number of decisions[1] of the Supreme Court, and the scope of the section in this respect is now well settled. There is some controversy,[2] as to whether the joinder of three charges of criminal breach of trust or misappropriation with three charges of falsification of accounts connected with those offences is permissible, even when all the offences have been committed within the space of twelve months. A charge specifying the gross sum, framed with reference to section 222(2), is no doubt a charge of one offence within the meaning of section 234, but this legal fiction contained in section 222(2) is only for the purposes of section 234.[3] While the falsification of accounts connected with a single act of misappropriation can be said to form the same transaction and consequently a joint trial of the two offences is permissible under section 235(1), it is not permissible to try together even two offences of misappropriation and two connected falsifications of accounts, much less a series of misappropriations charged as one offence under section 222(2) and all the connected falsifications of accounts.

This position creates practical difficulties. Criminal breach of trust (or misappropriation) is often accompanied by falsification of accounts (or analogous offences) committed either to facilitate the breach of trust or to conceal its commission. The exclusion of such connected offences of falsification of accounts from the fiction created by section 222(2) deprives this section of its usefulness in many cases. While misappropriation on several occasions within a year accompanied by falsification of several items in the account books may be fairly described as parts of the same transaction, the several acts of falsifying the accounts cannot be clubbed together in one charge.

New sub-section recommended.

19.11. After considering various alternatives we recommend the insertion of a new sub-section in section 235 as follows :—

> "(1) When a person charged with one or more offences of criminal breach of trust or dishonest misappropriation of property as provided in sub-section (2) of section 222 or in sub-section (1) of section 234, is accused of committing, for the purpose of facilitating or concealing the commission of that offence

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[1] *Purshottam Das Dalmia* v. *The State*, (1962) 2 S.C.R. 101; *R. K. Dalmia* v. *Delhi Administration*, (1963) 1 S.C.R. 253, 273; *State of Andhra Pradesh* v. *Ganeshwar Rao*, (1964) 3 S.C.R. 297.

[2] *See* case-law discussed in *Sriram* v. *The State*, A.I.R. 1956 All. 466.

[3] *D. K. Chandra* v. *The State*, A.I.R. 1952, Bom., 177; *Krishna Murthy* v. *Abdul Subhan*, A.I.R. 1962 Mys. 128.

or those offences, one or more offences of falsification of accounts, he may be charged with, and tried at one trial for, every such offence."

Section 236—unclear wording.

19.12. Section 236 cannot be said to be very clearly or expressively worded. The two illustrations that are appended to it would seem to be essential for a proper understanding of what the section means and what types of cases are intended to be covered by it. In fact, the second illustration is hardly covered by the words of the section inasmuch as when a person makes on oath two contradictory statements, and the prosecution cannot prove which of them is false, he does not commit several offences but only one. The illustration is, for practical purposes, a distinct rule enabling the Court to frame a charge of intentionally giving false evidence without specifying which one of two or more particular statements the accused either knew or believed to be false, or did not believe to be true. This is referred to in the illustration as charging in the alternative.

Judicial interpretations of the section.

19.13. The section refers to a "series of acts being of such a nature that it is doubtful which of several offences the facts which can be proved will constitute." In a Calcutta case,[1] the judge observed—

> "The confusion which has arisen about the interpretation of section 236 is due to the way in which it is worded. What is really meant seems to be 'if a single act or series of acts is of such a nature that it is doubtful which of several offences has been committed if the facts as alleged by the prosecution are established, the accused may be charged with the commission of all or any of such offences. The facts which can be proved are only ascertained after the completion of the trial and therefore the charge cannot be made to depend on them; moreover in the terms of the section, the doubt must arise from the nature of the act or series of acts, and the doubt would arise because of the inferences which might be drawn from those acts."

This view does not appear to be correct. It was dissented from by the Bombay High Court in a case[2] where the prosecution was in doubt as to the age of a girl who was alleged to have been kidnapped or abducted. The Court observed—

> "The condition on which the section comes into operation must be complied with, and there must be a single act or series of acts of a certain nature, and the nature must raise a doubt about which of several offences the facts which can be proved, will constitute. But we think that doubt may include a doubt as to what exact facts within the ambit of the series of acts postulated can be proved. At the time the charge is framed, the prosecution can

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[1] *Istahar Khandkar* v. *Emp.*, I.L.R. 62 Cal. 956; A.I.R. 1936 Cal. 796.
[2] *Emp.* v. *Kasinath*, A.I.R. 1942 Bom. 71 (F.B.)

> never know exactly what facts they will succeed in establishing. The most promising witness may break down in cross-examination; and in our view the prosecution are entitled to say : 'If we prove certain of our alleged facts, then such and such an offence will be committed; but if we prove other of such facts, then it will be another offence', and to charge the offences in the alternative. That is the exact case here, the prosecution being in doubt whether they could prove that the girl was under sixteen. We think illustration (a) to section 236 shows that the Calcutta view of the section is too narrow."

This is accepted as the correct interpretation of the section. To put it in an amplified form, if the offending act or series of acts alleged in the case is of such a nature that it may, depending on the facts that can be proved, at the trial, constitute one, or more than one, of several offences and doubt exists as to the particular offence or offences with which the accused should be charged, he may be charged with, and tried at one trial for, all or any of such offences, or he may be charged with having committed in the alternative one or the other of such offences.

Section 237.

19.14. The interpretation of section 237 also was a matter of some difficulty in the past. In a case[1] which went up to the Privy Council, several accused were charged under section 302, Indian Penal Code, but as regards some of them, the evidence did not sufficiently or definitely prove that they were present at and had taken part in the murder. It was, however, found that they had wrapped up the corpse, placed it on a horse, and gone away with it. These accused were convicted under section 201, Indian Penal Code, though not charged thereunder and their convictions were upheld by the Lahore High Court. Dismissing the appeal, the privy Council, after referring to sections 236 and 237 of the Criminal Procedure Code, said—

> "The illustration (to section 237) makes the meaning of these words quite plain. A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence, is such as to establish *a charge that might have been made*. That is what happened here. The three men who were sentenced to rigorous imprisonment, were convicted of making away with the evidence of the crime by assisting in taking away the body. They were not charged with that formally, but they were tried on evidence which brings the case under section 237."

In a later judgment of the Privy Council,[2] it was emphasised that the wide power to convict the accused of a crime not charged is subject to two conditions, *viz.*, (1) that the crime of which the accused was found guilty was established by the evidence and (b) that having regard to the information available to the prosecuting authorities, it was doubtful which of one or more offences would be established by the evidence. These

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[1] *Begu* v. *King Emp.*, A.I.R. 1925 P.C. 131.

[2] *Thakur Shah*, A.I.R. 1943 P.C. 192.

judgments of the Privy Council have been referred to with approval by the Supreme Court more than once. Since the law appears to be well settled, we consider it best to leave the wording of the sections and the illustrations as they are.

Section 238(2A) and abetment.

19.15. Section 238(2A) provides that when a person is charged with an offence, he may be convicted of an attempt to commit that offence although such attempt is not separately charged. It is clear that the section does not cover abetment of an offence, and Courts have held[1] that conviction for abetment would not be permissible where the accused was only charged with the substantive offence. In one case[2], however, a conviction for abetment of rape was upheld, though the offence charged was one of rape, and the abetment was treated as a 'minor' offence under section 238(2). We do not think this was a correct view to take of the section.

The case of abetment stands on a footing different from that of attempt. Abetment is not an incomplete form of the offence, nor connected with it in the same way as an attempt. The ingredients that have to be proved for the abetment of an offence are quite different from those required to establish the substantive offence.[3] There are authorities to the effect that if the facts of the case are such that the principle of sections 236 and 237 is applicable and if no prejudice has been caused to the accused in his defence, a conviction for abetment is permissible even though only the substantive offence was charged.[4] We do not consider it necessary or proper to widen the scope of section 238 by equating abetment with a minor offence of the same species.

Section 238(3) incomplete.

19.16. While section 238(3) saves the provisions of section 198 and section 199, it is incomplete in that it does not refer to the other analogous sections which also require a complaint or sanction for taking cognizance of particular offences. For example, section 195, 196 and 196A also require the complaint of a particular person or authority for the offences dealt with therein; and sections 197 and 197A require the previous sanction of the Government for prosecution in respect of certain offences. It appears to be desirable to make it clear, in section 238, that a conviction for a minor offence is not authorised where the requirements imposed by the law for the initiation of proceedings in respect of the minor offence have not been complied with. This clarification will incidentally help to codify the proposition that "section 238 must yield to section 195."[5] Thus, where the complaint is of an offence under section 211, Indian Penal Code, there cannot be a conviction under section 182 on the ground that the latter is a minor offence. The Supreme Court[6] has

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[1] *Padmanaba* v. *Emp.*, (1910) I.L.R. 33 Mad. 264; *Emp.* v. *Ragya*, A.I.R. 1924 Bom. 432; *Hulas Chandra* v. *Emp.*, A.I.R. 1927 Cal. 63, 64; *Hirasa* v. *Emp.*, A.I.R. 1947 Pat. 350, 351; *Chote* v. *Emp.* A.I.R. 1948 All. 168, 170; *Narvir Chand* v. *The State*, A.I.R. 1952 M.B. 17, 20.

[2] *Samuel John* v. *Emp.*, A.I.R. 1935 All. 935, 937.

[3] *Narvirchand* v. *The State*, A.I.R. 1952 M.B. 17, 20.

[4] *Hirasa* v. *Emp.*, A.I.R. 1947 Pat. 350, 351, 352, 353 (reviews case law); *Debi Prasad* v. *Emp.*, A.I.R. 1932 Cal. 455.

[5] *Kantir Missir* v. *Emp.*, A.I.R. 1930 Pat. 98, 102.

[6] *Basir-ul-Haq* v. *State of West Bengal*, (1953) S.C.R. 836; A.I.R. 1953 S.C. 293, 396.

also observed that the provisions of section 195 cannot be evaded by the device of charging a person with an offence to which it does not apply, and then convicting him of an offence to which it does, upon the ground that such latter offence is a "minor offence".

This aspect of the matter may be illustrated by the facts in an Allahabad case,[1] wherein a sentence under section 173, Indian Penal Code, was set aside by the High Court. The Magistrate's explanation, that he took cognizance under section 225B, Indian Penal Code, and convicted the accused under section 173 by virtue of section 238, Code of Criminal Procedure, was not accepted, as there was no complaint of a public servant as required by section 195.

Section 238 (3) revised.

19.17. We, therefore, recommend that, for sub-section (3) of section 238, the following sub-section may be substituted :—

> "(3) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the condition requisite for the initiation of proceedings in respect of that minor offence have not been satisfied."

Section 239.

19.18. Section 239 which lays down when persons may be charged and tried jointly has been elucidated in a recent decision[2] of the Supreme Court. The various clauses of the section need not be treated as mutually exclusive, and it is permissible to combine the provisions of two or more clauses. The joint trial of several persons partly by applying one clause and partly by applying another clause is authorised.

A small grammatical amendment is required in clause (b) which should read—

> "(b) persons accused of an offence and persons accused of abetment of, or x x x attempt to commit, such offence."

It has been held by the Privy Council[3] that the offence of conspiracy and any offence committed in pursuance of the conspiracy are to be regarded as forming part of the same transaction for purposes of section 235 and persons accused of such offences can, thus, be tried under clause (d) of section 239.

We note that Beaumont C.J. has, in a Bombay case,[4] criticised the language of clause (f). The interpretation of the words "possession of which has been transferred by one offence" is, however, now well settled, and we do not consider it necessary to alter the wording.

Section 240.

19.19. No change is needed in section 240.

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[1] *Narain Singh* v. *Emp.*, A.I.R. 1925 All. 129 (Neave J.).

[2] *State of Andhra Pradesh* v. *Ganeshwar Rao*, (1964) 3 S.C.R. 297; A.I.R. 1963 S.C. 1850.

[3] *Babulal* v. *Emp.*, 65 Indian Appeals 138; A.I.R. 1938 P.C. 130, 133.

[4] *Emp.* v. *Lakho Amra*, A.I.R. 1932 Bom. 201.

Power to order separate trial.

19.20. We considered the question whether a provision should be inserted after section 240 to empower the Court to order separate trial where a trial had begun on a joinder of various charges. The power is exercised even now although without an express provision. We do not think it is necessary to insert such a provision.

Joinder of charges with consent of accused — Provision not recommended.

19.21. It was suggested during our discussion that if the accused made a request in writing for the trial of certain charges together, then the joinder of those charges should be allowed even if the joinder is not otherwise permissible under the provisions of sections 233 to 239. We do not think that, in practice, there will be many accused persons making such a request. While theoretically there might be no objection to the suggested provision, it would not have much practical utility.

CHAPTER XX

TRIAL OF SUMMONS CASES BY MAGISTRATES

Section 241—Introductory.

20.1. Summons cases are tried with much less formality than warrant cases, and the manner of their trial is less elaborate. There need, for instance, be no formal charge, and at present even a formal plea by the accused is not necessary. As soon as the accused appears, "the particulars of the offence of which he is accused" are stated to him, and he is asked "if he has any cause to show why he should not be convicted". If he admits that he has committed the offence and shows "no sufficient cause why he should not be convicted", he can be convicted at once. In case the Magistrate does not on such admission convict him or if the accused "does not make such an admission", the Magistrate proceeds to hear the complainant, take "such evidence as may be produced" to support the prosecution, and then to hear the accused and take such evidence as he produces in defence. The proceedings are then virtually over, unless of course the Magistrate himself thinks it necessary to call some more evidence; and all that remains to be done by the Magistrate is to consider the evidence and either acquit or convict and sentence the accused. Even the method of preparing the record is less formal. The whole of the evidence is not required to be taken down; a memorandum of the substance of the evidence is enough (section 355). The scheme is simple, and the intention clearly is that these not very serious but numerous cases should be decided quickly. We agree that this is how it should be. All the essentials of a fair trial are present here, and the nature of these cases is such that a more elaborate method would only add to the expense and perhaps harassment of the parties without substantially aiding the cause of justice. Without departing from the substance of the existing provisions, therefore, we have considered if some changes of detail would improve the working of the existing scheme.

Section 241A (New).

20. 2. We have provided[1] in Chapter XVII that in the case of certain petty offences, an accused who is willing to plead guilty need not be compelled to appear in Court, either in person or through pleader. Our object is to avoid unnecessary trouble to offenders who have committed petty offences and are willing to pay the penalty. To provide for the procedure in such cases, a new[2] section 241A has also been proposed to be included in this Chapter.

Sections 242 and 243.

20.3. We recognise that a formal charge is not necessary in summons-cases, and it is sufficient to state the particulars of the offence. Section 242 then says that the accused should be asked "if he has any cause to show why he should not be convicted". This tends to be a little ambiguous. The intention, we take it, is to provide an opportunity to the accused to plead guilty or

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[1] Section 205A (proposed).

[2] *See* para 17.8 above.

not guilty. The language of sections 242 and 243, however, is likely to create the impression that an admission of guilt alone may not be sufficient ground for a conviction. We think it would be better if a straight-forward provision is made for the accused to plead guilty or not at that stage, as everybody understands these days what is meant by "pleading guilty" or "not guilty", and the Code itself uses this expression on other occasions. If the accused pleads guilty, he can be convicted at once; but if he does not, the case has to be decided on the evidence. On this view, section 242 and 243 may be amended to read as follows :—

Substance of accusation to be stated.

"242. When the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked *whether he pleads guilty or has any defence to make,* but it shall not be necessary to frame a formal charge.

Conviction of plea of guilty.

243. If the accused pleads guilty, *the Magistrate shall record the plea* as nearly as possible in the words used by the accused, . . and may *in his discretion* convict him *thereon.*"

Procedure under section 242 when attendance of accused has been dispensed with.

20.4. While doing this, we hope to set at rest a controversy that seems to have arisen at times about the meaning of section 242 when considered along with section 205. It will be noticed that section 205 enables a Magistrate issuing a summons for an accused to dispense with his personal attendance and to permit him to appear by his pleader. This power is likely to be used mostly in summons cases. Yet, in such cases, the proceedings have to start with the questioning of the accused about the accusation against him, so that if that questioning has to be personal, the power mentioned in section 205 cannot be usefully exercised. One view, therefore, has been that in cases where the personal attendance of the accused is dispensed with, his pleader can, in his stead, plead to the "charge" or make an answer to the statement of allegations. The other view is, that such an admission of guilt is a serious matter, and if made negligently by a pleader, it can burden the accused with severe penalty, so that the accused alone can make such an admission and the questioning of the accused must be intended to be personal. There is little doubt that nowadays in the Criminal Courts a pleader is in every case a practising lawyer. We do not think a member of the legal profession is likely to act without clear instructions in such a matter; and we therefore see no great danger in entrusting this task to the accused's pleader. We propose therefore that where the personal attendance of the accused has been dispensed with, his pleader may answer the charge against him.

Section 244.

20.5. The wording of sub-section (1) of section 244 is unnecessarily verbose. All the situations mentioned there in detail are covered by the opening words, the only two possibilities being when the Magistrate convicts on a plea of guilty, and when the Magistrate does not do so and the case proceeds to evidence. The proviso to the sub-section is also unnecessary. The sub-section may be revised to read as follows :—

Procedure when not convicted.

"(1) If the Magistrate does not convict the accused under *section* 243 . . . . the Magistrate shall proceed to

hear the *prosecution* and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence."

In sub-section (2) also, the word "prosecution" may be substituted for the word "complainant" in order to cover police-cases besides complaint cases.

Section 245.

20.6. A controversy has arisen whether the examination of the accused person himself is compulsory under section 342 in a summons-case. That section occurs in the Chapter on "General Provisions as to Inquiries and Trials", and it provides that the Court *shall* question the accused "generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence". Some High Courts are of the opinion that this provision applies to the trial of summons cases, as it occurs in the Chapter meant for all inquiries and trials, while some High Courts think that it is inapplicable to summons cases, as the accused is never, in such cases, called on for his defence. We feel that the examination of an accused would be useful in all cases, and we intend making a suitable clarification[1] in section 342.

In regard to section 245, however, the question would be whether this examination must be of the accused in person or whether his pleader can be examined if the accused's attendance has been dispensed with. Considering the general nature of summons cases, we think no harm would occur if the pleader is examined instead of compelling the accused's attendance, unless of course the court considers it necessary to do so. In other words, we prefer to leave this matter largely to the discretion of the Magistrate and merely enable him to examine the pleader if he thinks that sufficient or to compel the attendance of the accused and examine him in appropriate cases. As we intend to provide for this in section 342, we propose to omit the words "and (if he thinks fit) examining the accused" from section 245(1). No other amendment is required in this section.

Section 246.

20.7. In Chapter XIX of the Code concerning the charge, there is a provision that a person charged with one offence may be (if there is evidence, of course) convicted of another offence for which he might have been charged according to the provisions of that Chapter.[2] As there may be no charge framed in a summons case, a somewhat similar provision has been made in section 246 which says that a Magistrate may convict the accused "of any offence triable under this Chapter which from the facts admitted or proved he appears to have committed whatever may be the nature of the complaint or summons". The language used here is very wide, but we have no doubt that it is not the intention that a person accused of a particular offence triable under this Chapter, that is as a summons case, can be convicted of a totally different and unconnected offence about which he may never have been questioned and against which he

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[1] *See* para. 24.50 below.

[2] Section 237.

may never have defended himself. We, therefore, propose that a qualifying clause "if the Magistrate is satisfied that the accused would not be prejudiced thereby" should be added to section 246.

Section 247.

20.8. Section 247 seemingly requires the presence of the complainant in a complaint case at every hearing; and prior to the amendment of the Code in 1955, the rule was that if the camplainant absented himself, the accused must be acquitted unless the Magistrate thought it proper to adjourn the hearing. It was evidently felt that this rule was too harsh, and a proviso was added in 1955 saying that "where the Magistrate is of opinion that the personal attendance of the complainant is not necessary" he may dispense with such attendance. The rigour of the original rule has thus gone, and the whole thing is left to the discretion of the Court which, we assume, is being properly exercised. It has been suggested that if the complainant is a public servant or the complainant is properly represented by a pleader, the case should not be dismissed because of his absence. We have, however, no reason to think that in such situations the Court will not be persuaded to dispense with the presence of the complainant, so that the provision of law as it stands and as it is intended to be worked is in our view adequate.

The only change which we suggest in the section is to extend the scope of the proviso so as to empower the Magistrate to proceed with the case where the complainant is represented by his pleader or by the officer conducting the prosecution.

A question has arisen whether the complainant's death ends the proceedings in a summons case; and we find that different views have been expressed on this question. As a matter of policy, we think the answer should depend on the nature of the case and the stage of the proceedings at which death occurs. It is impracticable to detail the various situations that may arise and the considerations that may have to be weighed. We think, in the circumstances, that the decision should be left to the judicial discretion of the court, and the legal provision need only be that death and absence stand on the same footing. We trust this will in practice work satisfcatorily.

In the light of the above discussion, section 247 may be amended so as to read as follows :—

Non-appearance or death of complainant.

"247. (1) If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day :

Provided that *where the complainant is represented by a pleader or by the officer conducting the prosecution or* where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary the Magistrate may dispense with his attendance and proceed with the case.

(2) *The provisions of sub-section* (1) *shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.*"

Section 248.

20.9. Section 248 enables the complainant to withdraw the complaint with the Court's permission, and the accused is then acquitted. It has been doubled if the complaint can be withdrawn regarding some of the accused if there be more than one, and one High Court has held that the whole case against all the accused stands withdrawn if it is withdrawn regarding some of them. We think that this power, like that of compounding an offence, should be exercisable concerning each accused separately when there are more than one accused. We propose that section 248 may be amended to read :

Withdrawal of complaint.

"248. If a complainant, at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint *against the accused, or if there be more than one accused against all or any of them,* the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused *against whom the complaint is so withdrawn.*"

Section 249.

20.10. No change of substance is necessary in section 249. The reference to the District Magistrate may be replaced by "Chief Judicial Magistrate", and for the words "any other Magistrate", the words "a Magistrate of the second class" may be substituted.

Section 250.

20.11. Section 250 of the Code is designed for payment of compensation to those accused against whom frivolous or vexatious complaints are brought in Court. Apart from providing that compensation upto one-half of the fine which the Magistrate can impose can be awarded to the accused, it lays down the procedure governing such proceedings. Notice to the complainant is necessary, and of course he has to be heard in reply, and against the final order, an appeal lies. The procedure is, we think, satisfactory. We are not, however, satisfied with the scope of the power given to the Court. At present, the Court must be satisfied that the accusation "was false" and either frivolous or vexatious. We should have thought that a false accusation would be necessarily vexatious; but that view has not found favour with the Courts, and we understand that in very few cases, Magistrates resort to section 250 on the view that its requirements are rarely satisfied. To discourage frivolous complaints, it would, we feel, be proper to widen the scope of this provision. It is obvious that a complainant who brings a false complaint knowing it to be false needs to be punished. Knowledge on the complainant's part is, however, a subjective matter, and in any case hard to prove. We propose to put in its place on objective test, namely, the total absence of any reasonable ground for the accusation. In most cases, we think this would be the same as actual knowledge of the falsity of the accusation. We therefore propose, that in any case where the Magistrate acquits or discharge the accused and is further of opinion that there was no reasonable ground for making the accusation against them or any of them, he may award compensation to the accused. The only other change we suggest is that

the limit of non-appealable orders under this provision when made by a first class Magistrate should be raised from Rs. 50 to Rs. 100. No change in the procedure is required.

The following amendments may be made in the section :—

(1) in sub-section (1), for the words "that the accusation against them or any of them was false and either frivolous or vexatious", the words "that there was no reasonable ground for making the accusation against them or any of them", shall be substituted;

(2) in sub-section (2), for the words "that the accusation was false and either frivolous or vexatious", the words "that there was no reasonable ground for making the accusation" shall be substituted; and

(3) in sub-section (3) for the words "fifty rupees" the words "one hundred rupees" shall be substituted.

CHAPTER XXI

TRIAL OF WARRANT CASES BY MAGISTRATES

Section 251.

21.1. After the amendments made in 1955, this Chapter practically falls into two parts. The first consisting only of section 251A lays down the procedure for the trial of warrant cases instituted on a police report, and the second consisting of the other sections in the Chapter, namely, sections 252 to 259, lays down the procedure in other cases. This division has resulted in the repetition of some of the provisions but as the two parts are thereby made clear and self-contained, the scheme does not require to be changed.

Sub-section (1) to be omitted in view of new section 205B.

21.2. Section 251A deals with the procedure to be adopted in warrant cases instituted on a police report. Under sub-section (1), the first thing that has to be done by the Magistrate is to satisfy himself that the documents referred to in section 173 have been furnished to the accused, and if not, the Magistrate has to cause them to be so furnished. We have recommended above that the duty cast on the police by sub-section (4) of section 173 should be transferred to the Magistrate taking cognizance and suggested the necessary provision[1] to be included in Chapter XXII. In view of this provision, sub-section (1) of section 251A may be revised as follows :

> "(1) When, in any case instituted upon a police report, the accused appears, or is brought, before a Magistrate at the commencement of the trial, the Magistrate shall satisfy himself that the provisions of section 205B have been complied with."

Section 251A (2).

21.3. Section 251A(2) provides that, if upon consideration of the documents received under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the parties an opportunity of being heard, the Magistrate considers the charge to be groundless, he shall discharge the accused. The reference to section 173 may be replaced by a reference to the new section 205B.

One of the suggestions[2] received by us is that consideration of the documents alone cannot enable the court to form a definite opinion as to whether a *prima facie* case exists, and that the procedure laid down in sections 252 *et seq* should be adopted for cases instituted upon police report as well, subject to a modification that, after the framing of charge, there should be no further right of cross-examination and the accused should be called upon to enter upon his defence straightway. One advantage of the proposed procedure, it is stated, would be that if the statements of the prosecution witnesses disclosed that no offence was committed, the court should discharge the accused at an early stage.

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1 *See* paragraph 17.9 above.

2 The suggestion has been made by the Deputy I.G.P., Delhi F. 3(2)/55-L. C. Part II, S. No. 34(d) and F. 3(2)/55-LC. Part I, S. No. 83.

We are unable to accept this suggestion as it strikes at the very basis of the distinction between cases instituted upon police report and other cases. It is no doubt possible that in a few cases the recording of prosecution evidence at the outset before framing charge may prove to be useful. We do not, however, consider it desirable to make any such radical change as suggested.

Sub-section (2) does not require the Magistrate to record his reasons for discharging the accused. As he has to reach that conclusion after a proper consideration of the documents and hearing both sides and his order of discharge is subject to revision, it is obviously necessary that he should record his reasons in the order. The words "and record his reasons for doing so" may be added at the end of the sub-section.[1]

Section 251A(3) and (4).

21.4. No changes are needed in sub-sections (3) and (4) of section 251A.

Section 251A(5).

21.5. With reference to sub-section (5), the question whether in a warrant case the pleader of the accused can be allowed to plead to the charge has been considered by the courts.[2] The view generally taken is that if the accused is present, his plea must be recorded, even though his pleader is present, but if the attendance of the accused has been dispensed with, the pleader can be allowed to plead to the charge. We do not think that any specific amendment is necessary on the point.

Section 251A(6).

21.6. Sub-section (6) provides that if the accused refuses to plead, or does not plead, or claims to be tried, the date for the examination of witnesses shall be fixed. It does not, however, cover the case where the accused pleads guilty, but the plea is *not* accepted by the court under sub-section (5). The wording of section 244(1) (as amended in 1923) leaves no such lacuna in regard to summons-cases. It would be useful to adopt a similar wording in section 251A(6).

While sub-section (7) requires the Magistrate to take all such evidence as may be "produced" in support of the prosecution, there is no express provision in sub-section (6) or elsewhere for the issue of process to compel the attendance of prosecution witnesses. There has been some controversy in the past as to whether process can be asked for. Most High Courts[3] have taken the view that it can, but the lacuna has been judicially noticed.[4] It may be noted that the corresponding provision for the trial of complaint-cases—section 252(2)—is more specific on this point. In Uttar Pradesh the following words have been added at the end of sub-section (6) by a local amendment[5] :—

> "and shall summon the witnesses, documents or things specified in any application made on behalf of the prosecution before the said date for summoning the same, unless for

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[1] *See* para. 21.13 below.

[2] *Dorabshah*, I.L.R. 50 Bom. 250; Champa, A.I.R. 1950 Cal. 161; *Kanchanbai*, A.I.R. 1959 Madhya Pradesh 150.

[3] *Public Prosecutor*, A.I.R. 1965 Andhra Pradesh 162; *Paban*, A.I.R. 1965 Cal. 387; *Phulloo* A.I.R. 1966 All. 18.

[4] *State* v. *Shib Charan*, A.I.R. 1962 Orissa 157, 159 (para. 9).

[5] U.P., Act 31 of 1961.

reasons to be recorded, he deems it unnecessary to summon all or any of them."

We accordingly recommend that sub-section (6) be amended to read—

> "(6) *If the Magistrate does not convict the accused under sub-section* (5), he shall fix a date for the examination of witnesses; *and the Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or other thing.*"

Section 251A(7). 21.7. It has been mentioned to us that the proviso to sub-section (7) which permits the cross-examination of any witness to be deferred until any other witness or witnesses has been examined is sometimes resorted to without sufficient justification and leads to delay, expense and inconvenience to witnesses. There is at present no such provision in regard to sessions trials[1]. While the underlying principle is sound, such deferments of the cross-examination of witnesses are not intended to be a routine matter. We, however, do not think it desirable to omit this part of the proviso as suggested to us.

The proviso also enables the Magistrate to recall any witness for further cross-examination. It has been suggested that the proviso should further provide for the summoning of a new witness whose name is revealed during the examination of other witnesses. Even apart from section 540, there is nothing to debar the production of such a witness by the prosecution so long as the prosecution evidence is not closed. No amendment is required on this point.

Section 251A(8). 21.8. Sub-section (8) allows the accused to put in any written statement he wants. The practical necessity for this provision has been questioned but it seems to us that it does no harm and might be of some use to an accused person who (or whose pleader) feels that his examination under section 342 has not given him a full opportunity to explain all aspects of the case. The sub-section does not require to be curtailed.

Section 251A(9) 21.9. Sub-section (9) requires the Magistrate to summon at the instance of the accused, a witness "for examination or cross-examination", but under the proviso, the attendance of a witness is not compellable where the accused has had an opportunity of cross-examining that witness. This is, however, subject to the counter-exception expressed by the words "unless the Magistrate is satisfied that it is necessary for the purposes of justice". The Magistrate's action is, thus, hedged in by a number of seemingly contradictory provisions. Further, the word "or" in the main paragraph seems to allow the summoning of a new witness only for cross-examination, which may not be desirable and is perhaps not the intention of the sub-section. No change is, however, suggested on this point, since the sub-section vests full discretion

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[1] This provision is being made for Sessions trials also. *See* para 23.2, revised section 276(2) below.

in the Magistrate and indicates that he should be guided by "the ends of justice".

In the proviso to sub-section (9), the words "after the charge is framed" are unnecessary, because under the preceding sub-sections of the section, no examination of a prosecution witness takes place before the charge. The reference should really be to the stage before the accused enters on his defence. The words in question should be replaced by the words "before entering on his defence".

Section 251A(11).

21.10. Sub-section (11) provides that where in any case in which a charge has been framed, the Magistrate finds the accused not guilty, he shall record an order of acquittal. A State Government has stated that the absence of witnesses on the date fixed for hearing sometimes leads to acquittal and a subsequent prosecution is barred under section 403. It is suggested that an acquittal by reason of the absence of prosecution witnesses should be no bar to the subsequent prosecution and that this difficulty can be overcome by the insertion of a provision similar to section 249.

The question whether the accused is to be acquitted if there are no prosecution witnesses was considered by us in detail. In this connection the question whether the court is bound to summon prosecution witnesses under section 540 when the prosecution does not produce the witnesses, was also discussed. In an Orissa case,[1] it was stated that the case of the absence of prosecution witnesses is not provided for in the Code, and an order of acquittal was set aside in that case as an acquittal must be based on "evidence". Of course, once the prosecution has summoned the witnesses through Court, the Court must enforce their attendance.[2] But the question is, can the court acquit the accused merely on the ground of want of diligence on the part of the prosecution ?

In a Madras case,[3] it was stated that once the Court has already framed a charge in a warrant case, "an important duty is laid on it to see that all the powers available to the Court for the examination of witnesses are exercised for a just decision of the case irrespective of the laches of the complainant. Such powers include the powers under section 540, Criminal Procedure Code to summon witnesses on the motion of the Court".

In an Andhra Pradesh case,[4] the prosecution witnesses were not present, and the summonses also were not returned, on the date of hearing. The Assistant Sub-Inspector undertook the responsibility of producing the witnesses at the next hearing. None of the witnesses were however present at the next hearing, and consequently the accused were acquitted. Even so, the High Court set aside the acquittal.

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[1] *Shibcharan*, A.I.R. 1962 Orissa 157 (R. K. Das J.).

[2] *State of Mysore* v. *Narasimha*, A.I.R. 1965 Mys. 167 (D.B.).

[3] *P. P.* v. *M. Sambangi*, A.I.R. 1965 Mad. 31, 35, para. 4 (Ramakrishnan J.).

[4] *P. P.* v. *Pachtyappa*, A.I.R. 1965 A.P. 162 (Mohammed Mirza J.)

We have recommended above an amendment of sub-section (6) expressly enabling the prosecution to apply for, and the Magistrate to issue, summonses to secure the attendance of witnesses. We think the position will be clearer when this amendment is made. In any event, the insertion of a provision like section 249 in this Chapter relating to the trial of warrant cases will mean keeping the accused in suspense for no fault of his and for an indefinite period simply because the prosecution is unable to produce its witnesses before the Court. This is not a situation which can be recommended.

Section 251A(12) and (13).

21.11. No changes are needed in sub-sections (12) and (13).

Section 252.

21.12. In section 252(1) we propose to substitute for the words "complainant (if any)", the word "prosecution", and to omit the proviso which will be rendered unnecessary by this amendment.

Section 252(2) appears to throw on the Magistrate the responsibility of ascertaining the names of any persons likely to be acquainted with the case and to summon such of them as he considers necessary. This would appear to be both unnecessary and undesirable when the case has been instituted on complaint whether by a private individual or by a public servant. In those cases the complainant would have already furnished a list of prosecution witnesses under section 204(1A). Even in the rare cases where cognizance was taken under section 190(1)(c) there would be somebody prosecuting the case who should be in a position to give a list of witnesses. Sub-section (2) in its present form does not appear to be necessary, and in its place we may have a sub-section as follows :

> "(2) The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or other thing."

This will bring section 252(2) into line with section 251A(6) as proposed to be amended.[1]

Section 253.

21.13. We propose to make two amendments in section 253(1). In view of the comprehensive provision in section 342 relating to examination of the accused the words "and making such examination (if any) of the accused as the Magistrate thinks necessary" are practically superfluous and may be omitted. When the Magistrate finds that no *prima facie* case has been made out against the accused there will hardly be anything to examine him about ! Secondly, it is desirable to make it clear in sub-section (1), as already done in sub-section (2), that the Magistrate should record his reasons for discharging the accused. An order of discharge under either sub-section is a judicial order and subject to revision.[2]

Sub-section (1) may be revised as follows :—

> "(1) If, upon taking all the evidence referred to in section 252. . . . the Magistrate Considers, for reason to be

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[1] *See para.* 21.6 above.

[2] *L. Narayan* v. *P. Chettareddi,* A.I.R. 1961 A.P. 117, 119 (Reviews cases).

recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him."

Section 254.

21.14. In section 254, also the reference to examination of the accused is unnecessary and may be omitted. The opening words of the section may be amended to read "If when such evidence has been taken or at any previous stage of the case, etc."

Section 255.

21.15. In section 255(1), the words "whether he is guilty", may be replaced by the words "whether he pleads guilty" as being more appropriate.

The question whether, in section 255(2), after the words "record the plea", the words "as far as possible in his own words" should be added as in section 243 was considered by us. As section 243 relates to summons cases where there is no charge, the direction to record the admission of the accused as far as possible in his own words has a meaning and a purpose. The situation under section 255 is different. The plea is with reference to a detailed charge which has to be formulated precisely and must give full particulars of the offence. It is unnecessary to provide in this context that the plea must be recorded in the accused person's own words.

Section 255A.

21.15a. Section 255A, which is analogous to section 310 applying to sessions trials, was inserted by the Amending Act of 1923. The Lowndes Committee[1] which examined the Amendment Bill of 1914 recommended it for these reasons :

> "We think that this addition is necessary after section 255 to provide for a case where previous conviction is also charged. Definite provision is made for this in the case of trials before a Court of Session (*see* section 310), but it does not seem to have been provided for by the Code in the case of a Magistrate's trial."

The Select Committee which examined this clause observed as follows[2] :

> "It was suggested to us that the new section 255A is unnecessary, on the ground that though a procedure for the proof of previous convictions is necessary in a Sessions Court to prevent the Jury or the Assessors from being prejudiced by anything that they may hear as to the accused's previous record, yet in warrant cases the same considerations do not apply. On the whole, however, we think the new section may serve a useful purpose, and we have retained it."

Although in a Patna case,[3] it was observed by a Judge that "no advantage is to be gained by this procedure", we do not recommend the omission of this section. Postponement of the inquiry into the charge of previous conviction does not cause any inconvenience to the Magistrate or delay in the proceedings. Occasionally even the trained mind of a Magistrate may be affected by the knowledge that the accused has been previously

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1 Report of the Lowndes Committee Appendix B, under clause 56A.

2 Report of the Select Committee, (1922), under clause 68.

3 *Ishwar Singh* v. *Shama Dusadh*, A.I.R. 1937 Pat. 131.

convicted.[1] If this charge also is put to the accused from the beginning, he may get the feeling that the Magistrate is perhaps prejudiced by the knowledge of that previous conviction which it is better to avoid.

Section 256.

21.16. As proposed above in regard to section 251A(6), a formal amendment is required in the opening words of section 256(1). For the words "If the accused refuses to plead, or does not plead, or claims to be tried", the words "If the accused is not convicted under sub-section(2) of section 255" may be substituted. No other amendment is required in section 256.

Section 257.

21.17. Under section 257(2) the Magistrate may, before summoning any witness at the instance of the accused, require a deposit to be made of the reasonable expenses of such witness. A suggestion has been made that this sub-section should be deleted. While in the majority of the cases, the Magistrate may not think it necessary to exercise the power under this sub-section, it does not appear to be necessary or desirable to take away the power. Usually, the Government bears the expenses of defence witnesses[3], but not in all cases[4]. The matter is dealt with by rules.[5]

There seems to be some controversy as to the course to be adopted by the Magistrate when some prosecution witnesses are absent and cannot, therefore, be cross-examined after charge. One view is, that the accused should be acquitted and that the evidence previously given by those prosecution witnesses should be "expunged[6]. Another view is that the court should re-summon the witnesses under section 257.[7] The correct position seems to be that if the parties concerned have taken the necessary steps in accordance with law for summoning of the witnesses, or if the accused wishes to exercise his right of further cross-examination in accordance with law, the court must enforce the attendance of such witnesess, and cannot acquit the accused merely on the ground of the complaint's or witnesses' absence.[8] The rulings apparently to the contrary are distinguishable on facts.[9-10]

Section 258.

21.19. Section 258 needs no change.

Section 259.

21.20. A suggestion[11] has been made that the cases in which the Magistrate may discharge the accused because of the complainant's absence should not be limited to non-cognizable offences and compoundable offences. This question was also consi-

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[1] *Cf.* Beaumont C. J. in *Emp.* v. *Ahmad Ebrahim*, A.I.R. 1935 Bom. 39.

[2] *See* para. 21.6 above.

[3] See *Sayed Habib* v. *Emp.*, A.I.R. 1929 Lah. 23, 24 (Shadi Lal C.J.).

[4] *Ganpat Ra.* v. *The Crown*, A.I.R. 1923 Lah. 420 (Moti Sagar J.); *Abdul Rehman*, A.I.R. 1952 Ajmer 45.

[5] See *Jit Singh* v. *The State*, A.I.R. 1963 Punj. 143.

[6] *Sadek Mohd. Ahmed Hassan* v. *Jyotish Chander*, A.I.R. 1948 Cal. 88 (Roxburgh and Chunder JJ.).

[7] *Rampal* v. *Mangala*, A.I.R. 1952 Raj. 601.

[8] *Repin* v. *Paban*, A.I.R. 1951 Cal. 418.

[9] *Emp.* v. *Nazir*, A.I.R. 1930 All. 795, 796, (Boys J.)

[10] *Gobinda* v. *Rahl Prasad*, A.I.R. 1953 Orissa 152.

[11] F. 3(2)/55-L.C. Part III, S. No. 52, pages 269-270 of the Correspondence (Suggestion of the Chief Presidency Magistrate, Madras).

dered in the past. The Lowndes Committee[1] had suggested deletion of the words "and the offence may be lawfully compounded" as suggested by the Bengal Government. The Committee's reasoning was, that no useful result would follow from attempting (in ordinary cases) to force the complainant to go on against his will. But the Select Committee[2] which considered the Amendment Bill of 1922 thought that this would be going too far and that it would be "sufficient to extend the application of the section to cases of non-cognizable offences." The words "or is not a cognizable offence" were accordingly added in the section.

As to the principle underlying the section it was observed in a Rangoon case[3] :—

> "The principle underlying the provisions dealing with the trial of non-compoundable or cognizable warrant cases is that, whether instituted on complaint or otherwise, the final responsibility for the conduct of such cases rests with the State and that where there is reasonable ground for believing that such an offence has been committed, once the machinery of the law has been set in motion, the right of arresting its progress rests with the State alone."

Agreeing with this view, we do not recommend any widening of the scope of section 259.

The question whether the requirement of compoundability and the requirement of non-cognizability are alternative or cumulative has been discussed in one case.[4] The language of the section is clear on this point, and we do not, therefore, consider any such amendment necessary as was hinted at in that case.

It has been suggested [5-6] that a proviso should be added in section 259 to the effect that the Magistrate shall not discharge the accused if the complainant is a public servant acting or purporting to act in the discharge of his official duty. We do not think any such provision is necessary. Discharge of the accused under this section is a matter within the discretion of the court, and the fact that the complaint was made by the complainant in the discharge of his official duty will necessarily be taken into account by the court before passing an order under this section[7].

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[1] Report of the Lowndes Committee, Appendix B, clause 59.

[2] Report of the Select Committee, (1922) under clause 71.

[3] *Maung Thin*, I.L.R. 5 Rang. 136; A.I.R. 1927 Rang. 174, 175 (Doyle J.).

[4] *Shankar Das* v. *Mahu Ram*, A.I.R. 1963 H. P. 32, 33, para 4.

[5] F. 3(2)/55-L.C. Part I, S. No. 61.

[6] *See* also F. 3(2)/55-L.C. Part II, S. No. 34(c) and 34, (Suggestion of a District Magistrate, endorsed by the Administration of the Union Territory).

[7] *See* also discussion relating to section 247.

CHAPTER XXII

SUMMARY TRIALS

General.

22.1. From the point of view of procedure, a summary trial is an abridged form of the regular trial and is resorted to in order to save time in trying petty cases. Short-cuts in procedure in criminal cases are not without risks; but in view of the safeguards provided as to the type of judicial officers who may exercise this power, the nature of the offences that may be so tried and the punishment that may be inflicted in such trials, summary jurisdiction is justifiable.

Section 260—Classes of Magistrates who may try summarily.

22.2. Under section 260(1), the Magistrates who can try a case summarily are (a) the District Magistrate, (b) any first class Magistrate specially empowered by the State Government, and (c) any Bench of Magistrates invested with the powers of a first class Magistrate and specially empowered by the State Government.

In view of the proposed separation and change in nomenclature, the reference to "District Magistrate" should be changed to read "Chief Judicial Magistrate". However, we do not consider it necessary to include the Chief Judicial Magistrate as, in practice, he would hardly have the time or occasion to try cases summarily.

At present, Presidency Magistrates are not mentioned in section 260, because under section 362(4) Presidency Magistrates are not required to record the evidence or to frame a charge in a case in which an appeal does not lie. We propose to remove this special provision and to equate the procedure to be adopted by Presidency Magistrates in such cases with that laid down for summary trials. This not only avoids repetition, but also indicates clearly the record to be kept in the case. Hence we are adding Presidency Magistrates in section 260(1). (Compare the amendment made by Bombay Act 54 of 1959 on this point in section 260 and in section 362).

As regards first class Magistrates, the power to try cases summarily should be conferred, not by the State Government, but by the High Court which is in overall control and is in a better position to know their capabilities. As regards Benches of Magistrates also, the conferment of powers under this section should be by the High Court and not by the State Government.

Thus the three classes of magistrates who may try cases summarily will be—

(*a*) any Presidency Magistrate,

(*b*) any Judicial Magistrate of the first class specially empowered in this behalf by the High Court, and

(*c*) any Bench of Magistrates invested with the powers of a Judicial Magistrate of the first class and specially empowered in this behalf by the High Court.

Suggestions have been received that such powers should be given only to senior Judicial Officers. While it should be desirable that only experienced Magistrates with, say, 5 years' experience as a first class Magistrate should be given these powers, a statutory provision of a rigid character is not necessary. In fact, we find that powers under this section are even now conferred only upon experienced Magistrates.

Section 260–offences that may be tried summarily.

22.3. Section 260(1) gives in clauses (a) to (m) a list of the offences that may be tried summarily.

Clause (a) provides that all offences punishable with imprisonment upto six months may be tried summarily. This coincided with the definition of summons cases in the Code before the amendment of 1955. We are of the view that since the definition of "summons cases" has been now changed to cover offences punishable with imprisonment upto one year, the scope of offences triable summarily should also be correspondingly widened by substituting "one year" for "six months" in this clause.

Consequentially clauses (b) and (c) should be omitted, since the offences punishable under sections 264, 265, 266 and 323 of the Penal Code are punishable with imprisonment that may extend to one year only. It has been suggested that the offences under section 324 may be added in clause (c), and that, in clause (m), offences under the Prevention of Gambling Act, Opium Act, Excise Act and Dangerous Drugs Act may be added. The offence under section 324 (voluntarily causing hurt by dangerous weapons) is much more serious than that under section 323; it is cognizable, not bailable and punishable with imprisonment that may extend to three years and with fine. As regards offences under the Opium Act, a general provision covering all such offences would not be desirable. The suggestion has not, therefore, been accepted.

A suggestion has been made to effect the following changes in section 260(1) :

(i) in clauses (d), (e), (f) and (g), the limit laid down for the value of the property should be increased from Rs. 200 to Rs. 1000; and

(ii) offences under sections 406, 417, 419 and 420 involving property not exceeding Rs. 1000 in value should be included in the section.

So far as the increase in the value of the property is concerned, we note that the value mentioned before the Amendment of 1955 was Rs. 50 and it was increased to Rs. 200 in 1955. As not much time has elapsed since the increase, we are not inclined to recommend a further increase.

As regards offences under section 406 (criminal breach of trust), 419 (cheating by personnation) and 420 (cheating and dishonestly inducing delivery of property), these offences often involve complicated questions of facts and law, and it appears to us that an extension of the procedure for summary trials to such offences is not without risk. The offence under section

417 (cheating) will be covered by the proposed extension of section 260(1)(a) to offences punishable with imprisonment upto one year. We do not, therefore, recommend any amendment in this respect.

In clause (i), the reference to house-trespass under section 448 should be omitted since the offence is punishable with imprisonment up to one year only. The reference to section 457 should also be omitted since this is a grave offence punishable with five years' imprisonment and when connected with theft with 14 years' imprisonment.

Clause (m) is not accurately worded. Section 20 of the Cattle Trespass Act, 1871, does not create an offence, by itself. It is by virtue of the definition in section 4(1) of the Code of Criminal Procedure that any act in respect of which a complaint may be made under section 20 is included in the definition of "offence". The clause should be amended to read—

> "(m) any offence constituted by an act in respect of which a complaint may be made under section 20 of the Cattle Trespass Act, 1871."

Section 261.

22.4. Under section 261, the State Government can confer on any Bench of Magistrates invested with the powers of a Magistrate of the second or third class the powers to try summarily the specified offences. As in the case of the Benches mentioned in the previous section, we consider that the conferment of powers under this section also should be by the High Court, and not by the State Government.

In an earlier Report[1], the Law Commission observed that in States where there are Magistrates of the second class, summary jurisdiction should be given to such Magistrates sitting singly. In our view, however, it would not be proper to give the power in question to individual Magistrates of the second class, having regard to the need for experience and maturity for a proper exercise of summary jurisdiction.

As for the offences which the Bench of Magistrates may try summarily, one of the sections of the Indian Penal Code mentioned is section 352 (assault or use of criminal force otherwise than on grave and sudden provocation), but the offence under section 358 (assault or use of criminal force on grave and sudden provocation) is not mentioned. The former is punishable with imprisonment upto 3 months, or fine upto Rs. 500 or both, while the latter is punishable with simple imprisonment upto one month or fine upto Rs. 200 or both. It has been suggested that the offence under section 358, Indian Penal Code should be included in section 261(a) of the Code of Criminal Procedure. Having regard to the fact that the latter offence is in all respects a less serious one than the former, we would accept the suggestion.

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[1] 14th Report, Vol. 2, page 731, paragraph 47, and page 732, item 10.

Section 262(1)-Summons-case. Procedure in all summary trials.

22.5. Section 262(1) provides that in summary trials the procedure prescribed for summons cases shall be followed in summons cases and the procedure prescribed for warrant cases shall be folowed in warrant cases, except as mentioned in sections 263, 264 and 265. In an earlier Report[1] the Law Commission recommended that this distinction between summons-cases and warrant-cases should be abolished in summary trials. Since the Code defines the offences triable summarily and contemplates the appointment of specially empowered Magistrates for trying such cases, it was recommended that a uniform procedure should be followed in all such cases. It was pointed out, that in the majority of the offences so triable, the punishment was imprisonment for 6 months or less (which would be summons-cases under section 4(1)(w) as it stood before 1955), and that the maximum sentence that could be passed was limited to three months even when the specified offences were warrant cases. For these reasons, the Law Commission recommended that summons-case procedure should be followed in all cases, as no particular advantage would be gained by following the more complicated warrant-case procedure if the case was to be tried summarily. We entirely agree with this recommendation.

Section 262(2)-limit of sentence to be raised.

22.6. Section 262(2) provides that no sentence of imprisonment for a term exceeding three months shall be passed on conviction in a summary trial. We recommend that this limit of three months be increased to six months. It is true that the object of the restriction in section 262(2) is to restrict the passing of sentence of considerable length in a summary trial, but an increase upto six months should not, in our view, be objectionable since every sentence of imprisonment is appealable. Section 414 of the Code, as originally enacted, barred an appeal in a case tried summarily in which a sentence of imprisonment not exceeding 3 months or a sentence of fine not exceeding Rs. 200 was passed. That part of section 414 which related to imprisonment was omitted in 1923, and therefore every sentence of imprisonment or fine of over Rs. 200 is now appealable.

The record in a summary trial is no doubt less elaborate than that in a regular trial; but our recommendation that the substance of the evidence be recorded in all cases other than those where the accused pleads guilty will facilitate an effective scrutiny by a higher Court into the correctness of the Magistrate's order. In view of the fact that the scope of section 260(1)(a) is proposed to be widened so as to cover offences punishable with imprisonment upto one year, an increase in the maximum imprisonment which the court can award would also prove to be of practical use in some cases.

Amendment of section 262 recommended.

22.7. Accordingly, section 262 may be amended so as to read as follows :—

> "262. (1) In trials under this Chapter, the procedure prescribed for summons cases shall be followed..... except as hereinafter mentioned.

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[1] 14th Report, Vol. 2, pages 730-731, paragraph 45.

(2) No sentence of imprisonment for a term exceeding six months shall be passed in the case of any conviction under this Chapter."

Section 263 and 264.

22.8. Sections 263 and 264 deal with the procedure to be followed in non-appealable and appealable cases respectively. The main difference between the two is that, while in the former no evidence need be recorded, in the latter case the Magistrate has to record the substance of the evidence. The defect of this scheme is that procedure is made to depend on the result. In other words, if the need to record evidence is dependent on appealability, and appealability in turn depends on the sentence awarded, then the Magistrate has to decide on the guilt of the accused and sentence that should be awarded even before he has heard the evidence. This artificiality has led to some conflict[1] in the interpretation of the words "in which appeal lies" appearing in section 264.

Another shortcoming of this scheme is that the right of revision against a conviction and the right of an appeal against acquittal are rendered virtually ineffective in so far as the higher court cannot conduct a meaningful enquiry into the correctness of the trial court's order for want of a proper record of the case. This reason had prompted the Law Commission to recommend in an earlier Report[2] that the substance of the evidence should form part of the record of the case in appealable and non-appealable cases alike. We are also of the same view.

This change should not make any practical difference in the speedy disposal of summary cases as our investigation reveals that, even as it is, the Magistrates, due to the difficulty and undesirability of making up their minds on the ultimate result of the case even before they have heard the evidence, do take notes of the evidence during the examination of the witnesses to be later incorporated in the records, should an appealable conviction follow. It was also revealed that in a large number of summary trials the accused pleads guilty and the need to record evidence does not arise. We, therefore, recommend that the procedure to be followed in all summary trials should be the same irrespective of the result of the trial.

Section 263 expressly provides that no formal charge need be framed in a case where no appeal lies. Since we recommend that summons-case procedure, in which there is no formal charge, be adopted in all summary trials, the words "or frame a formal charge" in this section can be deleted.

Accordingly sections 263 and 264 may be combined and recast to read as follows :

"263. *In every case tried summarily,* the Magistrate or Bench of Magistrates.... shall enter, in such form as the State Government may direct, the following particulars namely :—

(a) the serial number *of the case;*

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[1] *See* discussion of case-law in *Antonio Vincente* v. *The State*, A.I.R. 1968 Goa 81.

[2] 14th Report, Vol. 2, page 827, para. 8.

(b) the date of the commission of the offence;

(c) the date of the report of complaint;

(d) the name of the complainant (if any);

(e) the name, parentage and residence of the accused;

(f) the offence complained of and the offence (if any) proved, and in cases coming under *clause* (*b*), (*c*), (*d*) or (*e*) of sub-section (1) of section 260, the value of the property in respect of which the offence has been commited;

(g) the plea of the accused and his examination (if any);

(h) the finding...;

(i) the sentence or other final order; and

(j) the date on which the proceedings terminated;

and when the accused does not plead guilty, the Magistrate or Bench shall also record the substance of the evidence and a judgment containing a brief statement of the reasons for the finding."

Section 265 (1)-Language of record and judgement.

22.9. Sub-section (1) of section 265 deals with the language of the record and judgment. The mention therein of the mother-tongue of the presiding officer may be omitted as unnecessary at the present day. It also appears unnecessary to require the presiding officer himself to write up the record. In practice, the factual particulars of the case are recorded by the Clerk of the Court. The sub-section may accordingly be revised to read :

"(1) Every such record and judgment shall be written either in English or in the language of the Court."

Section 265 (2), (3) and (4) Special provisions for Benches.

22.10. Sub-section (2) of section 265 enables the State Government to authorise any Bench of Magistrates to employ an official to prepare the record or judgment or both and take the signature thereon of each member of the Bench taking part in the proceedings. The official is to be "appointed in this behalf by the Court to which such Bench is immediately subordinate" *i.e.*, the Chief Judicial Magistrate of the district. As this is a petty administrative matter, the authorisation also could, it is suggested, be left in his hands. The sub-section may be revised to read :

"(2) The *Chief Judicial Magistrate* may authorise any Bench of Magistrates empowered to try offences summarily to prepare the aforesaid record or judgment *or both* by means of an officer appointed in this behalf by the Chief Judicial Magistrate, and the record or judgment so prepared shall be signed by each member of the Bench taking part in the proceedings."

No modifications are required in sub-sections (3) and (4).

CHAPTER XXIII

TRIALS BEFORE HIGH COURTS AND COURTS OF SESSION

Chapter to be shortened after omitting references to High Court and jury trials.

23.1. In this Chapter, which is the longest in the Code consisting of 70 sections, the procedure for trials before High Courts and Courts of Session is laid down in detail. A large portion of the Chapter is devoted to various details connected with trial by jury, like preparing and maintaining lists of jurors, issuing summonses to them, choosing of jury etc. The Law Commission has, in a previous Report,[1] recommended that the jury system should be abolished. Even now it is followed by Courts of Session in very few places. We propose that all references to jury trials should be removed from the Code. Secondly, we have, in an earlier Chapter,[2] recommended that the Calcutta High Court, which at present is the only High Court exercising ordinary original criminal jurisdiction in a very small category of cases, should cease to exercise that jurisdiction. In view of these two proposals this Chapter will be very much shortened and will lay down the procedure for trials by Courts of Session only, without the help of jurors or assessors.

Provisions revised.

23.2. The abolition of commitment proceedings has been recommended in an earlier Chapter.[3] Formally, however, cases, whether instituted on a police report or on a complaint, will ordinarily[4] be committed to the Court of Session for trial by a Magistrate who will have gone through certain preliminaries. We have already indicated in that Chapter in broad outline the procedure that will have to be followed by Courts of Session on such commitments. The detailed provisions to be includded in this Chapter governing "Trials before Courts of Session" may be as follows :—

Trial to be conducted by Public Prosecutor.

"270. In every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor.[5]

Opening the Case for prosecution.

271. When the accused appears or is brought before the Court in pursuance of a commitment of the case under section 205D, the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused.[6]

Discharge.

272. If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for doing so.[7]

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[1] 14th Report, Vol. 2, page 873.

[2] Para. 3.5 above.

[3] Chapter XVIII above.

[4] Prosecution under s. 198B is an exception.

[5] Present section 270.

[6] *Cf.* section 286(1). For new section 205D, see para 17.11 above.

[7] *Cf.* section 251A(2).

Framing of charge.

273. (1) If after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence triable by the Court, he shall frame in writing a charge against the accused.[1]

(2) The charge shall be read out in Court and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried.[2]

Plea of guilty.

274. If the accused pleads guilty, the Judge shall record the plea and may, in his discretion, convict him thereon.[3]

Date for prosecution evidence.

275. If the accused is not convicted under section 274, the Judge shall fix a date for the examination of witnesses, and may, on the application of the prosecution, issue any process for compelling the attendance of any witness or the production of any document or other thing.[4]

Evidence of the prosecution.

276. (1) On the date so fixed, the Judge shall proceed to take all such evidence as may be produced in support of the prosecution.[5]

(2) The Judge may, in his discretion, permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination.[6]

Acquittal.

277. If after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Judge considers that there is no evidence that the accused committed the offence, the Judge shall record an order of acquittal.[7]

Entering upon defence.

278. (1) Where the accused is not acquitted under section 277, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.[8]

(2) If the accused puts in any written statement, the Judge shall file it with the record.[9]

(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.[10]

Arguments.

279. When the examination of the witnesses (if any) for the defence is complete, the prosecutor shall sum up his case and the accused or his pleader shall be entitled to reply.[11]

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[1] *Cf.* section 251A(3).
[2] *Cf.* section 271(1) and section 251A(4).
[3] *Cf.* section 271(2) and section 251A(5).
[4] *Cf.* section 272 and section 251A(6).
[5] *Cf.* section 286(2) and section 251A(7).
[6] *Cf.* proviso to section 251A(7).
[7] *Cf.* section 289. (2) and (3).
[8] *Cf.* section 289(4) and section 251A(8).
[9] *Cf.* section 251A(8).
[10] *Cf.* section 251A(9).
[11] *Cf.* section 290 and section 292.

Judgment.

280. (1) Thereafter, the Judge shall give a judgment in the case.

(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 562, hear the accused on the question of sentence and then pass sentence on him according to law.[1]

Previous conviction.

281. In a case where a previous conviction is charged under the provisions of sub-section (7) of section 221 and the accused does not admit that he has been previously convicted as alleged in the charge, the Judge may, after he has convicted the said accused under section 274 or section 280 take evidence in respect of the alleged previous conviction, and shall record a finding thereon.[2]

Trial of cases instituted under section 198B.

23.3. In our discussion of section 198B, we have recommended[3] that apart from five sub-sections which deal with the conditions requisite for initiating proceedings under that section, the remaining provisions of the section should be put in this Chapter as they are special provisions governing the trial of these cases by Courts of Session. This section will be as follows :—

Procedure in cases instituted under section 198B.

"282. (1) A Court of Session taking cognizance of an offence under sub-section (1) of section 198B *shall try the case under this chapter as if it had been committed to it by a Magistrate taking cognizance of the offence upon a complaint* :

Provided that the person against whom the offence is alleged to have been committed shall, unless the Court, for reasons to be recorded, otherwise directs, be examined as a witness for the prosecution.[4]

(2) Every trial under this section shall be held in camera if either party thereto so desires or if the Court so thinks fit to do.[5]

(3) If, in any such case, the Court discharges or acquits all or any of the accused and is of opinion that there was no reasonable cause for making the accusation against them or any of them, it may, by its order of discharge or acquittal, direct the person against whom the offence was alleged to have been committed, *where such person was at the time of such commission a Minister,* to show cause why he should not pay compensation to such accused or to each or any of such accused, when there are more than one.[6]

(4) The Court shall record and consider any cause which may be shown *by the person so directed,* and if it satisfied that *there was no reasonable cause for making the accusation,* it may, for reasons to be recorded, direct that compensation to such amount not exceeding one thousand rupees, as it

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[1] *Cf.* section 309. The requirement about hearing the accused on the question of sentence before passing sentence has been added as a desirable provision.

[2] *Cf.* section 310 and section 251A(13).

[3] *See* para. 15.160 above.

[4] *Cf.* section 198B(5).

[5] *Cf.* section 198B(5A).

[6] *Cf.* section 198B(6).

may determine, be paid by such person to the accused or to each or any of them.[1]

(5) All compensation awarded under sub-section (4) shall be recovered as if it were a fine.[2]

"(6) No person who has been directed to pay compensation under sub-section (4) shall, by reason of such order, be exempted from any civil or criminal liability in respect of the complaint made under this section:

Provided that any amount paid to an accused person under this section shall be taken into account in awarding compensation to such person in any subsequent civil suit relating to the same matter.[3]

(7) The person who has been ordered under sub-section (4) to pay compensation may, in so far as the order relates to the payment of compensation, appeal from the order to the High Court.[4]

(8) When an order for payment of compensation to an accused person is made in a case which is subject to appeal under sub-section (7), the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided."[5]

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[1] *Cf.* section 198B(7).
[2] *Cf.* section 198B(8).
[3] *Cf.* section 198B(9).
[4] *Cf.* section 198B(10).
[5] *Cf.* section 198B(11).

CHAPTER XXIV

GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

Procedure when accused is a corporation or association.

24.1. Before considering in detail the various general provisions contained in this Chapter as to inquiries and trials, it is necessary to deal with a lacuna in the Code as regards the procedure when "persons" other than individuals are accused of offences. Section 11 of the Indian Penal Code states that the word "person" includes any company or association or body of persons, whether incorporated or not. The definition in section 3(42) of the General Clauses Act, 1897, is almost the same except that, instead of "persons", it refers to "individuals". While the context of most of the provisions of the Indian Penal Code referring to a person being punishable for doing or failing to do a specific thing would normally exclude their application to a body of individuals, there is no doubt that a company or association can be prosecuted for certain offences under the Indian Penal Code and other laws which are punishable with fine.

Penal provisions applying to companies and associations.

24.2. Certain special laws specifically provide for the application of the penal provisions contained in them to companies and associations. The standard form which has been adopted for this purpose in recent legislation[1] runs as follows :—

> "If the person committing an offence under this Act is a company, the company as well as every person in charge of, and responsible to, the company for the conduct of its business at the time of the commission of the offence shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly etc.
>
> *Explanation*—For the purpose of this section—
>
> (a) 'company' means any body corporate, and includes a firm or other association of individuals; and
>
> (b) 'director' in relation to a firm, means a partner in the firm."

Service of summons on corporations : section 69 (3).

24.3. Provision is made in section 69, sub-section (3) as to how service of a summons is to be effected on an incorporated company or other body corporate. This may be done *either* by serving it personally on the secretary, local manager or other principal officer of the corporation *or* by registered post letter addressed to the chief officer of the corporation in India. In the latter case, service is deemed to have been effected when the letter would arrive in ordinary course of post. The Code is, however, silent as to how the corporation is to appear in court

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[1] *e.g.*, section 23C of the Foreign Exchange Regulation Act, 1947, section 17 of the Prevention of Food Adulteration Act, 1954, section 88 of the Trade Marks Act, 1958, section 140 of the Customs Act, 1962, section 32 of the Gold Control Act, 1965 and section 61 of the Maharashtra Industrial Development Act, 1962.

through a representative, how the person who may come forward as a representative of the corporation is to be recognised as such by the court, what will happen if after due service no one appears in court as the authorised representative of the corporation, etc.

History of section 69(3).

24.4. In the code of 1882, section 69 did not contain a sub-section (3); this was added for the first time in the Code of 1898. It was briefly explained in the Statement of Objects and Reasons that "this amendment provides for service of summons on a company or other body corporate in such cases as public nuisance under Chapter X". The possibility of a corporation being summoned to answer to a charge of an offence before a criminal court was apparently not visualised and consequently no other provision was made in the Code for this purpose.

Lacuna noticed in a Calcutta case.

24.5. It appears that this lacuna has not given rise to any serious practical difficulty in the courts. In a Calcutta case,[1] however, where a conviction had to be set aside and the case remanded because the summons was served on one individual and there was no evidence to show any relationship between him and the company, these observations were made :—

> "The difficulty is caused by the circumstance that while the Indian Penal Code, as well as the General Clauses Act, provides that a person includes a company and there are decisions that a company can be prosecuted for an offence punishable with fine, there is no clear provision in any law as to the proper representative of the company when a company has to be prosecuted for an offence under the Indian Penal Code or an offence under other Acts like the Bengal Municipal Act.
>
> In view of the terms of section 69(3), Criminal Procedure Code, showing that summons on a company may be served on the Secretary or the local manager or other principal officer, it may be held by analogy that the secretary or the local manager or the principal officer of the company will represent the company in such a prosecution.
>
> Accordingly, when summons is issued against a company, some competent representative like the secretary, local manager or other principal officer must be described both by name and by designation as representing the company and there must be some evidence of his representative character. Only in such a case the conviction would be proper".

Evolution of law in England

24.6. The evolution of the law on the subject in England shows how certain difficulties were experienced in this respect to start with and how those were gradually surmounted. First it was felt that a corporation "having no muscles" could not act except through the individuals who were its servants. In the last century the courts got over this difficulty, in cases of nonfeasance, by emphasising that an artificial legal entity is not

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[1] *Commissioner of South Dum Dum Municipality* v. *Om Khosla*, A.I.R. 1956 Cal. 237, 238, para 5 (S. K. Sen J.).

incapable of failing to act,[1] and in cases of nuisance (*e.g.* obstructing the highway), on the principle that even at common law it was a crime of vicarious responsibility.[2] But the major development in juristic approach to the problem took place in this century.

In a judgment relating to civil liability in tort, the House of Lords, taking a step which extended beyond the boundaries of vicarious liability, enunciated the doctrine that the active and directing will of a corporation, which was "an abstraction", must be sought in the person of somebody who "for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the corporation."[3] This fiction was later extended to criminal law.

In 1939, it was held[4] that a corporation could be indicted for a libel. In 1944, it was held[5] that a company alongwith its managing directors and others, could be indicted for conspiracy, the fraud of the director being imputed to the company. The action of the director, it was stated, "is the very action of the company itself". The objection that a corporation could not commit crimes because it would be *ultra vires* for it to authorise the commission of crimes, was also overruled.[6]

Because the corporation has no mind and, therefore, no *guilty* mind, it was thought that it could not be held liable for any crime involving intention, knowledge or deceit. This difficulty was solved, first by holding a corporation liable for crimes of absolute prohibition, next by holding it liable in cases where vicarious criminal liability was permissible, and lastly, by imputing the state of mind of the directors to the corporation. Thus, the scope of criminal liability of corporations widened in course of time. It was held that even a local authority could be convicted of a crime.[7] In 1951, the Yorkshire Electricity Board was fined £ 20,000 for committing breach of a Defence Regulation by unauthorised building.[8]

Corporations punishable only with fine.

24.7. As it is impossible to imprison a corporation practically the only punishment which can be imposed on it for committing an offence is fine. If the penal law under which a corporation is to be prosecuted does not provide for a sentence of fine, there will be a difficulty. As aptly put by a learned writer,[9]—

> "Where the only punishment which the court can impose is death, penal servitude, imprisonment or whipping, or a punishment which is otherwise inappropriate

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1 *R.* v. *Birmingham & Gloucester Rly.* (1840) 2Q.B. 47.

2 *Great North of England Rly.*, (1846) 9 Q.B. 315; 115 E.R. 1294.

3 *Lennards' Carrying Co. Ltd.* v. *Asiatic Petroleum Co. Ltd.*, (1915) A.C. 705, 713 (per Lord Haldane).

4 *Triplex Safety Glass Co. Ltd.* v. *Lansgage Safety Glass Ltd.* (1939) 2 All E. R. 613, 620, 621 (C.C.A.).

5 *R.* v. *I.C.R. Haulage Ltd.* (1944) K.B. 551; (1944) 1 All. E. R. 691.

6 *Harker* v. *Brittanic Assurance Co.* (1928) 1 K.B. 766.

7 *Wursel* v. *Houghton Main Home Delivery Service*, (1937) 1 K.B. 380.

8 *Glanville Williams*, Criminal Law (1961), page 864.

9 Welsh, "Criminal Liability of Corporations", (1945) 62 L.Q.R. 363.

to a body corporate, such as a declaration that the offender is a rogue and a vagabond, the court will not stultify itself by embarking on a trial in which, if the verdict of guilt is returned no effective order by way of sentence can be made".

In order to get over this difficulty we recommend that a provision should be made in the Indian Penal Code *e.g.* as section 62 in Chapter III relating to punishments, on the following lines :—

"In every case in which the offence is only punishable with imprisonment or with imprisonment and fine and the offender is a company or other body corporate or an association of individuals, it shall be competent to the Court to sentence such offender to fine only".

Procedure in English Law.

24.8. Since a corporation cannot be physically present in court, procedural difficulties may arise which in England have been got over by legislation. Thus at common law, a corporation could not be committed for trial; consequently it was provided by statute that in place of "commitment" there would be an order empowering the prosecutor to prefer a bill of indictment against the offending corporation. Statute also provides for the appearance in court through an authorised representative of the corporation to answer to the charge brought against it.

Registered societies.

24.9. We have noticed above that in recent legislation some penal provisions are expressly made applicable to companies as well as to unincorporated associations of individuals. The Code, however, contains no provisions at all in regard to such associations. Even section 69(3) which provides for the service of a summons covers only corporate bodies. Societies registered under the societies Registration Act, 1860, though not formally incorporated, possess some of the attributes of a corporation, and it appears desirable that they should be treated on a par with corporations in criminal proceedings.

New section 336 recommended.

24.10. We accordingly recommend the insertion of a new section at the beginning of Chapter XXIV of the Code. The section (which is provisionally numbered 336) may be as follows :—

Procedure when corporation or a registered society is an accused.

"336. (1) In this section, "corporation" means an incorporated company or other body corporate, and includes a society registered under the Societies Registration Act, 1860.

(2) Where a corporation is the accused person of one of the accused persons in an inquiry or trial, it may appoint a representative for the purpose of the inquiry or trial. Such appointment need not be under the real of the corporation.

(3) Where a representative of a corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or shall be read or stated or explained to the accused, shall be construed as a requirement that that thing shall be done in the presence

of the representative or read or stated or explained to the representative, and any requirement that the accused shall be examined, shall be construed as a requirement that the representative shall be examined.

(4) Where a representative of a corporation does not appear, any such requirement as is referred to in sub-section (3) shall not apply.

(5) Where a statement in writing purporting to be signed by the managing director of the corporation or by any person (by whatever name called) having, or being one of the persons having, the management of the affairs of the corporation, to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this section, is filed, the Court shall unless the contrary is proved, presume that such person has been so appointed.

(6) If a question arises as to whether any person appearing as the representative of a corporation in an inquiry or trial before a court is or is not such representative the question shall be determined by the Court".

Section 337—sub-section (1) analysed.

24.11. Section 337 deals with the tender of pardon to an accomplice. Sub-section (1), which is the main provision and a lengthy and complicated one, lays down (1) the offences in respect of which pardon can be tendered; (ii) the Courts which can tender pardon; and (iii) the stage at which pardon can be tendered.

(i) The offences in respect of which the power can be exercised fall in three groups, namely :—

(a) any offence triable exclusively by the High Court or Court of Session;

(b) any offence punishable with imprisonment which may extend to seven years; and

(c) any of the offences under eight specified sections of the Indian Penal Code.

(ii) The Magistrates who can tender pardon are District Magistrates, Presidency Magistrates, Sub-Divisional Magistrates and Magistrates of the first class.

(iii) Pardon can be tendered at any stage of (a) investigation into the offence; (b) inquiry into the offence; or (c) trial of the offence.

Under the proviso, however, where the offence is under inquiry or trial, no magistrate of the first class other than the District Magistrate, can exercise the power unless he is the inquiring or trying Magistrate, and where the offence is under investigation no such magistrate can exercise this power unless he has jurisdiction in the place where the offence might be inquired into or

tried and sanction of the District Magistrate has been obtained. In other words, while the power of the District Magistrate is unlimited as regards the stage, any other first class magistrate can tender pardon—

(a) during investigation, only if he has territorial jurisdiction in reard to the offence *and* the sanction of the District Magistrate has been obtained, and

(b) during inquiry or trial, only if he is the inquiring or trying magistrate.

Changes in the section.

24.12. It may be noted that the section originally enacted in 1898 was different in all these respects. The power was then vested in the District Magistrates, Presidency Magistrates and First Class Magistrates inquiring into the offence and any other magistrate who had obtained the sanction of the District Magistrate. As regards the offences, it was confined to those triable exclusively by the High Court or Court of Session. Lastly, as regards the stage of tender of pardon, it did not make elaborate provisions as at present dealing separately with investigation, inquiry and trial. During the last 70 years, the section has been made much more elaborate, and as regards offences, its scope has been enlarged more than once. In 1923, offences punishable with imprisonment which may extend to 10 years, an offence punishable under the latter part of section 211, and the offences under sections 216A, 369, 401, 435 and 477A of the Penal Code were added. Then, in 1955 the limit of 10 years' imprisonment was reduced to 7 years, and the offences under sections 161, 165 and 165A of the Penal Code were included. Apparently by oversight, while the reference to section 211 was omitted in 1955 as no longer necessary, reference to sections 216A, 369, 401, 435 and 477A were kept, though all these offences are punishable with imprisonment which may extend to 7 years.

A decision of the Supreme Court.

24.13. The question whether an offence under section 409 of the Penal Code, which is punishable with imprisonment for life or with imprisonment which may extend to 10 years and is triable by the Court of Session, a Presidency Magistrate or a Magistrate of the first class, was an offence in respect of which pardon could be tendered under section 337 (as it stood before the amendment of 1955), was raised before the Supreme Court[1]. The argument was that, where an offence was not exclusively triable by the Court of Session, pardon could be granted *only if* it was punishable with imprisonment up to 10 years, but not if a higher punishment like imprisonment for life was provided for the offence. The Supreme Court repelled this contention, observing that the very object of section 337 was to allow pardon to be tendered where a grave offence was alleged to have been committed by several persons so that with the aid of the evidence of the approver the offence could be brought home to the rest. The gravity of the offence was, of course, to be determined with reference to the sentence awardable for the offence. The State Counsel's suggestion was that section 337 could be reasonably interpreted to mean that even where the offences are punishable

[1] *State* v. *Ganeshwara Rao*, A.I.R. 1963 S.C. 1850.

with imprisonment exceeding 10 years, pardon could be granted. The Supreme Court, while observing that this interpretation might fulfil the object of the section, namely, to embrace within it the graver offences, stated that it wished to express no opinion on it. It held that, since the alternative punishment for the offence under section 409 was imprisonment which may extend to 10 years, and since section 337 did not expressly say that the only punishment should be imprisonment which may extend to 7 years, the case was covered by section 337.

Amendment to remove ambiguity.

24.14. There is, thus, an ambiguity in the expression "any offence punishable with imprisonment which may extend to seven years". We recommend that the ambiguity should be removed by adding the words "or with a more severe sentence", so as to include offences for which the maximum term of imprisonment prescribed in the Penal Code or other law is more than 7 years (*e.g.* 10 years or 14 years) or imprisonment for life.

Offences triable by Courts of Special Judges.

24.15. Offences punishable under sections 161, 165 and 165A of the Penal Code were brought within the scope of section 337 of the Code of Criminal Procedure (Amendment) Act, 1955. The Criminal Law Amendment Act, 1952 which provided for the appointment of Special Judges equal in rank to Sessions Judges, had made these offences and the offence punishable under sub-section (2) of section 5 of the Prevention of Corruption Act, 1947, triable exclusively by the Courts of such Special Judges. When this Act was subsequently amended in 1955 by the inclusion of offences under sections 162, 163 and 164 of the Penal Code within this list, there was no corresponding amendment of section 337(1) of the Criminal Procedure Code. These offences are not in any way different from the offences punishable under sections 161 and 164 of the Penal Code, particularly in regard to the desirability of obtaining the evidence of an approver. We, therefore, recommend that a uniform principle may be adopted, and that all offences which are triable exclusively by the court of a Special Judge appointed under the Criminal Law Amendment Act, 1952, may be brought within the scope of section 337(1) of the Code.

Offences to which section 337 (1) should apply.

24.16. As indicated above,[1] the reference to sections 216A, 369, 411, 435 and 477A of the Indian Penal Code is superfluous, as the offences under these sections are punishable with imprisonment for seven years. The reference to the High Court in the opening part of section 337(1) is also unnecessary, in view of our recommendation for abolition of the ordinary original criminal jurisdiction of all High Courts. We recommend that this section should apply to any offence triable exclusively by the Court of Session or by the Court of a Special Judge appointed under the Criminal Law Amendment Act, 1952, and to any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.

Offences against customs and foreign exchange laws.

24.17. In a recent case[2] which came up before the Supreme Court in appeal, a woman who acted as a carrier in a conspiracy

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[1] *See* para 24.2 above.

[2] *Laxmipat Choraria* v. *The State of Maharashtra.* A.I.R. 1968 S.C. 938, 945.

to smuggle gold into India had, in her statements made to the customs officials investigating the case, admitted her role as a participant in the crime. But, instead of being included in the array of accused persons and sent up for trial, she was examined as a witness against her former associates. The question arose whether she was competent witness. While holding that she was, the Supreme Court observed—

> "It is, however, necessary to say that where section 337 or 338 of the Code applies, it is always proper to invoke those sections and follow the procedure there laid down. Where these sections do not apply, there is the procedure of withdrawal of the case against an accomplice. To keep the sword hanging over the head of an accomplice and to examine him as a witness is to encourage perjury. Perhaps it will be possible to enlarge section 337 to take in certain special laws dealing with customs, foreign exchange etc. where accomplice testimony will always be useful and witnesses will come forward because of the conditional pardon offered to them."

We have given our respectful consideration to this observation of the Supreme Court but it does not seem practicable to select from among the large number of special laws creating socio-economic offences those which are sufficiently grave to be brought within the scope of section 337. The result of such inclusion will be that every case pertaining to such an offence where tender of pardon is made, will have to be tried by the Court of Session which may not be feasible.

Section 337 (1) and Magistrates empowered to grant pardon.

24.18. The next question to be considered is whether, in view of separation, the power to tender pardon under this section should be given to Judicial Magistrates or to Executive Magistrates, or to both to be exercisable at different stages. It is clear that when the stage of inquiry or trial has been reached, the power should be exclusively with the Judicial Magistrates and the Executive Magistrates need not come into the picture. We are of the opinion that the power to grant pardon even at the stage of investigation should be confined to Judicial Magistrates as the matter relates primarily to prosecutions in courts. We propose that at this stage the power should be with the Chief Judicial Magistrate of the district. Once the inquiry or trial has commenced, the Magistrate holding the inquiry or trial would normally be exercising the power to tender pardon but the Chief Judicial Magistrate should also have the power. Accordingly, we propose that the Magistrate competent to tender pardon under section 337 should be—

(a) a Presidency Magistrate or Chief Judicial Magistrate, at any stage of the investigation, inquiry or trial, and

(b) a Judicial Magistrate of the first class, while inquiring into or trying an offence, at any stage of the inquiry or trial.

Section 337(1A).

24.19. A few minor changes are necessary in sub-section (1A). It is desirable to provide for a clear record of not only

the reasons for tendering pardon but also of the fact whether the tender was accepted or not accepted. Secondly, there is no justification for the proviso which requires the accused to pay for a copy of the record unless the magistrate for special reason exempts him from payment. The proviso should be omitted.

Section 337(2A).

24.20. Under sub-section (2A) every approver's case whether or not it relates to an offence triable by the Court of Session has to be committed to that Court when the Magistrate, after recording the evidence of the approver under sub-section (2) is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence. Sub-section (2B), however, lays down a different procedure in cases where the offence is triable by the Court of Special Judge appointed under the Criminal Law Amendment Act, 1952. In view of the abolition of commitment proceedings, we consider that the procedure should be made uniform and there is no need to require the Magistrate to scrutinise the evidence of the approver and that of the other witnesses produced by the prosecution. It is desirable that every approver's case should be committed to the Court of Session whether or not the case is exclusively triable by that Court.

Section 337(3).

24.21. Under sub-section (3), an approver, unless he is already on bail, has to be detained in custody until the termination of the trial. The trying Magistrate or Sessions Court has no power to release the approver on bail. Though this may seem harsh, particularly where the trial is prolonged, we do not think the provision should be changed. In extraordinary cases of hardship, the approver can approach the High Court whose powers as to bail are very wide.

It is fairly clear that the words "unless he is on bail" do not prevent a Court from cancelling the bail previously granted to an approver and the general provisions as to cancellation or modification of bail apply to an approver as they apply to the accused persons under trial.

Revised section recommended.

24.22. We recommend that section 337 may be revised as follows :—

Tender of pardon to accomplice.

"337. (1) With a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to any offence to which this section applies, the Chief Judicial Magistrate or a Metropolitan Magistrate at any stage of the investigation or inquiry into, or the trial of, the offence, and a Magistrate of the first class inquiring into or trying the offence, at any stage of the inquiry or trial, may tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

(2) This section applies to—

(a) any offence triable exclusively by the Court of Session or by the Court of a Special Judge

appointed under the Criminal Law Amendment Act, 1952; and

(b) any offence punishable with imprisonment which may extend to seven years or with a more severe sentence.

(3) Every Magistrate who tenders a pardon under sub-section (1) shall record—

(a) his reasons for so doing, and

(b) whether the tender was or was not accepted by the person to whom it was made;

and shall on application made by the accused, furnish him with a copy of such record free of cost.

(4) Every person accepting a tender of pardon made under sub-section (1)—

(a) shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any;

(b) shall, unless he is already on bail, be detained in custody until the termination of the trial.

(5) Where a person has accepted a tender of pardon made under sub-section (1) and has been examined under sub-section (4), the Magistrate taking cognizance of the offence shall, without making any further inquiry in the case, commit it for trial—

(a) where the offence is triable exclusively by the Court of a Special Judge appointed under the Criminal Law Amendment Act, 1952, to that Court.

(b) in any other case, to the Court of Session.

Section 338.

24.23. Under section 338, the Court of Session may at any time after commitment of the case, but before passing judgment, either tender pardon itself, or may "order the committing Magistrate or the District Magistrate" to tender pardon. Though this power is rarely resorted to by a Court of Session, it will be useful to retain the section. But in view of the abolition of commitment proceedings, the Court of Session need not be authorised to direct "the committing Magistrate" or any other Magistrate to tender pardon. The section may be revised to read as follows :—

Power of Court of Session to tender pardon.

"338. At any time after commitment of a case but before judgment is passed, the Court of Session may, with the view to obtaining at the trial the evidence of any person supposed to have been directly or indirectly concerned in or privy to, any such offence, tender a pardon on the same condition to such person".

Section 339 and 339A-Introductory.

24.24. Sections 339 and 339A lay down the procedure for prosecuting a person who, after accepting a pardon tendered under section 337 or 338, fails to comply with the condition on which the tender was made. Section 339 as originally enacted was found to be sketchy and unsatisfactory in many respects and was, therefore, amended, and amplified by the addition of section 339A, by the Amending Act of 1923. A certificate by the Public Prosecutor that the approver has, either by wilfully concealing anything essential or by giving false evidence, broken the condition of his pardon, is an essential requisite for prosecuting him for the offence in respect of which the pardon was tendered or for *any other offence of which he appears to have been guilty in connection with the same matter.*

Prosecution for perjury and public prosecutor's certificate.

24.25. It is by no means clear whether the offence of giving false evidence is covered by the underlined words. This offence which the approver might have committed, either during his examination as a witness by the Magistrate or during his examination by the Sessions Judge, could hardly be said to be an offence committed "in connection with the same matter" as the original offence. But in an Oudh case[1], where sanction of the High Court under sub-section (3) of section 339 was asked for by the Sessions Judge who had forwarded the papers to the High Court, it was held that sanction for the prosecution could be granted only if a certificate from the Public Prosecutor under sub-section (1) was produced.

When prosecution for perjury should be launched.

24.26. In a Nagpur case[2], the approver accepted the tender of pardon and was immediately examined as a witness, but denied that he knew anything about the murder. At a subsequent examination he gave an account of the murder which agreed with the account given by the prosecution, but a few days later, he again denied all knowledge and swore that his previous statement was false and given at the instance of the Police Inspector. After the sessions trial had ended in the conviction of two persons for murder, the Public Prosecutor gave his certificate under section 339(1) to enable the approver to be tried for the offence of murder or for any other offence committed by him in connection with the same matter. When, without prosecuting him for any such offence, the Local Government applied under section 339(3) for the sanction of the High Court to prosecute him for perjury, the Court observed :—

> "The reasons for which a High Court should grant or refuse sanction to the prosecution of a pardoned approver for perjury seem to be indicated with fair certainty by the fact of the sanction being necessary in that case only. It is clearly not necessary that such a person should be punished for perjury if he can be punished sufficiently both for that and the original crime on a conviction for that original crime. Sanction therefore ought to be refused unless it appears that a conviction for the original crime is unlikely or a prosecution for it undesirable for any other reason, or that on a conviction for the original crime the sentence that could be passed would be too light to cover both

[1] *Emperor* v. *Ghasitey*, A.I.R. 1929 Oudh 527.

[2] *Gambhir Bhajua*, A.I.R. 1927 Nagpur, 189, 192.

offences. Before sanction can be granted, therefore, it must be shown that there is no intention of prosecuting the approver for the original crime, or that he has already been prosecuted for it and either has been acquitted or has received or is likely to receive such a light sentence that it is not sufficient to cover his further crime of perjury."

Rejecting the application for sanction as premature, the Court added that the person's acquittal for murder would not of itself be any bar to his conviction for perjury. If such prosecution should fail, that failure of itself would be no reason why another application for sanction to prosecute the accomplice for perjury should not be made. The Court also observed that while the prosecution for murder would be by the police on the basis of a certificate from the Public Prosecutor, section 339(1) of the Code did not cancel section 476. It merely imposed an additional condition essential to the institution of a prosecution for perjury by an approver and, even when that condition is satisfied, the prosecution could still be initiated only on a complaint by the Sessions Court or the High Court.

Is trial for perjury under section 339?

24.27. The position is also obscure in one other aspect. Under the proviso to sub-section (1), the approver is entitled to plead at such trial that he has complied with the condition upon which the tender of pardon was made to him. The procedure for giving effect to such a plea is indicated in section 339A. The trial of the approver for the original offence must necessarily be distinct from his trial for perjury. While the first would without doubt be regarded as a trial "under section 339", the second might not be so regarded. It is obviously desirable that doubts on these points should be removed by a proper rewording of the two sections.

Applicability of sections 195 and 476 to offence of perjury by approver.

24.28. It will be readily conceded that the offence of perjury committed by an approver stands on a special footing and prosecutions for that offence require a certain amount of screening. It does not, however, appear to be necessary that there should be, first, a certificate of the Public Prosecutor under section 339(1), secondly, the sanction of the High Court under section 339(3), and thirdly, a complaint under section 195(1)(b) (after an inquiry, if necessary under section 476) by the Court before which the offence was committed or by the High Court. The certificate of a responsible law officer like the Public Prosecutor who has been in charge of the original trial and consequently fully acquainted with the facts and circumstances of the case might even be regarded as sufficient guarantee that the approver is prosecuted for perjury only in appropriate cases. As indicated in the judgment cited above, such a prosecution would be launched in the majority of cases only when the circumstances do not justify a prosecution of the approver for the original offence or when that prosecution has, for some reason, failed. After careful consideration, however, we are of the view that it would be sufficient to provide for a certificate of the Public Prosecutor and sanction of the High Court under section 339 and that it is not necessary to complicate and delay the prosecution by insisting upon a prior inquiry under section 476, followed by a complaint under section 195(1)(b).

Section 339(2).

24.29. Section 339(2) provides that "the statement" made by a person who has accepted a tender of pardon may be given in evidence against him at a trial referred to in section 339(1). This gives an impression that there is only one such statement which is generally not the case. Judicial decisions[1] make it clear that the statements referred in sub-section (2) are the statements made by the approver *after* he has accepted the tender of pardon. As pointed out in a Lahore case,[2] the sub-section "makes, by necessary implication, a statement of this nature an exception to the rule of evidence enacted in section 24, Indian Evidence Act, so far as that section excludes confessions made as the result of the inducement of pardon". Such statements could have been recorded by a Magistrate under section 164 during investigation or by the Court during the inquiry or trial under section 337(2), and notwithstanding that they were or might have been induced by the tender of pardon, they are made admissible in evidence under section 339(2). Despite the loose wording, this section cannot be held to cover other statements made by the approver after accepting the tender of pardon, *e.g.*, statements made to a police officer or to a private person. Their admissibility in evidence will be decided under the general provisions of the Evidence Act.

Section 339A.

24.30. The provisions contained in section 339A are supplementary to those contained in section 339. In fact, it will be conducive to clarity and easier understanding if the provisions are put together in one section. The reference to a High Court in sub-section (1)(a) and the reference to the jury and to the Magistrate in sub-section (2) will have to be omitted as being unnecessary or superfluous.

Revised section 339 recommended.

24.31. The revised section 339, after including the provisions of section 339A, may be as follows :

Trial of persons not complying with condition of pardon.

"339. (i) Where in regard to a person who has accepted a tender of pardon made under section 337 or section 338, the Public Prosecutor certifies that in his opinion such person has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered and any other offence of which he appears to have been guilty in connection with the same matter, and also for the offence of giving false evidence :

Provided that such person shall not be tried jointly with any of the other accused;

Provided further that such person shall not be tried for the offence of giving false evidence except with the sanction of the High Court, and nothing contained in section 195 or in section 476 shall apply to that offence.

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[1] *Rambharose*, A.I.R. 1944 Nag. 105 (F.B.); *Horilal*, A.I.R. 1940 Nag. 218; *Miral*, A.I.R 1943 Sind. 166, 169.

[2] *Ram Nath* v. *Emperor*, 29 Cr. L.J. 413; A.I.R. 1928 Lah. 320(2), at page 322.

(2) Any statements made by such person after accepting the tender of pardon and recorded by a Magistrate under section 164 or by a Court under sub-section (3) of section 337 may be given in evidence against him at such trial.

(3) At such trial the accused shall be entitled to plead that he has complied with the condition upon which such tender was made in which case it shall be for the prosecution to prove that the condition has not been complied with.

(4) At such trial, the court shall—

(a) if it is a Court of Session, before the charge is read out and explained to the accused, and

(b) if it is the Court of a Magistrate, before the evidence of the witnesses for the prosecution is taken,

ask the accused whether he pleads that he has complied with the condition on which the tender of pardon was made.

(5) If the accused does so plead, the Court shall record the plea and proceed with the trial. It shall, before passing judgment in the case, find whether or not the accused has complied with the condition of the pardon, and, if it finds that he has so complied, it shall, notwithstanding anything contained in this Code, pass judgment of acquittal."

Section 340.

24.32. Section 340 consists of two sub-sections which have no connection with each other. Sub-section (1) deals with the right of any person accused of an offence or against whom proceedings are instituted under the Code to be defended by a pleader. Sub-section (2) deals with the right of persons against whom certain proceedings are instituted to offer themselves as witnesses, which is an entirely different matter. This should be dealt with in a separate section, a convenient place for which would be after section 342A.

Sub-section (2) amended and amplified.

24.33. Sub-section (2) mentions proceedings under section 107 but leaves out proceedings under sections 108, 109 and 110 which are in the same category. We are of the view that persons against whom such proceedings are instituted should also have a right to offer themselves as witnesses. In their case, however, it should be provided that their failure to give evidence should not be made the subject of any comment or give rise to any adverse presumption : *vide* clause (b) of the proviso to section 342A.

We recommend that sub-section (2) of section 340 be omitted, and a new section 342B added after 342A reading as follows :—

"342B. Any person against whom proceedings are instituted in any Criminal Court under Chapter VIII, Chapter X, Chapter XI, Chapter XII or Chapter XXXVI, or under section 552, may offer himself as a witness in such proceedings :

Provided that in proceedings under section 108, section 109 or section 110, the failure of such person to give evidence shall not be made the subject of any comment by any of the

parties or the court or give rise to any presumption against him or any other person proceeded against together with him at the same inquiry."

Legal aid to accused at expense of the State in certain cases-present position.

24.34. Though section 340 provides that the accused may be represented by a pleader, it does not give him any right to legal aid at the expense of the State. Assistance of counsel at the expense of the State is at present provided for by rules or administrative orders which vary from State to State. Almost all States provide for such assistance in capital cases. In Maharashtra and Gujarat it is provided in all Sessions trials; and in Kerala it is provided also for all trials before District Magistrates.

Recognised as a "human right" by International covenant.

24.35. It can hardly be disputed that, in a trial for a serious offence, the assistance of counsel on both sides is essential for a just decision of the case. Development in the field of human rights has been towards the recognition of the right of the accused person to assigned counsel. The recently adopted International Covenant on Civil and Political Rights[1] provides in Article 14(3) that "in the determination of any criminal charge against him, every one shall be entitled to the following minimum guarantees in full equality :—

> (d) x x x x x to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;"

The European Covenant on Human Rights, which has been in effective operation for some years, contains a similar provision.

Gideon's Trumpet case.

24.36. In a celebrated case,[2] the Supreme Court of the U.S.A., after a review of previous decisions, held that the right of an accused in a criminal case to have the assistance of counsel for his defence[3] includes the right to have a Counsel provided at the expense of the State if the accused is too poor to engage one at his expense. The reasons for this decision have been given by Black J. as follows :—

"Not only these precedents but also reason and reflection require us to recognise that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both State and Federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defences.

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[1] Adopted by the General Assembly of the United Nations in January, 1968.

[2] *Gideon* v. *Wainwright*, (1963) 372 U.S. 335.

[3] U. S. Constitution, Sixth Amendment.

That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our State and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realised if the poor man charged with crime has to face his accusers without a lawyer to assist him."

Recommendation in 14th Report.

24.37. In India, the importance of this right, i.e. a right to assignment of counsel at Government expense was emphasised in the Law Commission's Report on the Reform of Judicial Administration,[1] where a brief review of the schemes in force in some of the States was made, and it was pointed out that certain measures of legal aid were capable of being implemented forthwith, without setting up elaborate legal aid organisations, by amending the law or the rules of the high Courts. As regards criminal cases, three recommendations were made in that Report.[2] First, representation by a lawyer should be made available at Government expense to accused persons without means in all cases tried by a Court of Session. Secondly, representation by a lawyer should be made available at Government expense to applicants without means in proceedings under section 488 of the Code. Thirdly, representation by a lawyer should be made available at Government expense to an accused person without means at the time of the final hearing of a jail appeal which has been admitted.

Our recommendation.

24.38. The matter has been engaging the attention of the Government of India for a long time, and the need for action in the matter has been impressed upon State Governments. But, apparently, financial considerations have come in the way of setting up legal aid organisations or putting into effect comprehensive schemes. It is not necessary for our purpose to go into the details of the various possible schemes. But we strongly recommend that the right of the accused to representation at Government expense should be placed on a statutory footing in relation to trials for serious offences, and as a first step in this direction, we propose that such a right should be available in all trials before the Court of Session. The Code should also contain a provision enabling the State Government to extend this right by a notification to any class of trials before other courts in the State.

New section 340A proposed.

24.39. The new section may be as follows :—

"340A. (1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, the Court shall assign a pleader for his defence at the expense of the State.

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[1] Law Commission, 14th Report, Vol. 1, Chapter 27, pages 587 to 500.
[2] 14th Report, Vol. 1, page 598, paragraph 17.

(2) The High Court may, with the previous approval of the State Government, make rules providing for—

(a) the mode of selecting pleaders for defence under sub-section (1),

(b) the facilities to be allowed to such pleaders by the Courts,

(c) the fees payable to such pleaders by the Government, and, generally, for carrying out the purposes of sub-section (1).

(3) The State Government may by notification in the Gazette direct that, from such date as may be specified in the notification the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before Courts of Session."

Section 342 Introductory.

24.40. Section 342 is one of the most important sections in the Code. It requires that the Court must, at the close of the prosecution evidence, examine the accused "for the purpose of enabling him to explain any circumstance appearing in the evidence against him." The section, for a moment, brushes aside all counsel, all prosecutors, all witnesses, and all third persons. It seeks to establish a direct dialogue between the Court and the accused for the purpose of enabling the accused to give his explanation. For a while the section was misunderstood and regarded as authorising an inquisitorial interrogation of the accused, which is not its object at all. The key to the section is contained in the first sixteen words of the section. Giving an opportunity to the accused to explain the circumstances appearing in the evidence is the only object of the examination. He may, if he chooses, keep his mouth shut or he may give a full explanation, or, if he is so advised, he may explain only a part of the case against him.

Stephen's criticism.

24.41. Discussing the history and scheme of his section in his History of the Criminal Law of England,[1] Stephen writes :—

> "The words specifying the purpose for which questions are to be asked were not in the Code of 1872, which authorised the examination of the accused without assigning any reason for it. Perhaps the expression was introduced in the Code of 1882 in order to soften what many people consider a harsh proceeding. For my own part I regret the alteration. It will either be inoperative or most embarrassing, and it looks like an apology for what does not require one. It is, however, hypocritical, for the Code contains no provision as to what is to happen if the questioning does not conform to the directions of the Code, and it specifically enacts that 'the court and jury (if any) may draw such inference from' the refusal of the accused to answer or from his answers as they please. Besides, in practice, every question any one could want to ask might be justified by the terms of the section; *e.g.* 'The witnesses say they saw you at this place. Were

[1] Vol. 3, p. 335.

you there or not, and, if not, where were you ?'. The words thus make hardly any difference."

Law in England.

24.42. At another place in the same treatise,[1] however, Stephen has expressed himself in favour of questioning the accused at the trial. After tracing the history of the law on this point in England, he writes :

"This state of the law continued till the year 1848, when by 11 & 12 Vic. c. 42, the present system was established, under which the prisoner is asked whether he wishes to say anything, and is warned that if he chooses to do so what he says will be taken down and may be given in evidence on his trial. The result of the whole is that as matters stand the prisoner is absolutely protected against all judicial questioning before or at the trial, and that, on the other hand, he and his wife are prevented from giving evidence in their own behalf. He is often permitted, however, to make any statement he pleases at the very end of the trial, when it is difficult for any one to test the correctness of what is said.

"This is one of the most of characteristic features of English criminal procedure, and it presents a marked contrast to that which is common to, I believe, all continental countries. It is, I think, highly advantageous to the guilty. It contributes greatly to the dignity and apparent humanity of a criminal trial. It effectually avoids the appearance of harshness, not to say cruelty, which often shocks on English spectator in a French court of justice, and I think that the fact that the prisoner cannot be questioned stimulates the search for independent evidence. The evidence in an English trial is, I think, usually much fuller and more satisfactory than the evidence in such French trials as I have been able to study.

"On the other hand, I am convinced by much experience that questioning, or the power of giving evidence, is a positive assistance, and a highly important one, to innocent men, and I do not see why in the case of the guilty there need be any hardship about it. It must be remembered that most persons accused of crime are poor, stupid and helpless. They are often defended by solicitors who confine their exertions to getting a copy of the depositions and endorsing it with the name of some counsel to whom they pay a very small fee, so that even when prisoners are defended by counsel, the defence is often extremely imperfect, and consists rather of what occurs at the moment to the solicitor and counsel than of what the man himself would say if he knew how to say it. When a prisoner is undefended his position is often pitiable, even if he has a good case. An ignorant uneducated man has the greatest possible difficulty in collecting his ideas, and seeing the bearing of facts alleged. He is utterly unaccustomed to sustained attention or systematic thought, and it often appears to me as if the proceedings on a trial, which to an experienced person appear plain and simple, must pass before the eyes and mind of the prisoner like a dream which he cannot grasp."

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1 Stephen, History of Criminal Law of England, Vol. 1, pp. 441-442.

Is section 342 redundant in view of section 342a ?

24.43. It has been suggested that after the enactment of section 342A which enables the accused to enter into the witness box if he so chooses and give evidence, section 342 is redundant and can be safely omitted. A view has also been expressed that the elaborate examination contemplated by this section leads to needless delay. At least where the accused is represented by counsel, it should be unnecessary to examine the accused, because his counsel is bound to put forth, whatever explanation there is to be offered.

As against this it has to be borne in mind that there are several offences (such as receipt of stolen property) which are of such a nature that the accused has to give his explanation, because in the absence of a reasonable explanation[1] the accused runs the risk of being convicted by the court relying on section 114, illustration (a) of the Evidence Act, 1872. The provisions of the Prevention of Corruption Act, 1947, and other special laws which enable the court to hold the accused guilty unless he can satisfactorily account for his possession of property or other articles may also be referred to in this connection. Section 342 of the Code affords the accused the only opportunity of giving such an explanation without running the risk of facing cross-examination.

Need for examination of accused.

24.44. Furthermore, differing from civil cases in this respect, the parties in criminal cases are not equally placed. The whole machinery of the States is against the accused. The accused has no investigating machinery, no power of search and no power of questioning, which the prosecution has. If he puts forth a definite case, he may not in many cases be able to prove it. This is also the reason why in civil cases preponderance of evidence is sufficient, but in criminal cases a shadow of doubt operates in favour of the accused. Even where the State provides counsel for the accused, experience shows that the Court has to guide counsel who is usually a junior member of the Bar. In this state of affairs, examination of the accused under section 342 appears to be essential proceeding. The mode of applying the section would, no doubt, vary with the knowledge intelligence and experience of the Judge. If in a particular case the Judge exceeds the permissible limit and subjects the accused to an inquisitorial examination, the superior courts will correct the error. The words "question him generally" in the section are clearly intended to prevent unfair interrogation of the accused.

Section 342 should be retained.

24.45. We have, after considering the various aspects of the matter as summarised above, come to the conclusion that section 342 should not be deleted. In our opinion, the stage has not yet come for its being removed from the statute book. With further increase in literacy and with better facilities for legal aid, it may be possible to take that step in the future.

Section 342 (1)—Two kinds of examination.

24.48. The examination of the accused under section 342 is of two kinds :—

(a) the power of the court to put a particular question to him at any stage for the purpose of enabling him

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[1] *G. Feller*, A.I.R. 1943 P.C., 211; *Hori Lal*, I.L.R., 56 All. 250.

to explain any circumstance appearing in the evidence against him, and

(b) the *duty* of the Court to *generally* examine him (after the close of the prosecution evidence) for the above purpose.

The object of the examination in each case is the same. But the first is optional, while the second is mandatory. The first can be at any stage of the inquiry or trial, while the second is after the witnesses for the prosecution have been examined, and "before the accused is called upon to enter upon his defence". The first is particular; while the second is general. These points of difference between the two would be brought out more clearly if each is dealt with in a separate clause, and we recommend that sub-section (1) may be split up into two clauses, each clause dealing with one kind of examination.

Application to summons cases.

24.47. There is a conflict of decisions on the question whether section 342 applies to summons cases. Most High Courts have taken the view[1] that it does so apply, but a contrary view[2] has been taken by some High Courts.

Examination of pleader in places of accused.

24.48. Where the Court has dispensed with the personal attendance of the accused, is it necessary that his pleader should be examined under section 342, or should such examination be of the accused himself? There is also a controversy on this point, and different views have been expressed both as to what the law is and as to what it should be. One view is that the accused himself should be examined in all cases, and even where his personal attendance has been dispensed with at other hearings, the court must require him to be present for examination under section 342. Another view is that where it is not a serious case and personal attendance has been dispensed with, the court may also dispense with the examination of the accused or of his pleader. It is against the intendment of section 342 to examine the pleader instead of the accused and such examination serves no useful purpose.

The question came up before the Supreme Court in a case[3] decided recently. After noting the sharp conflict of Judicial opinion, the Supreme Court referred to the decision of the Calcutta High Court in *Prova Debi* v. *Mrs. Fernandes*[4] and said :—

> "In that case a Full Bench of the Calcutta High Court by a majority decision held that the Magistrate may in his discretion examine the pleader on behalf of the accused under section 342. This view is supported by numerous decisions of other High Courts, but from time to time many judges expressed vigorous dissents and came to the opposite conclusion. The two sides of the question are ably discussed in

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[1] *Khacho Mal* v. *Emp.*, A.I.R. 1926 All. 358; *Sita Ram* v. *Emp.*, A.I.R. 1935 All. 217; *Ram Dhiraj* v. *State*, A.I.R. 1956 All. 167; *Balkrishna* v. *Emp.*, A.I.R. 1931 Bom. 132; *Gulam Rasul*, A.I.R. 1921 Pat. 11.

[2] *Ponnuswami*, A.I.R. 1924 Mad. 15; *Vidyanand*, A.I.R. 1962 A.P. 394.

[3] *B. B. Das Gupta* v. *State of West Bengal*, (1969) 1 S.C.J. 867, 869.

[4] A.I.R. 1962 Cal. 203.

the majority and minority judgments of the Calcutta case. After a full examination of all the decided cases on the subject, we are inclined to agree with the minority opinion."

A third view is that the pleader should be examined in such cases, but the law should also provide that the answers given by the pleader shall not be put in evidence against the accused in any other inquiry or trial for any other offence which the answers of the pleader may tend to show that the accused has committed. It would not, according to this view, be proper to totally dispense with the examination of both the accused and his pleader. There should be something on the record to show the explanation either of the accused or of his pleader.

A suggestion intended to simplify the matter was also considered by us, namely, in summons cases, no examination of the accused under section 342 should be necessary, and neither the accused nor the pleader need be examined; but in all other cases, the accused person should be examined personally. A more limited form of this suggestion was also considered by us, namely, that in summons cases in which the personal attendance of the accused is dispensed with, section 342 should not apply, and neither the accused nor the pleader need be examined.

Conclusion.

24.49. We have, on a consideration of the various views expressed in the matter, come to the conclusion that :—

(a) the section does, and should, apply to all inquiries and trials, including commitment inquiries and trials of summons cases, and to make this position clear, the words 'In every inquiry or trial' should be inserted at the beginning of sub-section (1);

(b) in summons cases where the personal attendance of the accused has been dispensed with, either under section 205 or under section 540A, the court should have a power to dispense with his examination; and

(c) in other cases, even where his personal attendance has been dispensed with, the accused should be examined personally.

Amendment of section 342 (1) recommended.

24.50. We accordingly recommend that section 342(1) be revised as follows :—

"(1) In *every inquiry or trial*, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court—

(a) may,.....at any stage without previously warning the accused, put such questions to him as the Court considers necessary, and

(b) shall, ...after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case :

Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

Section 342 (2)-does it offend article 20(3)?

24.51. Section 342(2) is ambivalent in its import. The first part rightly provides that the accused shall not render himself liable to punishment by refusing to answer the questions put by the Court or by giving false answers to them, but the section immediately gives the warning to the accused that "the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just." It has been suggested that in view of the clear possibility of the Court drawing an adverse inference from a refusal to answer, the section offends article 20(3) of the Constitution, in that its indirect effect may be to compel the accused to be a witness against himself. We note that two learned authors[1] have expressed doubts about the constitutional validity of the provision.

View of High Courts.

24.52. The matter has not come up before the Supreme Court, but High Courts have held that the provision does not conflict with the Constitution. The reasoning on which one of the decisions is based[2] is that the drawing of an adverse inference is a far cry from being *compelled* to be a witness. A distinction is made between "evidence" and "statement" and it is said that the statement of the accused is not "evidence". It is also stated[3] that no oath is administered to the accused and therefore he is not a "witness". We are afraid, however, that it is possible to argue that the permissibility of drawing an adverse inference would, at least in some cases, amount to an indirect compulsion of the accused to enter the witness box. Where the prosecution evidence is strong, this will be particularly so. It cannot be denied that the accused will be placed in a dilemma : he must either answer the questions under section 342 or enter the witness box under section 342A. The first course compels him to incriminate himself, because the answers can be used against him. The second course also compels him to incriminate himself, because, once he enters the witness box, he is bound to be cross-examined.

It may be said that the privilege against self-incrimination operates regardless of the ultimate result, and emphasises that certain means cannot be adopted even for a righteous end. In a Calcutta case,[4] the Judges observed :—

> "If a person accused of an offence refuses to answer a question on the ground that by answering it he will incriminate himself or to produce a document on the ground that it will incriminate him, he will in a way be admitting his guilt, and yet, if effect is to be given to article 20(3) of the Constitution, he will, in effect be protected from being compelled to furnish evidence of his admitted guilt and protected even by the issue of, if necessary, a writ. This may seem odd, but in

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[1] Seervai, Constitutional Law, (1966), page 442, paragraph 12.43; Basu Commentary on the Constitution, (1962), Vol. 2, pages 36, 37.

[2] *Bansari Lal* v. *The State*, A.I.R. 1956 All. 341, 344, paragraph 33 (D.B.).

[3] *In re B. N. Ramakrishna*, A.I.R. 1955 Mad. 100, 119, paragraph 60 (Ramaswami J.).

[4] *Collector of Customs* v. *Calcutta Motor and Cycle Co.*, A.I.R. 1958 Cal. 682, 690, paragraph 19 (P. B. Chakravarti C.J. and K. C. Das Gupta J.).

balancing the advantages of an effective detection of crime, with information collected from all sources, against the observance of civilised standards of enquiry and the upholding of the dignity of man, the framers of our Constitution like those of the Constitution of America, have given preference to the latter."

Amendment recommended.

24.53. We, therefore, recommend that the latter part of section 342(2) be omitted. Since section 342(3) provides that the answers (whether false or true given by the accused may be taken into consideration in such inquiry or trial, there is no need to state in section 342(2) that the court "may draw such inference from such answers as it thinks just."

Section 342 (3).

24.54. The latter part of section 342(3) provides that the answers given by the accused may be put in evidence for or against him in an inquiry into, or trial for, any other offence which such answers may tend to show he has committed. Such use of the answers *for* the accused would be governed by the Evidence Act. Reference may be made to sub-sections (1), (2), (3) of section 21 and illustrations (c), (d) and (e) thereto, and also sections 157 and 159, of the Evidence Act.

The answers given by the accused may amount to an admission of some other offence or may by themselves constitutes an offence, *e.g.* contempt of court or defamation. As regards the latter case, the question may arise whether the answers enjoy any absolute protection. In a Bombay case[1] it was held, that the criminal law of defamation being codified in section 499 of the Indian Penal Code, the case must (if an exemption is claimed) be brought within the four corners of one of the nine exceptions given below that section. The Court followed a Calcutta decision,[2] wherein the judgment contains a comprehensive discussion of the law of defamation under the Indian Penal Code. A wider view was taken in one case by the Madras High Court,[3] holding that such answers enjoy absolute protection, and that this rule of the English law was not intended to be abrogated by section 499 of the Indian Penal Code; but this was over-ruled in a latter case.[4] The Allahabad High Court[5] has taken the wider view, recognising absolute protection for answers given by the accused.

These decisions, however, are not based on the effect of section 342(3), but on an interpretation of section 499, Indian Penal Code. Most courts have assumed that the answers given by the accused can be used in evidence in a latter prosecution for defamation filed against the accused, and have proceeded to deal with the case on the other legal issues. We have considered the question whether this position requires to be disturbed.

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1 *Bhai Shanti* v. *Umrao Amir*, I.L.R. 50 Bom. 162; A.I.R. 1926 Bom. 141, 143 (F.B.).

2 *Satish Chandra* v. *Ram Dayal*, I.L.R. 48 Cal. 388; A.I.R. 1921 Cal. 1; 24 C.W.N. 982 (S.B.).

3 *In re Venkata Reddy*, (1912) I.L.R. 36 Mad. 216 (F.B.).

4 *Tiruvengade Mudali* v. *Tripuransu Udai*, (1926) I.L.R. 49 Mad. 728, 737; A.I.R. 1926 Mad. 906 (F.B.).

5 *Murli Pathak*, I.L.R. 50 All. 169; A.I.R. 1927 All. 707, 708, (Dalal J.).

It was stated before us, that the accused is in a less favourable position than a witness to whom section 132, Evidence Act, gives full protection. Though the accused is not, in law, "compelled" to answer the questions put under section 342 (so that the analogy of section 132 may not be strictly appropriate), yet the accused has to answer the questions in order to save himself from conviction for the offence for which he is under trial. Such compulsion as there may be is, in our view, no compulsion in law. If the accused, while answering such questions, commits an offence, such as defamation, contempt of court, or uttering obscene words, there is no reason why he should not be punishable. Any privilege that the substantive law itself recognises in such cases would, no doubt, be available; but the procedural law need not, in our opinion, add its own special cloak of protection to the accused.

Section 342 (4).

24.55. It would be more appropriate to place sub-section (4) of section 342 immediately after sub-section (1) instead of at the end.

Section 342 A.

24.56. Under section 342A, (which was inserted in 1955), the accused is now a competent witness for the defence and can give evidence in disproof of the charges made against him or against his co-accused. Are the words[1] "in disproof of the charges" intended merely to prevent the accused from implicating other co-accused? Or do they also shut out cross-examination of the accused as to *the main offence?* The position in this respect appears to be somewhat obscure. It is also not clear as to what is the scope of the cross-examination of the accused when he offers himself as witness. Can questions regarding his character or impeaching his credit be put in cross-examination? If such questions are permissible, to what extent can he be questioned in respect of previous convictions?[2] All these matters may prove to be controversial, but having regard to the fact that section 342A has been recently introduced and apparently has not created any difficulty so far, we are not recommending any elaboration of the section.

Section 343.

24.57. No change is needed in section 343.

24.58. Section 344(1A) provides for the postponement of the commencement of an inquiry or trial and for adjournment during the inquiry or trial. It empowers the court to remand the accused, if in custody, for not more than 15 days at a time. The explanation at the end of the section states that if sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand, mainly because of the explanation in these terms, the view has been taken that remands can be given by Magistrates under section 344 even at the stage of investigation and even before a court has taken cognizance of the offence on a police report.

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[1]The wording follows that of section 7, Prevention of Corruption Act, 1947.

[2] *Cf.* s. 1 of the (English) Criminal Evidence Act, 1898.

Detention under section 167(1).

24.59. In our opinion, this reliance on s. 344 is not correct, as the explanation cited above is only an explanation to that section and cannot be read into section 167. This lax view of the two sections seems to have been taken in order to avoid the practical difficulty that arises in cases where investigation is prolonged, the accused has been arrested and detained in custody, and the maximum period of 15 days allowed for such detention under s. 167(2) is found to be inadequate. The Code, however, makes a clear distinction between detention in custody *before* taking cognizance and detention in custody *after* taking cognizance. The former is covered by section 167 and the latter by s. 344. The two are, in our opinion, mutually exclusive and ought to be kept so.

Maximum period should be increased.

24.60. There is, however, no doubt that serious offences take a long time for investigation and the police often find it necessary to place the accused person under arrest even before the investigation is quite complete. The only way of solving this difficulty appears to be to increase the period of remand mentioned in section 167(2) to *"fifteen days at a time and sixty days in the whole"*. There may be some risk that if this amendment was made in s. 167(2) remands would be asked for, and granted, as a matter of routine up to the permissible limit of 60 days. But such an amendment appears to us to be unavoidable.

Remand under s. 344 (1A) only after taking cognizance.

24.61. In order to make it very clear that remands under section 344(1A) can only be given *after* cognizance has been taken of the offence and *not* at the stage of investigation, we recommend that the opening words of this section should be altered to read :—

> "If the Court, after taking cognizance of an offence finds it necessary or advisable to postpone etc."

Adjournment costs.

24.62. Under this section the Court has the power to impose "such terms as it thinks fit" on either party while granting an adjournment or postponement at its instance. The power to impose "terms" would, in theory, seem to include a power to direct the payment of costs by a party whose conduct has necessitated the adjournment. We find, however, that Courts are reluctant to award costs against the prosecution, even where the adjournment is due to serious laches on its part like delay in producing important witnesses, delay in giving necessary documents to the defence, etc. While the power to award costs as a part of the "term" which can be imposed is not denied, the courts do not seem to exercise that power with a view to speeding up the inquiry or trial. We would therefore draw pointed attention of the Courts to this power by adding another explanation to section 344.

Amendment of section recommended.

24.63. Sub-section (2) of section 344 appears to us to be practically unnecessary. The requirement in sub-sections (1) and (1A) that reasons shall be recorded should be quite sufficient. There is also considerable verbiage in sub-section (1A) which could be cut out. We recommend that in place of the existing sub-sections (1A) and (2) and explanation, the following sub-section and explanation may be substituted :—

"(2) If the Court, after taking cognizance of an offence, finds it necessary or advisable to postpone the commencement of

or, adjourn, any inquiry or trial it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody :

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time :

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded.

Explanation 1. If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2. The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused".

Section 345.

24.64. Section 345 deals with the compounding of offences. Sub-section (1) lists 22 Penal Code offences which may be compounded by the specified aggrieved party without the permission of the court and sub-section (2) lists 32 other Penal Code offences which also may be compounded but with the permission of the court.

General rule for determining compoundable offences suggested.

24.65. It was suggested before us that instead of having two such long lists, some simple general rule should be evolved to determine which offences are compoundable, e.g. by relating them to the punishment provided for the offence. The theory that the offences at present listed as compoundable are those in which the individual aggrieved person is much more concerned than the community as a whole was said to be not very convincing. It was also said that withdrawal of the prosecution under section 494 was often resorted to for securing the same result after privately compounding the offence.

Not feasible.

24.66. We have, however, come to the conclusion that it is not feasible to formulate any general rule for determining compoundable offences. The broad principle that forms the basis of the present scheme is that where the offence is essentially of a private nature and relatively not serious, it is compoundable. It is, in our opinion, better to have clear and specific provisions such as those contained in section 345 than a general rule which is likely to lead to different interpretations. A rule to the effect that an offence will be compoundable if the maximum punishment provided for it is not more than three years' imprisonment will, no doubt, be definite but will not, in our opinion, be suitable.

Court's permission necessary in some cases.

24.67. It was further suggested that, even if the existing section is maintained, the distinction between offences compoundable with the permission of the Court and offences without such permission should be abolished and that the law should be simplified requiring permission in every case. This suggestion, however, did not appeal to us. The safeguard of the Court's permission is to prevent an abuse of the right to compound and to

enable the court to take into account the special circumstances of the case which may justify composition. It is not in every case that such a safeguard is required.

Offences under special laws not compoundable.

24.68. Under the Second Schedule to the Code all offences under special laws are at present non-compoundable. It was suggested that if such an offence is punishable with fine or with imprisonment not exceeding one year, it should be compoundable. We think that this should be left to the legislature concerned to decide as a matter of policy whether and to what extent offences under the special laws should be compoundable. It is not desirable to make any general provision in the Code touching this point.

Addition to the two lists considered.

24.69. Various suggestions have been received by us to add some more Penal Code offences in sub-section (1) or in sub-section (2) of section 345. The additions suggested are : being member of an unlawful assembly (s. 143), rioting (s. 147), false claim in a court of justice (s. 209), fraudulently obtaining decrees (s. 210), driving or riding on a public way so rashly or negligently as to endanger human life (s. 279), causing death by rash or negligent act (s. 304A), causing grievous hurt by dangerous weapon (s. 326), wrongful confinement for extortion (s. 347), theft in a building (s. 380), lurking house-trespass or house-breaking by night (s. 456), the same in order to commit an offence (s. 457) and bigamy with concealment (s. 495). We do not consider that any of these offences should be compoundable. Public peace, order and security are matters in which society is vitally interested and offences which jeopardize them ought to be suitably punished by the courts. They should not be left to be compounded by the person directly aggrieved by the offence.

Three additions in sub-section (2) recommended.

24.70. We, however, agree with the suggestion that the offence under section 354, Indian Penal Code, should, with the permission of the court, be compoundable by the woman on whom the assault is committed or to whom criminal force is used. We also recommend that the offences under section 411 (receiving or retaining stolen property) or under section 414 (assisting in the concealment or disposal of stolen property) should be compoundable with the permission of the court, if the value of the property does not exceed Rs. 250.

Petty theft should be compoundable.

24.71. We have received a suggestion that the term relating to "theft where the value of property stolen does not exceed 250 rupees" should be omitted from the list in sub-section (2) of section 345. It is said that, after the offence of theft has been made compoundable to this limited extent in 1955, habitual thieves are taking advantage of it and escaping punishment This is not easy to understand. In such cases, it is very likely that the prosecution has mentioned in the chargesheet itself the previous convictions of the accused with a view to asking for enhanced punishment under section 75 of the Indian Penal Code, or, if for some reason it has initially failed to do so, it will bring the fact to the notice of the court when permission to compound the offence is sought. We do not think any harm is being done by the amendment of 1955 which has made petty thefts compoundable with the permission of the Court.

Compulsory labour not to be compoundable.

24.72. We recommend that the offence of unlafwul compulsory labour punishable under section 374 of the Indian Penal Code, should not be compoundable and that this item should be omitted from the list in section 345(1).

Section 346.

24.73. As it is possible that a Magistrate inquiring into or trying an offence may find that some other Magistrate should deal with the case; a provision is made in section 346 enabling the Magistrate to report the case to his superior, who can then deal with it himself, or transfer it to some other competent Magistrate. Want of jurisdiction is not mentioned in the section as a reason for presuming that "the case should be heard by another Magistrate", and some doubt has, on occasions, been expressed[1] whether "lack of jurisdiction", is covered by section 346. We think it is, and we propose to make this clear by a suitable change in the language.

There may be cases which a subordinate Magistrate cannot dispose of, but which the Chief Judicial Magistrate can, e.g. a case relating to an offence punishable with imprisonment for a term that may extend to 7 years. There is, at present, no provision empowering a subordinate Magistrate to refer such cases to the Chief Judicial Magistrate before or during trial. Such a provision would obviously be useful from the point of view of reducing the work of Sessions Courts.

Presidency towns are expressly excluded from the scope of the section, but we think that it can be usefully extended to metropolitan areas. Under our proposed scheme, the Chief Metropolitan Magistrate will have higher powers of trial and sentencing than ordinary Metropolitan Magistrates, and there are likely to be quite a few cases which an ordinary Metropolitan Magistrate cannot dispose of, but which should be referred to the Chief Metropolitan Magistrate for disposal instead of being committed to the City Sessions Court. We would, therefore, extend the section to metropolitan areas.

Section 346 is a provision for the transfer of proceedings concerned with offences, i.e. inquiry into and trial of offences. We propose to make it clear that it is so limited, by adding the words "into an offence" after the word "inquiry".

Accordingly, section 346 may be revised as follows :—

Procedure in cases which Magistrate cannot dispose of.

"346. (1) If, in the course of any inquiry into an offence or a trial before a Magistrate in any district, the evidence appears to him to warrant a presumption—

(a) that he has no jurisdiction to try the case or commit it for trial, or

(b) that the case is one which should be tried or committed for trial by some other Magistrate in the district, or

(c) that the case should be tried by the Chief Judicial Magistrate, he shall stay the proceedings and submit

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[1] *State* v. *Pokker*, A.I.R. 1959 Ker. 53 (Reviews cases).

the case, with a brief report explaining its nature, to the Chief Judicial Magistrate or to such other Magistrate having jurisdiction as the Chief Judicial Magistrate directs.

(2) The Magistrate to whom the case is submitted may, if so empowered, either try the case himself or refer it to any Magistrate subordinate to him having jurisdiction to commit it for trial."

Procedure in Cases which Magistrate cannot dispose of.

24.74. Section 347 lays down the procedure when, after commencement of the inquiry or trial before a Magistrate, he finds that the case ought to be tried by the Court of Session. As all Magistrates will be competent to commit a case to the Court of Session and the reference to High Courts will have to be deleted, the section may be formally revised as follows :—

"347. If, in any inquiry into an offence or a trial before a Magistrate, it appears to him, at any stage of the proceedings before signing judgment that that case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained."

Section 348

24.75. Section 348 requires a Magistrate to commit to the Court of Session the case of any accused person liable to enhanced punishment under section 75 of the Indian Penal Code as a previous convict. In order to avoid unnecessary commitment to the Sessions Court, however, two exceptions have been provided in the section, (i) when a Magistrate having powers under section 30 of the Code is available to try the case, and (ii) when the Magistrate dealing with the case is of opinion that he will be able to inflict suitable punishment in case of conviction. No change of substance is necessary in this section, but it may be formally revised as follows :—

Trial of persons previously convicted of offences against coinage, stamp—law or property.

"348. (1) Where a person, having been convicted of an offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those Chapters with imprisonment for a term of three years or upwards, and the Magistrate before whom the case is pending is satisfied that there is ground for presuming that such person has committed the offence, he shall be sent for trial to the Chief Judicial Magistrate or committed to the Court of Session, unless the Magistrate is competent to try the case and is of opinion that he can himself pass an adequate sentence if the accused is convicted.

(2) When any person is sent for trial to the Chief Judicial Magistrate or committed to the Court of Session under sub-section (1), any other person accused jointly with him in the same inquiry or trial shall be similarly sent or committed, unless the Magistrate discharges such other person under section 251A or section 253, as the case may be."

Section 349.

24.76. Section 349 deals with the transfer of a case pending before a second or third class Magistrate if he thinks the accused guilty but meriting punishment which the Magistrate is not competent to impose. The case then goes to his superior who has to

decide it on the merits. This provision is obviously necessary and useful. We propose to extend it to convictions before first class Magistrates also, so that they can report the case to the Chief Judicial Magistrates. The latter have higher powers of sentencing, and it would be useful if cases tried by Magistrates of the first class could be sent to them for punishment, where the circumstances demand the imposition of a sentence higher than what a first class Magistrate can impose. At present, this is not possible, both because Magistrates of the first class are not mentioned in sub-section (1), and because the proviso to sub-section (2) restricts the sentencing powers of the Magistrate to whom the case is forwarded. We consider both these restrictions to be unnecessary. Sub-section (1) may be revised as follows :—

> "(1) Whenever a Magistrate X X X is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty and that he ought to receive a punishment different in kind from, or more severe than, that which the Magistrate is empowered to inflict, or, being Magistrate of the second class, is of opinion that the accused ought to be required to execute a bond under section 106, he may record the opinion and submit his proceedings and forward the accused to the Chief Judicial Magistrate to whom he is subordinate."

Apart from consequential changes in sub-sections (1A) and (2), the proviso to sub-section (2) may be omitted.

Section 350(1).

24.77. Section 350 deals with "part-heard cases", when one Magistrate who has partly heard the case is succeeded by another Magistrate, either because the first Magistrate is transferred and is succeeded by another, or because the case is transferred from one Magistrate to another Magistrate. The rule mentioned in section 350 is that second Magistrate need not re-hear the whole case; he can start from the place the first Magistrate left it, unless of course he is of opinion that "further examination of any of the witnesses whose evidence has already been recorded is necessary in the interest of justice." The decision for a re-hearing, thus, rests with the Magistrate, and this arrangement is, we think satisfactory.

The section is confined to cases in the Magistrate's Courts, and is inapplicable to the Courts of Session. We have considered the advisability of extending this rule to Sessions cases, as we understand that sometimes Sessions Judges are transferred, leaving behind part-heard cases which have to be heard all over again. It would be an ideal position if such transfers did not take place, as Sessions cases are to be heard from day-to-day and decided within a few days. It is obviously desirable that in serious cases the whole evidence should be heard by the Judge who finally decides the case. However, having regard to the realities of the situation, it is necessary to make some provision for cases where such transfers do take place, because a mandatory provision for a *de novo* trial may often cause considerable inconvenience and hardship. We, therefore, propose to extend the section to Judges of Sessions Courts by referring to "Judge or Magistrate" instead of "Magistrate" only.

Section 350(2).

24.78. At the other end are "summary trials", which again should be decided quickly and no question of a "part-heard case" should normally arise. Also, the record of evidence in a summary trial is scanty;[1] and in certain cases may be virtually non-existent. In these cases too, the rule in section 350 ought not to apply.[2] We propose that section 350(2) should be amended to read, "Nothing in this section applies *to summary* trials to cases in which etc."

Section 350A.

24.79. Section 350A deals with Benches of Magistrates, and provides that the judgment of a Bench will not be affected by any change in the constitution of the Bench, if it is constituted "in accordance with sections 15 and 16" and the "Magistrates constituting it have been present on the Bench throughout the proceedings".

The language used here tends to obscure the meaning of the provision[3], and the Courts have at times complained[4] of the obscurity.

The requirement that the "Magistrate"—meaning "all the Magistrates" constituting the Bench—should have been present throughout the proceedings, greatly reduces the usefulness of the provision. The cases handled by Benches of Magistrates are not important, and we think it should be quite sufficient if one of the Magistrates has been present and heard all the proceedings, so that the other members of the Bench (even if not present throughout) can be properly advised by him. We, therefore, suggest that the scope of section 350A should be widened, and all decisions by a Bench of Magistrates should be valid so long as one of the Magistrates deciding the case has heard the whole evidence.

Section 350A speaks of "order or judgment". Obviously, "judgment", which is the more important of the two, should be mentioned first.

In the light of the above discussion, section 350A may be amended to read as follows :—

Changes in constitution of Benches.

"350A. No *judgment or order* of a Bench of Magistrates shall be invalid by reason only of a change having occurred in the constitution of the Bench, in any case in which the Bench by which such *judgment or order* is passed is duly constituted under sections 15 and 16, and *at least one of the Magistrates constituting the Bench by which the judgment or order was delivered has been present* on the Bench throughout the proceedings."

Section 351-limited to offenders in courts.

24.80. It happens sometimes, though not very often, that a Magistrate hearing a case against certain accused finds from the

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[1] *See* section 263.

[2] For a review of case-law, see *Surat Municipality* v. *Nagendra*, A.I.R. 1953 Bom. 29.

[3] See *Harnarain* v. *Emp.* A.I.R. 1943 All. 20; *Jai Ram* v. *The State*, A.I.R. 1953 All. 137; *Kali Charan* v. *Emp.* A.I.R. 1955 All. 711.

[4] *Cf. Dasrath Rai* v. *Emp.*, I.L.R. 56 All. 599; A.I.R. 1934 All. 144, 146 (*Per* Sulaiman C.J.).

evidence that some person, other than the accused before him, is also concerned in that very offence or in a connected offence. It is only proper that the Magistrate should have the power to call and join him in the proceedings. Section 351 provides for such a situation, but only if that person happens to be attending the Court. He can then be detained and proceeded against. There is no express provision in section 351 for summoning such a person if he is not present in Court. Such a provision would make section 351 fairly comprehensive, and we think it proper to expressly provide for that situation.

How is cognizance taken?

25.81. Section 351 assumes that the Magistrate proceeding under it has the power of taking cognizance of the new case. It does not, however, say in what manner cognizance is taken by the Magistrate. The modes of taking cognizance are mentioned in section 190, and are, apparently, exhaustive. The question is, whether against the newly added accused, cognizance will be supposed to have been taken on the Magistrate's own information under section 190(1)(c), or only in the manner in which cognizance was first taken of the offence against the other accused. In concrete terms, if the original case was instituted on a police report, i.e. under section 190(1)(b), will cognizance against the new accused be supposed to have been taken in the same manner, or under section 190(1)(c)? The question is important, because the methods of enquiry and trial in the two cases differ[1]. About the true position under the existing law, there has been difference of opinion, and we think it should be made clear. It seems to us that the main purpose of this particular provision is, that the whole case against all known suspects should be proceeded with expeditiously, and convenience requires that cognizance against the newly added accused should be taken in the same manner as against the other accused. We, therefore, propose to re-cast section 351 making it comprehensive and providing that there will be no difference in the mode of taking cognizance if a new person is added as an accused during the proceedings. It is, of course, necessary (as is already provided) that in such a situation the evidence must be re-heard in the presence of the newly added accused.

Offences to be indicated.

24.82. The offence for which the newly added accused can be tried is not indicated in precise terms in the section. Obviously, that offence should be connected with the one for which the original accused is under trial. To bring that out, a small verbal amendment is recommended.

Amendment of s. 351 recommended.

24.83. Section 351 should, therefore, be amended to read as follows :—

Power to proceed against other persons appearing to be guilty of offence.

"351. (1) Where, in the course of an inquiry into or trial of an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is attending the Court, although not under arrest or upon a summons, he may be detained by

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[1] *See* sections 207, 207A, 251 and 251A

such Court for the purpose of the inquiry into or trial of the offence which he appears to have committed.

(3) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(4) Where the Court proceeds against any person under sub-section (1), then—

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

[Section 352.

24.84. Section 352 contains the healthy rule that Criminal Courts should ordinarily be open to the public, and no change is to be suggested in that rule.

CHAPTER XXV

MODE OF TAKING AND RECORDING EVIDENCE IN INQUIRIES AND TRIALS

Section 353.

25.1. Section 353 lays down the general rule that at any inquiry or trial, all evidence "shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader". There is a difference of judicial opinion as to whether the words "when his personal attendance is dispensed with" occurring in this section confer by themselves a power on the Court to dispense with the personal attendance of the accused, or whether they merely refer to the two other provisions of the Code, namely sections 205 and 540A, under which such attendance can be dispensed with. The Madras,[1] Allahabad[2] and Assam[3] High Courts have taken the view that the section itself empowers the Court to dispense with the attendance of the accused at the evidence stage but the contrary view has been taken by the Calcutta[4] High Court. In our opinion, section 353 is not intended to confer an independent power of dispensing with the personal attendance of the accused and this should be made clear by adding a reference to sections 205 and 540A after the words "dispensed with".

We considered a suggestion that in cases where the accused deliberately obstructs the proceedings or otherwise makes it impossible for the Court to take the evidence of witnesses in his presence, it should be lawful for the trial to proceed in his absence, or even in the absence of his pleader if he has no pleader to represent him. Since, however, no such difficulty has arisen in practice, so far as we are aware, we do not consider it necessary to provide for such a contingency.

Section 354—omission recommended.

25.2. The object of section 354 is purely to introduce the next seven sections. It enacts no rule of procedure and is really superfluous. Furthermore, the reference to a Sessions Judge is, strictly speaking, not correct; it should be to a Court of Session so that there is no doubt as to the applicability of the sections to Additional and Assistant Sessions Judges. We also propose to place inquiries and trials by Presidency Magistrates on the same footing as those by other Magistrates in regard to the recording of evidence. We, therefore, recommend that this section be omitted.

Different modes of recording evidence.

25.3. Section 355 governs the recording of evidence in three categories of cases, namely (1) summons cases tried before a Magistrate other than a Presidency Magistrate; (ii) cases of the offences mentioned in clauses (b) to (m) of section 260(1) when tried by a Magistrate of a first or second class but not summarily; and (iii) proceedings under section 514 otherwise than

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[1] *In re* : *Ummal Hasanath*, A.I.R. 1947 Mad. 433, 434.

[2] *Sultan Singh* v. *The State*, A.I.R. 1951 All. 864, 867 (Full Bench); *Aditya Prasad* v. *Jogindra Nath*, A.I.R. 1948, All. 393, 395.

[3] *Kamal Devi* v. *Pannalal*, A.I.R. 1952 Assam 151.

[4] *Kali Das* v. *The State*, A.I.R. 1954 Cal. 576.

in the case of a trial. The essential feature is that in these cases, the Magistrate is only required to make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds. Section 358, however, provides that the Magistrate may, if he thinks fit, take down the evidence of any witness in a fuller manner as provided for warrant cases.

The mode of recording evidence in all other trials except before Presidency Magistrates and in all inquiries under Chapter XII and XVIII is regulated mainly by sections 356 and 359. In these cases, evidence has to be recorded in greater fullness, generally in the form of a narrative and occasionally, when considered necessary by the presiding Judge or Magistrate, in the form of questions actually put and answers actually given.

Section 362 applies to trials by Presidency Magistrates. Here again two modes of recording evidence are prescribed, a distinction being made between cases in which an appeal lies and cases in which there is no appeal. In the former class of cases, evidence is recorded in the same manner as in the trial of warrant-cases by Magistrates, while in the latter class of cases the Presidency Magistrate need not record the evidence at all.

The manner of recording evidence in cases coming up before the High Courts (other than Judicial Commissioners' Courts) is left to be prescribed by the Courts themselves under section 365.

Language of evidence and language of record.

25.4. The language or languages in which this record of evidence is to be prepared is also regulated by sections 356 and 357, but only in regard to sessions trials, trials of warrant-cases and committal proceedings. Neither section 355 nor section 362 refers to the language in which the evidence is to be recorded in summons-cases and by Presidency Magistrates. Presumably, however, it is to be done in the language of the Court or in English. Under section 356, the evidence is ordinarily to be taken down in the language of the Court. When the evidence is given in some other language, including English, it may, if practicable, be taken down in that language or, if it is not practicable to do so, the evidence has presumably to be translated into the language of the Court as the examination of the witness proceeds and such translation is to be recorded. Sub-section (3) of section 356 provides that in cases where the presiding Judge or Magistrate does not take down the evidence with his own hand or dictate it in open Court, he should make a memorandum of the substance of what each witness says and this memorandum also shall form part of the record. Section 357 contains a curious provision that the State Government may direct that in any district or part of a district, or in any proceedings before any Court of Session, or before any Magistrate or class of Magistrates, evidence shall be taken down by the Sessions Judge or Magistrate with his own hand *and in his mother-tongue*. The same section, however, goes on to provide that the State Government may direct the Sessions Judge or the Magistrate to take down the evidence in English or in the language of the Court although such language is not his mother-tongue.

Section 355 to 359 and 362 not well drafted.

25.5. This broad summary of sections 355 to 359 and 362 shows that they are a confused jumble of provisions, incomplete in some respects, and not very clearly or systematically arranged.

The language in which the evidence is actually given and the language of the record are occasionally mixed up. For instance, it is not in all cases correct to say that the Judge or Magistrate "takes down" the evidence in his mother-tongue or in English or in the language of the Court. When the witness is giving evidence in an altogether different language, what is taken down, or caused to be taken down, by the Judge or Magistrate is a simultaneous translation of that evidence in his mother-tongue or English or the language of the Court, as the case may be.

Predominant position of English in the past.

25.6. In this connection it will be useful to remember, particularly in regard to the language of the record, that this Chapter was enacted at a time when English was the language in which the business of practically all the criminal courts was conducted and all evidence given in the regional language was translated into, and recorded in English. The dual record of the evidence, for which provision is made in section 356(3), owed its origin to the same circumstance. The Sessions Judge or Magistrate was often not sufficiently acquainted with the regional language in which most of the evidence was given, to take it down in that language. Consequently, the law had to provide for the preparation of a full record of the evidence by a court official, the Judge or Magistrate only taking notes of the evidence as the examination of the witness proceeded.

Simplification desirable.

25.7. In view of the greatly changed conditions which now prevail, we think it desirable to analyse, both the mode of recording evidence and the language of the record for different classes of cases and courts and to simplify the provisions contained in this Chapter.

Section 355—Language to be mentioned.

25.8. Taking section 355 which prescribes what may be called a brief record of the evidence in three categories of cases, we have already mentioned the fact that it is silent as to the language of the record. This omission should be rectified by stating in the section itself that the Magistrate shall make a memorandum of the substance of the evidence in the language of the Court or in English. This would be in accord with the present practice.

Section to cover presidency magistrates.

25.9. This section at present covers summons-cases tried before a Magistrate other than a Presidency Magistrate. Earlier in this report we have recommended the inclusion of Presidency Magistrates in section 260(1) in order that they may be able to try all summons-cases (and also the warrant-cases specified in that section) in a summary way. In practice, the number of summons-cases tried by Presidency Magistrates in a regular manner must be comparatively very small. It could hardly make any difference if in those few cases they record the evidence briefly in the same manner as Magistrates elsewhere are required to do under section 355. The words "other than a Presidency Magistrate" occurring in sub-section (1) of this section may accordingly be omitted.

Section not to apply to any warran -cases.

25.10. The second category of cases in which a brief record is prescribed by this section are warrant-cases relating to the offences mentioned in clauses (b) to (m) of section 260(1)

when tried by the Magistrate of a first or second class in the regular way. Though some of these cases may be trivial, in view of the possibility of substantial sentences being imposed in such cases when not tried summarily, we think a full record of the evidence would be desirable. We, therefore, recommend omission of this part of sub-section (1) of section 355.

Section to apply to inquiries under Chapter XII.

25.11. On the other hand, in inquiries under Chapter XII *i.e.* sections 145, 146 and 147, which are now governed by section 356, a brief record of the evidence will be quite sufficient as the object of these proceedings is not determination of any right to immoveable property but the prevention of an apprehended breach of the peace and the proceedings are intended to be summary in character. The reference to Chapter XII should accordingly be transposed from section 356(1) to section 355(1).

Revised section 355.

25.12. Including a few drafting changes, the revised section 355 may read as follows :—

Record in summons-cases, inquiries under Chapter XII and proceedings under section 514.

"355. (1) In all summons-cases tried before a Magistrate, in all inquiries under Chapter XII, and in all proceedings under section 514 otherwise than in the course of a trial, the Magistrate shall, as the examination of each witness proceeds, make a memorandum of the substance of his evidence in the language of the Court or in English :

Provided that if the Magistrate is unable to make such memorandum himself, he shall, after recording the reason of his inability, cause such memorandum to be made from his dictation in open Court.

(2) Such memorandum shall be signed by the Magistrate and shall form part of the record."

Section 358—omission recommended.

25.13. Section 358 which is a sort of proviso to section 355 is hardly necessary. It purports to enable the Magistrate to take down the evidence in a fuller manner than that contemplated in section 355. This is not necessary since there could be no technical objection to any Magistrate taking down a memorandum of the evidence of each witness instead of trying to abbreviate or summarise it. Section 358, could, in our opinion, be safely omitted.

25.14. The mode of recording evidence in trials of warrant-cases before Magistrates, inquiries under Chapter XVIII and sessions trials is prescribed partly in section 356 and partly in section 359. The language of the record is dealt with partly in section 356 and partly in section 357. The provisions would be clearer and easier to follow if they were put in three separate sections : one dealing with the mode of recording evidence in warrant-cases and commitment proceedings, another dealing with the mode of recording evidence in sessions trials, and the third dealing with the language of the record in all these cases.

25.15. The first two sections may be as follows :— Revised Sections 356 and 357.

"356 (1) In all warrant-cases tried before a Magistrate ....,[1] the evidence of each witness shall, as his examination proceeds, be taken down in writing either by the Magistrate himself or, under his direction and superintendence by an officer of the Court appointed by him in this behalf. Record in warrant cases and inquiries under Chapter XVIII.

(2) Such evidence shall ordinarily be taken down in the form of a narrative; but the Magistrate may, in his discretion, take down, or cause to be taken down, any part of such evidence in the form of question and answer.

(3) The evidence so taken down shall be signed by the Magistrate and shall form part of the record.

357. (1) In all trials before a Court of Session, the evidence of each witness shall, as his examination proceeds be taken down in writing either by the presiding Judge himself or, under his direction and superintendence, by an officer of the Court appointed by him in this behalf. Record in trials before Courts of Session.

(2) Such evidence shall ordinarily be taken down in the form of question and answer; but the presiding Judge may, in his discretion, take down, or cause to be taken down, the whole or any part of such evidence in the form of a narrative.

(3) The evidence so taken down shall be signed by the presiding Judge and shall form part of the record."

25.16. We have made two important changes in this revision, besides simplifying the unduly complicated provisions now contained in sections 356, 357 and 359. First, we consider that at the present time there is no need for the dual record which is being prepared in a few north Indian States under section 356(3). In cases where the evidence is not recorded by the Magistrate or presiding Judge himself but by an officer of the Court under his direction and superintendence, the notes[2] which he may (or may not) keep for his own use need not necessarily form part of the record as provided in this section. Neither of the revised sections 356 and 357 contains a provision similar to sub-section (3) of the present section 356. It will also be noticed that details like "from his dictation in open Court" "in his presence and hearing" and "personal direction" which now occur in the present sections 356 and 357 have been omitted in the revised sections as being superfluous.

25.17. The second substantial change we have proposed is that in sessions trials evidence of each witness should ordinarily be recorded in the form of question and answer, though the presiding Judge may, in his discretion, have the whole or any part of the evidence recorded in the form of a narrative. This is

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[1] In section 356(1), mention of Chapter 18 is omitted in view of proposed changes regarding commitment.

[2] Such notes were invariably in English while the full record of the evidence used to be in Urdu.

reversing the existing position under section 359. It can hardly be disputed that, in the process of converting a question put by the advocate, particularly in cross-examination, and the answer given by the witness, to a sentence purporting to be the witness's statement, accuracy is often lost and the record does not always convey all the implications of the question and the answer. We recognise that making a full record of the evidence in the form of questions and answers almost necessarily involves the employment of shorthand writers at every sessions trial but consider that this step has to be taken in the interests of justice. The additional expense which it might seem to involve is, in our opinion, worth incurring, since the presiding Judge would be relieved of the tiresome task of recording the evidence himself and be able to concentrate attention on what the witness is saying and assess its worth.

25.18. As regards the language of the record we propose the following new section :—

Language of record of evidence.

"358. In every case where evidence is taken down under section 356 or 357—

(a) if the witness gives evidence in the language of the Court, it shall be taken down in that language;

(b) if he gives evidence in any other language, it may if practicable be taken down in that language, and if it is not practicable to do so, a true translation of the evidence in the language of the Court shall be prepared as the examination of the witness proceeds, signed by the Magistrate or presiding Judge, and shall form part of the record; and

(c) where under clause (b) evidence is taken down in a language other than the language of the Court, a true translation thereof in the language of the Court shall be prepared as soon as practicable signed by the Magistrate or presiding Judge and shall form part of the record :

Provided that when under clause (b) evidence is taken down in English and a translation thereof in the language of the Court is not required by any of the parties the Court may dispense with such translation."

Section 360.

25.19. Section 360 which prescribes the procedure to be followed after the evidence of each witness has been taken under section 356 or 357 requires only one or two formal amendments. In sub-section 2, for the words "Sessions Judge", the words "presiding Judge" may be substituted. In sub-section (3), it would be more accurate to refer to the record of the evidence being in a language different from that in which it has been given. The sub-section may be amended to read :

"(3) If the record of the evidence is in a language different from that in which it has been given and the witness does not understand that language, the record shall be interpreted to him in the language in which it was given, or in a language which he understands."

25.20. Section 361, which deals with the interpretation of the evidence to the accused or his pleader needs no change. **Section 361.**

25.21. As already mentioned, the recording of evidence in inquiries and trials before the Presidency Magistrate will be governed by the same provisions as those applicable to other Magistrates. A distinction is now made in section 362 between cases in which an appeal lies and those in which no appeal lies. If the case falls in the latter category—and the Magistrate has to make up his mind at the beginning of the trial which *prima facie* is not appropriate—the Magistrate need not record any evidence. If the Magistrate thinks that the case is such that in the event of conviction of the accused, he may have to pass an appealable sentence, he has to record the evidence in the same way as a Magistrate in a district. We do not think it is desirable to maintain this distinction. Another peculiar feature is that in a non-appealable warrant-case it is not necessary for a Presidency Magistrate to frame a charge : *vide* section 362(4). There is hardly any justification for this artificial distinction. We recommend the omission of the whole of section 362. **Section 362.**

25.22. No change of substance is required in section 363, which relates to remarks respecting the demeanour of witness; but the reference to "a Sessions Judge", may be replaced by the words "the presiding Judge" in order that there may be no doubt as to the applicability of the section to an Additional or Assistant Sessions Judge. **Section 363.**

25.23. Section 364 relates to the mode of recording the examination of the accused and the language of such examination and of the record. It applies to all Magistrates other than Presidency Magistrates whose proceedings in this respect are regulated by section 362(2A). Since the omission of section 362 is being proposed, sub-section (2A) of that section may be included in section 364. **Section 364.**

This section does not apply to the High Courts of States but applies to the Courts of Judicial Commissioners. Apparently, the matter is left to be dealt with either by rules made under section 365 on the footing that "evidence" in a wide sense includes the examination of the accused, or by the rules of Court referred to in article 225 of the Constitution. However that may be, since original criminal trials before a High Court or a Judicial Commissioner's Court are rare, the exclusion of these Courts from the scope of section 364 is not of any practical consequence. There is no need to treat the Courts of Judicial Commissioners differently and they also may be excluded.

In sub-section (2), the requirement that the record shall be signed only "when the whole is made conformable to what the accused declares is the truth" is not very appropriate. The provision in sub-section (1) that he shall be at liberty to explain or add to his answers is sufficient for practical purposes.

We propose that the section may be revised as follows :—

"364. (1) *Whenever the accused is examined by a Metropolitan Magistrate,* the Magistrate shall make a memorandum of the substance of the examina- **Record of examination of accused.**

tion of the accused *in the language of the Court or in English.* Such memorandum shall be signed by the Magistrate and shall form part of the record.

(2) Whenever the accused is examined by any Magistrate *other than a Metropolitan Magistrate, or by a Court of Session,* the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full *either by the Magistrate or Judge himself or under his direction and superintendence by an officer of the Court appointed by him in this behalf.*

(3) The record shall, *if practicable,* be in the language in which *the accused* is examined or, if that is not practicable, in the language of the Court.....

(4) The record shall be shown or read to *the accused,* or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(5) *It shall thereafter* be signed by the accused and by the Magistrate or *presiding Judge who* shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(6) Nothing in this section shall be deemed to apply to the examination of an accused person *in the course of a summary trial.*"

Section 365.

25.24. Section 365 may be amended so as to confer a rule-making power on Judicial Commissioners' Courts besides the High Courts of States and also to cover expressly examination of the accused. The section may read as follows :—

Record in high court.

"365. Every High Court may, by general rule, prescribe the manner in which the evidence *of witnesses and the examination of the accused* shall be taken down in cases coming before *it;* and *such evidence and examination* shall be taken down in accordance with such rule."

CHAPTER XXVI

JUDGMENT

Section 366 (1)—Modes of pronouncing judgement.

26.1. Section 366(1) deals with the modes of pronouncing a judgment, though the marginal note to the section speaks of "delivering" a judgment. Under section 366(1) a judgment may be pronounced or its substance explained. Here "pronounced" evidently means the reading out of the whole judgment. The proviso to section 366(1) states that, if the prosecution or the defence so desire, the whole judgment shall be read out. Further, under section 367(1), it is permissible to dictate a judgment in court. Thus, a reading of sections 366 and 367 reveals three modes of pronouncing a judgment—

(a) delivering a judgment by dictation in open court;

(b) reading out the whole of a judgment already written; and

(c) explaining the substance of the judgment already written.

We feel that all the three modes should be brought under one section. Further, the provisions of section 367(1) regarding the dating and signing of judgments should also be included in this section.

Dating and signing of judgment.

26.2. Section 367(1) provides that the judgment shall be dated and signed at the time of pronouncing it. However, it is quite obvious that unless the judgment is a very short one, this requirement cannot be satisfied where the judgment is pronounced by dictating in court. Transcribing a dictated judgment will take time. In such cases the judgment can be signed and dated only when the transcript is ready—which may be some hours or even days after the judgment is pronounced. Therefore, besides re-arranging the matter contained in section 366(1) and 367(1) as we have recommended above, the position regarding the dating and signing of judgments dictated in court has also to be stated more clearly.

Operative part should be read out.

26.3. We also propose to add a provision to the effect that when the judgment is pronounced by explaining the substance of it, the operative part of the judgment should be read out.

Reference to language in s. 366(1) (b) unnecessary.

26.4. The main paragraph of section 366(1) provides that the judgment shall be pronounced or its substance explained. Clause (a) says that this should take place immediately on the termination of the trial or on a later notified date; and under clause (b) it should be in the language of the court or in some language the accused or his pleader understands. Clause (a) obviously applies to both modes of pronouncing the judgment, but clause (b) evidently has reference only to explaining the substance of the judgment, as otherwise it would mean that the judgment should be written or read out in some language the accused understands. We think, that the reference to a language

the accused or his pleader understands may be safely omitted, as the court, when "explaining" the substance of the judgment will ensure that the accused understands what is being explained.

Reading out whole judgment need to be compulsory.

26.5. The proviso to section 366(1) requires the court to read out the whole judgment if so requested by either party. We think that it would suffice if the judgment or a copy thereof is made available for the perusal of either party. We also propose to make it clear, that this should be confined to cases where the judgment is pronounced by explaining its substance. Obviously, when the whole judgment is read out or dictated, there is no point in requiring a copy for perusal.

Section 366(2).

26.6. Section 366(2) provides that the judgment shall be pronounced in the presence of the accused, except in certain specified instances where the presence of his pleader is sufficient. This requirement can give rise to difficulties in cases where there are more accused than one and some of them, out on bail, fail to appear at the time of judgment. In such cases, the pronouncement of the judgment will have to be postponed even against the accused present in court, till the absconding accused are apprehended. This, apart from wasting the time of the court, will also cause needless harassment to the other accused.

We would, therefore, recommend that a power be given to the court to pronounce judgment in such instances, even if one or more of the several accused in the case are not present to hear it, making it clear that the power is to be used only to prevent undue delay. True, even under the present provisions such a pronouncement will not be an illegality due to the saving provision in section 366(3); but it would be better to give the court such power in clear terms than to leave the procedure as an irregularity curable under another section. A consequential amendment[1] to section 383 will be necessary in order to provide that in such cases the Magistrate shall issue a warrant for the arrest of the accused who is absent.

Two other changes also appear necessary in sub-section (2). It provides that the accused need not be present to hear the judgment if his personal attendance during trial had been already dispensed with and the sentence to be passed is only one of fine or if he is acquitted, in both of which cases the presence of the accused's pleader is sufficient. We do not think it necessary to insist on the presence of even the pleader in such cases. Secondly, the sub-section, as it stands, deals with the cases of the accused in custody as well as the accused on bail. It would be better, in the interests of clarity, to provide for these two cases separately.

Section 366 (3) and 366(4).

26.7. No changes are needed in sections 366(3) and 366(4).

Amendment of Section 366 recommended.

26.8. Section 366 may, in the light of the above discussion, be amended to read as follows :—

Judgment "366.(1) The judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced

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[1] *See* para. 28.5 below.

in open court *by* the presiding officer immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders,—

(a) by delivering the whole of the judgment; or

(b) by reading out the whole of the judgment; or

(c) by reading out the operative part of the judgment and explaining the substance of the judgment.

(2) Where the judgment is delivered under clause (a) of sub-section (1), the presiding officer shall cause it to be taken down in short-hand, sign the transcript and every page thereof as soon as it is made ready, and write on it the date of the delivery of the judgment in court.

(3) Where the judgment or the operative part thereof is read out under clause (b) or clause (c) of sub-section (1), it shall be dated and signed by the presiding officer in open court, and if it is not written with his own hand, every page of the judgment shall be signed by him.

(4) Where the judgment is pronounced in the manner specified in clause (c) of sub-section (1), the whole judgment or a copy thereof shall be immediately made available for the perusal of the parties or their pleaders free of cost.

(5) If the accused is in custody, he shall be brought up to hear the judgment pronounced.

(6) If the accused is not in custody, he shall be required by the court to attend to hear the judgment pronounced, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted.....;

Provided that, where there are more accused than one, and some of them do not attend the court on the date on which the judgment is to be pronounced, the presiding officer may, in order to avoid undue delay in the disposal of the case, pronounce the judgment notwithstanding their absence.

(7) No judgment delivered by any Criminal Court shall be deemed to be invalid by reason only of the absence of any party or his pleader on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving, on the parties or their pleaders, or any of them, the notice of such day and place.

(8) Nothing in this section shall be construed to limit in any way the extent of the provisions of section 537."

Section 367.

26.9. We have already considered[1] that part of section 367(1) which deals with the dating and signing of the judgment. The remaining part deals with the contents of the judgment. The same topic is also dealt with in sub-sections (2) and (4). We recommend that all these provisions be brought together under one sub-section, so that one can know at a glance what the contents of a judgment should be.

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[1] *See* para. 26.2 above.

No changes are needed in sub-section (3) of section 367. Sub-section (5), is relevant only to trials by jury. As this type of trial is proposed to be abolished, sub-section (5) of section 367 may be omitted.

Section 367 and reasons for sentence in capital cases.

26.10. A recommendation relevant to section 367 was made in the Law Commission's Report[1] on Capital Punishment, while considering the question whether a provision requiring the court to state its reasons for awarding the sentence of death or imprisonment for life in a capital case, should be inserted. The conclusion was thus expressed—

> "The replies to question 8 show a considerable body of opinion which is in favour of a provision requiring the court to state its reasons for imposing the punishment either of death or of imprisonment for life. Further, this would be a good safeguard to ensure that the lower courts examine the case as elaborately from the point of view of sentence as from the point of view of guilt. It would also provide good material at the time when a recommendation for mercy is to be made by the court, or a petition for mercy is considered. Again, it would increase the confidence of the people, in the courts, by showing that the discretion is judicially exercised. It would also facilitate the task of the High Court in appeal or in proceedings for confirmation in respect of the sentence (where the sentence awarded is that of death), or in proceedings in revision for enhancement of the sentence (where the sentence awarded is one of imprisonment for life).
>
> Thus, there appears to be sufficient justification for a provision requiring the court to state its reasons, whenever it awards either of the two sentences in a capital case. We recommend the insertion of such a provision in the Code of Criminal Procedure, 1898."

We are also of the same view, and recommend that the section be amended accordingly. In this connection, it may be noted that there are certain offences for which the Penal Code prescribes the punishment as death or in the alternative, life imprisonment or imprisonment for a term of years. Therefore, the amendment recommended above should cover these cases also.

Pronouncement of judgment by successor.

26.11. We note that there is no provision in the Code as to pronouncement of a judgment written by a predecessor. We considered the question whether any provision on the subject should be inserted. In our view, it is not proper that in criminal cases, a judge should pronounce a judgment written by his predecessor. He can, no doubt, make use of the material contained in the (draft) judgment prepared by his predecessor. But in that case he is himself responsible for the contents of the judgment.

Section 367(6).

26.12. Section 367(6) provides that for the purposes of this section, an order under section 118 or section 123(3) shall be

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1 35th Report (Capital Punishment), paragraph 820-822.

deemed to be a judgment. Its main object seems to be to ensure that, in any such order reasons are given separately for the order as to each person proceeded against. It is, in our view, sufficient to provide[1] in section 118 itself that reasons should be recorded for an order under that section. No such provision is necessary for orders under section 123. These orders are passed by Sessions Judges, who may be expected to give reasons without a statutory provision.

Revision of Section 367 recommended.

26.13. Revised on the lines suggested above, section 367 will read as follows :—

Language and contents of judgment.

"367. (1) Except as otherwise expressly provided by this Code, every such judgment—

(a) shall be written in the language of the Court or in English;

(b) shall contain the point or points for determination, the decision thereon and the reasons for the decision;

(c) shall specify the offence (if any) of which, and the section of the Indian Penal Code or other law under which, the accused is convicted and the punishment to which he is sentenced; and

(d) if it be a judgment of acquittal, shall state the offence of which the accused is acquitted and direct that he be set at liberty.

(2) When the conviction is under the Indian Penal Code and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.

(3) When the conviction is for an offence punishable with death or in the alternative with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded.

Section 368.

26.14. No changes are needed in section 368.

Section 369 applicability to High Courts.

26.15. Section 369, as enacted in 1898, provided that "no Court, other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in sections 395 and 484 or to correct a clerical error." Despite the express exclusion of the High Courts from the operation of this provision, they held[2] that they had no implied power to alter or review their own judgments whether under section 369 or under section 439 or otherwise. It was accordingly proposed in 1921 that the words "other than a High Court" should be omitted to make it clear that section 369 conferred no such power on the High Courts. The Joint Committee which examined the Bill noticed that one or two other sections in the Code, besides sections 395 and 484, and clause 26 of the Letters Patent of the High Courts,

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1 *See* para. 8.15 above.

2 *Queen Empress* v. *Durga Charan*, (1885) I.L.R. 7 All. 672; *Queen Empress* v. *C. P. Fox*, (1885) I.L.R. 10 Bom. 176 (F.B.); *In the matter of Gibbons*, (1886) I.L.R. 14 Cal. 42 (F.B.).

empowered the High Courts to revise their judgments. They accordingly re-drafted the amendment to read as follows :—

> "In section 369 of the said Code, for the words 'No Court other than a High Court', the words 'Save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court' shall be substituted; and the words and figures 'as provided in sections 395 and 484' shall be omitted."

Subsequent adaptation in 1950 and formal amendment in 1955 have given the section its present form.

Amendment recommended.

26.16. It is, however, clear that the Letters Patent or other instrument constituting a High Court are also laws for the time being in force and accordingly the words "or in the case of a High Court established by the Letters Patent or other instrument constituting such High Court" are redundant and somewhat confusing. In fact, the reference to Letters Patent of the older High Courts is practically obsolete after the insertion of section 411A in the Code. We, therefore, recommend that the words cited above should be omitted from the section.

High Court's power of review.

26.17. It is to be noted that the judgment referred to in section 369 is the judgment of a criminal court in its original jurisdiction *vide* section 366(1). The rule in section 369 that no court shall alter or review its own judgment except to correct a clerical error is made applicable by section 424 to the judgment of any appellate court other than a High Court. The question whether a High Court has any inherent power of reviewing its judgment in an appeal or revision will be considered later under section 561A.

Section 370.

26.18. Section 370 relieves a Presidency Magistrate of the task of writing a detailed judgment setting out the point or points for determination, the decision thereon, reasons for the decision, etc., as provided in section 367 for other Magistrate. He has only to record the essential particulars of the case and the final order in all cases, and in those cases in which he inflicts imprisonment, or fine exceeding Rs. 200, or both, a brief statement of the reasons for the conviction. It will be noticed that under section 411 a sentence of fine not exceeding Rs. 200 is not appealable and, presumably because of this fact, section 370, clause (i) does not require a Presidency Magistrate to record the reasons for the conviction when the fine is within this limit. In regard to sentences of imprisonment, however, the said clause is not logical even where the imprisonment inflicted is not more than six months and consequently the sentence is not appealable under section 411, the Presidency Magistrate has to record reasons for the conviction. Then again, although a judgment of acquittal is appealable under section 417, the Presidency Magistrate need not record even a brief statement of the reasons for his decision which the prosecution might not always find satisfactory. We consider that it would be more logical and reasonable to provide in clause (i) of section 370 that, in all cases in which an appeal

lies from the final order either under section 411 or under section 417, the Presidency Magistrate should record a brief statement of the reasons for his decision. This clause should be amended to read—

> "(1) *in all cases in which an appeal lies from the final order either under section* 411 *or under section* 417, a brief statement of the reasons for the *decision*."

Section 371.

26.19. Under sub-section (1) of section 371, a copy of the judgment has to be given without delay to the accused on his application. Though the section does not say that this should be a certified copy the Supreme Court has held[1] that "whether it is the accused person who applies for a copy under s. 371, sub-section (1) and (2) or it is the State which applies for a copy. the copy supplied by the public officer must be a certified copy." In conformity with this interpretation the words "certified copy" may be substituted for the word 'copy'.

This sub-section further provides that the copy shall be given free of cost except in a summons case. Considering that the main object of the sub-section is to facilitate the lodging of an appeal by the accused without avoidable delay, we propose that the second sentence of sub-section (1) should be amended to read "such copy shall, in every case where the judgment is appealable by the accused, be given free of cost."

In cases where the High Court passes or confirms or maintains a death sentence, a certified copy of the judgment should, in our view, be immediately given to the accused whether or not he applies for it. This would enable him to make immediate preparations for an appeal.

Accordingly, sub-section (1) of s. 371 may be simplified to read as follows :—

Copy of judgment to be given to accused.

> "371. (1) On the application of accused, a *certified* copy of the judgment, or when he so desires, a translation in his own language, if practicable, or in the language of the Court, shall be given to him without delay. Such copy shall, in every case *where the judgment is appealable by the accused,* be given free of cost :
>
> *Provided that where a sentence of death is passed, confirmed or maintained by the High Court, a certified copy of the judgment shall be immediately given to the accused free of cost, whether or not he applies for the same.*

Sub-section (2) of s. 371 may be omitted as it relates to trials by jury and consequentially the words "or sub-section (2)" in sub-section (4) may also be omitted. Sub-section (3) does not require any change.

Since an order under s. 118 may result in the imprisonment of the defendant, we think it desirable that the provisions of sub-section (1) of this section should also apply to any order under

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[1] *State of U.P.* v. *C. Tobit,* 1958 S.C.R. 1275, 1280.

s. 118. We, therefore, propose the addition of a new sub-section (2) in lieu of the existing sub-section (2) reading as follows :—

"(2) The provisions of sub-section (1) shall apply in relation to an order under section 118 as they apply in relation to a judgment which is appealable by the accused."

Sections 372 and 373.

26.20. No changes are needed in sections 372 and 373.

CHAPTER XXVII

SUBMISSION OF SENTENCES FOR CONFIRMATION

Section 374 Supreme Court's power to confirm in appeal.

27.1. When the Court of Session passes sentence of death and the proceedings are submitted to the High Court, section 374 provides that the sentence shall not be executed unless it is confirmed by the High Court. In an appeal which came before the Supreme Court, the accused had been sentenced to death by the Court of Session but the High Court, holding that section 27 of the Evidence Act was unconstitutional, excluded a statement admitted under that section and acquitted the accused as the remaining evidence was not sufficient to establish his guilt. Against this order of acquittal the State appealed to the Supreme Court with a certificate under Article 134(1)(c) of the Constitution granted by the High Court. The Supreme Court decided that section 27 of the Evidence Act was a valid provision and that, if the evidence admitted under that section was taken into account, there was no doubt as to the guilt of the accused. Their Lordships accordingly set aside the order passed by the High Court and restored the order passed by the Court of Session. They stated[1] :—

> "It may be observed that the sentence of death cannot be executed unless it is confirmed by the High Court. The High Court has not confirmed the sentence, but in exercise of our powers under Article 136 of the Constitution, we may pass the same order of confirmation as the High Court is, by the Code of Criminal Procedure, competent to pass. We accordingly confirm the sentence of death."

It is difficult to follow the reference to Article 136; and it is possible that a reference to Article 142(1) was intended. However that may be, in view of this decision of the Supreme Court, we do not think it is necessary to amend section 374 of the Code for this purpose.

Authority to issue warrant in form 34.

27.2. After passing sentence of death, the Court of Session is expected to issue a "warrant of commitment under sentence of death" to the Superintendent of Jail. While the form of warrant is set out as form XXXIV in the Fifth Schedule to the Code, it is not expressly referred to or provided for in section 374 or anywhere else. It is noticed that when the accused is sentenced by the Court of Session to imprisonment for life, section 383 expressly provides for the issue of a suitable warrant and the forwarding of the accused with the warrant to the jail in which he is to be confined. It is desirable that a similar provision should be made in section 374 so that there may be specific statutory authority for holding the accused in prison after the Court of Session has passed sentence of death and until it is executed in due course. We recommend that a sub-section should be added as follows :—

> "(2) The Court passing the sentence shall commit the convicted person to jail custody under a warrant."

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[1] *State of U.P.* v. *Deoman Upadhyaya.* 1961(1) S.C.R. 14, 33.

Section 375.

27.3. In view of the abolition of jury trials, sub-section (2) of section 375 may be formally amended to read :—

"(2) Unless the High Court otherwise, directs, the presence of the convicted person may be dispensed with when such inquiry is made or such evidence is taken."

Section 376.

27.4. No change is needed in section 376.

Section 377.

27.5. Section 377 requires that every confirmation case shall be heard and decided by a Bench of two or more Judges of the High Court. The section, however, does not apply to a Judicial Commissioner's Court which has only one Judge, as in the Union Territories of Manipur and Tripura. It is somewhat anomalous that a person sentenced to death in either of these Union Territories does not have the benefit of two Judges of the Court of Criminal Appeal reviewing his case as in the rest of India. An obvious way of removing the anomaly is to extend the jurisdiction of the Assam High Court to these two Union Territories. However, since the number of death sentences passed by the two Sessions Judges is very small, the matter is not of much practical importance. No amendment is proposed in section 377.

Section 378.

27.6. The wording of section 378 is repeated in section 429 which applies when the Judges composing the Court of Appeal are equally divided in opinion in regard to "the case" heard by them. The question has frequently arisen under section 429 as to what exactly is the case that is to be laid before the third Judge, whether it means the entire case of all the accused and all the charges in which they were tried, or whether it means the entire case of a particular accused about whose guilt the Judges are equally divided in their opinion or whether, even more restrictedly, it means only the particular point or points of law or of fact on which there is a difference of opinion. This difficulty does not appear to have been felt to any noticeable extent with reference to section 378.

27.7. In any event we do not consider it necessary or desirable to amend section 378 with the object of clarifying the position. When for instance five persons are tried together on charges of a capital offence, two are convicted and sentenced to death and the others are convicted of lesser offences, the whole proceedings before the Court of Session are submitted to the High Court for obtaining confirmation of the two death sentences passed in the case. If the two Judges hearing the "referred cases" together with the connected appeals, if any, of the convicted persons, are agreed that the death sentence of one of them should be confirmed but divided in opinion as to the other, it is "the case" heard by the Bench which has to be laid before another Judge together with the opinion of the two Judges. The matter in regard to which the third Judge has to deliver a binding and conclusive opinion under section 378 is not expressly indicated in the section. There can however be hardly any doubt that it is the matter over which there is a difference of opinion between the two Judges and that the third Judge is entitled and bound to consider this matter in all its aspects and give his opinion so that a conclusive judgment or order may follow thereon. There is nothing to be gained by amending or adding to the words used in section 378 which would only have the effect of fettering the discretion of the third Judge.

27.8. In several cases the question has been discussed whether the third Judge ought to consider himself bound by the views expressed by the two referring Judges on points on which there was no difference between them. Under the corresponding provisions in the Letters Patent[1] of High Courts and in the Code of Civil Procedure,[2] the view of the majority of all the Judges including those who first heard the case prevails in a civil matter. The position in criminal cases, however, is different from that in civil cases where clear-cut issues of fact and law have to be framed and decided. As observed by the Supreme Court[3] with reference to section 429, it is for the third Judge to decide on what points, if any, he will hear arguments and this postulates that he is completely free to resolve the differences in such manner as he thinks fit and proper. The position for the purposes of section 378 is no doubt the same. In our view, no change in the Code of Criminal Procedure is needed on this point, and the matter should be left to the discretion of the third Judge.

27.9. We may here refer to the amendment of section 378 proposed by the Lowndes Committee in 1917. They stated in their Report :—

> "We think that in confirmation cases, where the Judges hearing the case are equally divided, it may not always be sufficient to refer the case to another Judge by whose opinion it is to be decided. We think that it should be within the power of the Judges before whom the case was originally heard in the High Court to insist upon a re-hearing before themselves and the additional Judge. As in some cases this may not be feasible, we would allow the Chief Justice in any such case to direct a re-hearing before three other Judges."

That Committee accordingly proposed the addition of the following proviso to section 378 :—

> "Provided that, if any Judge being a member of such Bench so require, such case shall be re-heard before them and another Judge or, if the Chief Justice or the Judicial Commissioner so direct, before three other Judges, and the judgment or order shall follow the opinion of the majority of the Judges so re-hearing such case."

This amendment was not accepted by the Select Committee which reported on the Bill in 1922 :—

> "The amendment of section 378 has been condemned by a majority of the Judges who have expressed an opinion on the Bill. In view of the fact that the difficulty which the amendment is intended to meet is probably of rare occurrence and that the second portion of the proviso will be inapplicable in the case of Judicial Commissioners' Courts which do not at present consist of five Judges, we prefer to leave the law as it is, and we delete this clause.[4]"

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[1] *See e.g.*, Clause 36, Letters Patent of the Calcutta High Court.

[2] Section 98.

[3] *Dharam Singh* v. *State*, (1962) Suppl. 3 S.C.R. 769; *Babu* v. *The State*, A.I.R. 1965 S.C. 1467, 1470.

[4] Gazette of India (1922), Part V, pages 263 and 264; Report of the Select Committee under clauses 99 and 113.

Section 379.

27.10. No change is required in section 379.

Section 380.

27.11. Section 380 is ancillary to section 362 which empowers Courts to release certain convicted first offenders on probation of good conduct instead of sentencing them to imprisonment. In fact, with the enforcement of the Probation of Offenders Act, 1958, in many States, the utility of section 562 of the Code has been much reduced. If at all it is necessary to retain that section in the Code, section 380 may appropriately be added to it. We propose to omit section 380 from this Chapter and consequentially to alter the heading of the Chapter to "Of the Submission of *Death* Sentences for Confirmation."

CHAPTER XXVIII

EXECUTION

Section 381 Death sentence passed by High Court in appeal or revision.

28.1. Section 381, as it now stands, is confined to cases where a sentence of death passed by a Court of Session is sent up for confirmation by the High Court. When a sentence of death is passed by the High Court in appeal or in revision proceedings for enhancement of sentence, its execution is now left to be governed by sections 425(2) and 442 and the High Court Rules. As it is desirable to have a specific provision in regard to this important matter, we recommend that a new section 381A be inserted after section 381, as follows :—

Execution of death sentence passed by High Court.

> "381A. When a sentence of death is passed by the High Court in appeal or in revision, the Court of Session shall, on receiving the order of the High Court, cause the sentence to be carried into effect by issuing a warrant."

Postponement of execution in case of appeal to Supreme Court.

28.2. We propose the insertion of another new section providing for the postponement of execution of a death sentence in cases where an appeal against the judgment of a High Court passing or confirming such sentence can be preferred to the Supreme Court under the Constitution. Our object in recommending the new provision is to ensure that where there is a possibility of appealing to the Supreme Court, the appeal is not rendered infructuous by an unfortunately prompt execution of the sentence.

Appeals in capital sentence cases may come up before the Supreme Court; (i) as of right under sub-clause (a) or (b) of article 134(1); or (ii) on a certificate of fitness granted by the High Court under article 132 or 134(1)(c) or (iii) after obtaining special leave from the Supreme Court under article 136 of the Constitution.

In the first case, since the appeal is as of right, it is clearly necessary that execution should be postponed until the period of limitation for preferring the appeal expires, or, if an appeal is filed within that period, until the appeal is disposed of.

In the second case, it is only if an application for a certificate is made to the High Court that there is a reasonable possibility of appeal. If such application is made, execution should be postponed until the application is disposed of. If the certificate is granted, the possibility of appeal becomes almost a certainty, and the execution should be further postponed till the period of limitation for preferring an appeal expires. Within that period, the person sentenced should prefer an appeal and obtain a stay from the Supreme Court.

In the third case, it is sufficient if execution is postponed for such period as would enable the person sentenced to apply for special leave to the Supreme Court. Within that period, the person sentenced can apply for special leave and obtain from the Supreme Court orders for stay of execution.

New Section 381 B.

28.3. The new section providing for postponement of execution pending possible appeal to the Supreme Court may be as follows :—

Postponement of execution in case of appeal to Supreme Court.

"381B. (1) Where a person is sentenced to death by the High Court and an appeal from its judgment lies to the Supreme Court under sub-clause (a) or (b) of clause (1) of article 134 of the Constitution, the High Court shall order the execution of the sentence to be postponed until the period allowed for preferring such appeal has expired, or, if an appeal is preferred within that period, until such appeal is disposed of.

(2) Where a sentence of death is passed or confirmed by the High Court, and the person sentenced makes an application to the High Court for the grant of a certificate under article 132 or under sub-clause (c) of clause (1) of article 134 of the Constitution, the High Court shall order execution of the sentence to be postponed until such application is disposed of by the High Court, or if a certificate is granted on such application, until the period allowed for preferring an appeal to the Supreme Court on such certificate has expired.

(3) Where a sentence of death is passed or confirmed by the High Court, and the High Court is satisfied that the person sentenced intends to present a petition to the Supreme Court for the grant of special leave to appeal under article 136 of the Constitution, the High Court shall order the execution of the sentence to be postponed for such period as it considers sufficient to enable him to present such petition."

Section 382.

28.4. No change is needed in section 382.

Section 383.

28.5. Under section 383, an accused person sentenced to imprisonment has to be forwarded with a warrant to "the jail in which he is or is to be confined". Section 384, however, refers to "the jail or other place" indicating the possibility of a convicted persons being confined temporarily in a place other than a jail. It is desirable to bring the wording of section 383 into line with that of section 384 in this respect.

Secondly, where the accused is sentenced to imprisonment till the rising of the Court, as is sometimes done, he is simply detained in custody in the Court premises for the few hours. No warrant is prepared or sent under section 383, which can be regarded as a breach of the statutory provision. It is desirable to add a proviso to the section legalising the procedure.

Thirdly, in our discussion[1] on section 366, we have suggested that a suitable provision should be made in section 383 for cases where a sentence of imprisonment is passed in the absence of the accused.

Accordingly, we recommend that section 383 may be amplified and amended as follows :—

Execution of sentence of imprisonment.

"383. (1) Where the accused is sentenced to imprisonment for life or imprisonment in cases other than those provided for by section 381, the Court passing the sentence shall

[1] *See* para. 26.6 above.

forthwith forward a warrant to the jail *or other place* in which he is, or is to be, confined, and, unless the accused is already confined in such jail *or other place,* shall forward him to such jail *or other place, with the warrant* :

Provided that where the accused is sentenced to imprisonment till the rising of the Court, it shall not be necessary to prepare or forward a warrant to a jail, and the accused may be confined in such place as the court may direct.

(2) *Where the accused is not present in Court when he is sentenced to such imprisonment as is mentioned in sub-section* (1), *the Court shall issue a warrant for his arrest for the purpose of forwarding him to the jail or other place in which he is to be confined; and in such case, the sentence shall commence on the date of his arrest."*

Section 384 and 385.

28.6. No change is needed in sections 384 and 385.

Section 386—Levy of fine by attachment and sale of movable property.

28.7. Section 386 lays down the two methods by which the Court passing a sentence of fine may take action for realising it. One is to issue a warrant for levying the amount by attachment and sale of any movable property belonging to the offender. By virtue of section 4(2) the expression "movable property" has the meaning assigned to it by section 22 of the Indian Penal Code, and not the wider meaning given in the General Clauses Act, 1897; only "corporeal property" may be attached and sold for realising the fine imposed by a criminal court. This would appear to exclude actionable claims, debts, salary not due etc. from the court's process. Where the offender has only a share in movable property belonging to a joint family questions have arisen in the Courts whether the share can be attached and sold, and if so, whether attachment can be by way of seizure of the property. We do not, however, consider it necessary to clarify and elaborate this clause. It is primarily intended to furnish the Court with a rough and ready method of seizing and selling tangible goods belonging to the offender, especially when the fine to be realised is not a large sum, and it can be left at that.

Fine to be made recoverable as arrear of land revenue.

28.8. The second method laid down in clause (b) of sub-section (1) and sub-section (3) is cumbrous and time consuming. The Collector to whom the warrant is sent has to take steps like any other decree-holder in a civil court for recovery of the fine. This appears to be a waste of time. Once payment of an amount has been judicially ordered, there is no reason why the amount due to the State should not be recovered like any other monetary demand of the State. We recommend that a provision authorising recovery of the fine by the Collector as an arrear of land revenue may be substituted in place of clause (b).

It appears that there is some uncertainty as to how far property exempt from attachment under the Code of Civil Procedure is exempt when the Collector proceeds under clause (b). In view of the changed procedure which we propose in place of clause (b), it is unnecessary to discuss this point elaborately.

Section 386 (1), proviso.

28.9. Under the proviso to section 386(1), if the offender has undergone the whole of the imprisonment in default of payment of fine, no court shall issue a warrant for levy of the fine

unless, for special reasons to be recorded in writing, it considers it necessary to do so. The object of the proviso and the special reasons that can possibly arise were dealt with at length in a Bombay case[1] in these words :—

> "The proviso applies in terms only to the issue of a fresh warrant and does not require the withdrawal of a warrant already issued before expiration of the sentence in default of payment. But I think that in dealing with such existing warrants the Court should follow the policy which seems to have inspired the proviso to section 386.
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> "That policy appears to be that in general an offender ought not to be required both to pay the fine and to serve the sentence in default. But the proviso enables a warrant to be issued for recovery of the fine, even if the whole sentence in default has been served, if the Court considers that there are special reasons for issuing the warrant. I apprehend that the special reasons should be reasons accounting for the fact that the fine has not been recovered before the sentence in default has been served, and any reasons which are directed to that point would be relevant. It may be that the authorities, through no negligence on their part, did not know of the existence of the property or the accused may have inherited property after he served his sentence in default; or there may not have been time to execute the warrant. Matters of that sort would all be special reasons for issuing a warrant after the sentence in default had been served; and I think, in the same way, they are reasons justifying the Court in refusing to withdraw a warrant already issued.
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> "In the present case, in my opinion, there are special reasons, though not quite those which were recorded by the Judge. I think that a special reason for not withdrawing the warrant is that before the sentence in default had been served the authorities had taken steps to enforce this warrant by levying execution upon the immovable property of the applicant, and the delay which has taken place is not, in my opinion, shown to be due to any default on the part of the authorities. The learned Judge himself gave as his reasons for not withdrawing the warrant that the offence was a serious one and the complainant had been allotted part of the fine. In my view, reasons of that sort are not relevant because they do not account for the fine not having been recovered before the service of the sentence in default."

Fine should be recoverable when compensation has been ordered.

28.10. We notice that in the above judgment the fact that the complainant has been allotted part of the fine was not considered a relevant special reason for purposes of the proviso as it stands. A contumacious offender should not, in our opinion, be permitted to deprive the aggrieved party of the small compensation awarded to it by the device of undergoing the sentence of imprisonment in default of payment of the fine. When an order under section 545 has been passed for payment of expenses or compensation out the fine, recovery of the fine should be

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[1] *Digambar* v. *Emperor*, A.I.R. 1935 Bom. 160, 161, 162 (Basumont C.J.).

pursued, and in such cases, the fact that the sentence of imprisonment in default has been fully undergone should not be a bar to the issue of a warrant for levy of the fine. We recommend that the proviso to section 386(1) should make this clear.

Section 386 (2)—Rules for settling claims necessary.

28.11. Section 386(2) contemplates the making of rules by State Governments[1]. The desirability of framing such rules has been pointed out in a Bombay case[2]. Where such rules are not made and a claim is made by a third party to the property attached under section 386(1)(a), the question may arise what procedure should be followed. One view is, that in such a case the only thing that can be done by the Magistrate is to stay the sale and refer the claimant to a Civil Court[2]. But according to another view, the procedure given in section 88(6A) *et seq.* (which is analogous to order 21, rule 58, Civil Procedure Code) should be followed[3-4]. The rules should provide for the procedure to be followed when such claims are made.

Section 386 (3).

28.12. Section 286(3) can be shortened in view of the amendment which we propose in section 386(1)(b). The matter contained in the main paragraph requires to be modified; the proviso may be retained with such verbal changes as are necessary in view of the changes to be made of the main paragraph.

Amendment of Section 386 recommended.

28.13. Section 386 may accordingly be amended to read as follows :—

"386. (1) Whenever an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways, that is to say, it may— Warrant for leavy of fine.

(a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender;

(b) issue a warrant to the Collector of the district, authorising him *to realise the amount as arrears of land revenue* from the movable or immovable property, or both, of the defaulter :

Provided that, if the sentence directs that in default of payment of the fine, the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no Court shall issue such warrant unless, for special reasons to be recorded in writing, it considers it necessary to do so, *or unless it has made an order for the payment of expenses or compensation out of the fine under section* 545.

(2) The State Government may make rules regulating the manner in which warrants under clause (a) of sub-section (1) are to be executed, and for the summary determination

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[1] A letter inquiring about the present position has been sent to the ·s in October, 1968. For the old U.P. Rules, see Harimal, A.I.R. 1933 135.

re Pandurang, A.I.R. 1932 Bom. 476, 477.

rasanna v. *Emperor*, I.L.R. 55 Mad. 1041; A.I.R. 1932 Mad. 538.

agan Lal v. *Memunabi*, A.I.R. 1955 Saurashtra 86, 87, para. 3. ·ase-law).

of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the Court issues a warrant to the Collector under clause (b) of sub-section (1), *the Collector shall realise the amount in accordance with the law relating to recovery of arrears of land revenue, as if such warrant were a certificate issued under such law.*

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender."

Section 387.

28.14. Under section 387, a warrant issued under section 386(1)(a) (warrant for the attachment and sale of movable property) can be executed within the local limits of the jurisdiction of the Court issuing it, and, if endorsed by the District Magistrate or Chief Presidency Magistrate concerned, also outside such local limits.

No amendment of substance is required in section 387.

Section 387A.

28.15. Section 387A deals with the levy of fine under a warrant issued in the State of Jammu and Kashmir. If, as we have recommended elsewhere in this Report, the Code is extended to that State, this special provision will not be necessary and the section may be omitted. In the meantime, until the Code is so extended, section 387A will require a slight formal amendment to bring it into line with the amendments proposed above in clause (b) of sub-section (1) and sub-section (3) of section 386. In section 387A, for the words "by execution according to civil process against the movable or immovable property, or both, of the offender" there should be substituted the words "as if it were an arrear of land revenue."

A Bombay provision.

28.16. We have considered an additional provision made in the Code by a Bombay amendment and numbered section 387AA, for the recovery by executive Magistrates of fines and penalties imposed under special laws. The need for such a provision is not very clear, and in any event, it does not appear to have been felt in any other State.

Section 388 to 395.

28.17. Section 388 and 389 need no change. Section 390 to 395 have already been repealed.

Section 396.

28.18. Section 396 is not well-constructed. It may be redrafted as follows :—

Execution of sentence on escaped convicts.

'396. (1) When a sentence *of death, imprisonment for life or fine* is passed under this Code on an escaped convict, such sentence shall, subject to the provisions hereinbefore contained, take effect immediately.

(2) *When a sentence of imprisonment for a term is passed under this Code on an escaped convict,—*

(a) if such sentence is severer in kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately;

(b) if such sentence is not severer in kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment for a further period equal to that which, at the time of his escape, remained unexpired of his former sentence.

(3) For the purposes of *sub-section* (2),—

(*a*) a sentence of imprisonment with solitary confinement shall be deemed *to be* severer *in kind* than a sentence of the same description of imprisonment without solitary confinement; and

(*b*) a sentence of rigorous imprisonment shall be deemed *to be* severer *in kind* than a sentence of simple imprisonment with or without solitary confinement."

Section 397 and 398.

28.19. No changes are required in sections 397 and 398.

Section 399.

28.20. Section 399 is in force only where the Reformatory Schools Act, 1897, is not in force. Furthermore, the Children's Acts in force in certain States and Union Territories contain provisions which practically supersede those of section 399 of the Code. This section is thus obsolete and may be omitted.

Section 400.

28.21. No change is needed in section 400.

CHAPTER XXIX

SUSPENSIONS, REMISSIONS AND COMMUTATION OF SENTENCES

Provisions ancillary to powers under the Constitution.

29.1. The provisions of this Chapter are ancillary to the powers conferred on the President of India and the Governors of States by article 72 and article 161, respectively, of the Consitution. Both these articles first refer to the power to grant pardons, reprieves, respites or remissions of punishment, and then, to the power to suspend, remit or commute the sentence, of any person convicted of any offence. Section 401 contains detailed provisions in regard to the suspensions and remissions of sentences, while section 402 deals with the commutation of sentences. Following article 72(1)(c) of the Constitution, section 402A makes the powers conferred by sections 401 and 402 on the State Governments in respect of the State field of offence exercisable also by the Central Government.

Prerogative of mercy in England.

29.2. It is noteworthy that these section do not circumscribe in any way the power of the President and Governors to grant pardons, reprieves and respites, which is analogous to the sovereign's prerogative of mercy in England. This is described as follows by a writer[1] on English constitutional law :—

> "The Sovereign, acting in this country by the Home Secretary, may pardon offences of a public nature which are prosecuted by the Crown. A pardon may generally be granted before or after conviction. No pardon may be pleaded as a bar to impeachment (Act of Settlement, 1700),[2] although some scottish lords impeached for the rebellion of 1715 were pardoned after conviction; nor may the Crown remit the penalties prescribed by the Habeas Corpus Act, 1679, for sending a prisoner out of the realm; and the Crown cannot by a pardon deprive a third party of his rights.[3]
>
> A pardon is either free or conditional. An example of the latter is where a death sentence is commuted to a term of imprisonment for life. The Home Secretary acts either on a recommendation to mercy by the Judge who passed the sentence, or on a petition from the criminal or others on his behalf. In considering whether to advise a pardon the Home Secretary is responsible to the Sovereign and not to Parliament. The practice whereby the decision is made by the Home Secretary and not by the Sovereign dates from the beginning of Queen Victoria's reign.
>
> The Crown may also grant a reprieve, which temporarily suspends the execution of sentence; or (within statutory limits) may remit the whole or part of the penalty."

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1 O. Hood Phillips. Constitutional Law (1962), p. 256.

2 *Cf. Danby's case* (1679) 11 St. Tr. 599.

3 *Thomas* v. *Sorrell*, (1674) Vaughan 330.

Effect of granting pardon.

29.3. In India, as in England,[1] "the effect of a pardon, or what is sometimes called a 'free pardon' is to clear the person from all infamy and from all consequences of the offence for which it is granted and from all statutory or other disqualifications following upon conviction. It makes him, as it were, a new man. But the same effect does not follow on a mere remission which stands on a different footing altogether. An order of remission does not wipe out the offence; it also does not wipe out the conviction. All that it does is to have an effect on the execution of the sentence. x x x 'The judicial power and the executive power over sentences are readily distinguishable', observed Justice Sutherland. To render a judgment is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment but does not alter it *qua* judgment'."

Consulting the Court before granting pardon.

29.4. In connection with the grant of "free pardon" to a convicted person, we have considered a suggestion of the Ministry of Home Affairs that the Government should be required to consult the appropriate court before granting pardon. In this suggestion it is stated that where pardon is proposed to be granted on the ground of miscarriage of justice or discovery of new evidence, the practice in England is to consult the Judges and a reference has been made to section 19 of the Criminal Appeal Act, 1907.[2] This section, however, does not go to the length of providing that a reference must be made in every case but leaves it entirely to the discretion of the Secretary of State. We are not aware whether it is invariably the practice in England to refer the whole case or particular points to the Court of Appeal before exercising the prerogative of mercy. However that may be, since the power to grant pardons is derived from the Constitution, it would, in our view, be hardly appropriate to lay down by statute the procedure for the exercise of the power, even if it were constitutionally permissible, a matter about which we have some doubts Nor do we see any compelling need to do so. It will be noticed that, even in regard to suspensions and remissions of sentences, prior consultation of the court is not made compulsory under section 401(2) of the Code. And it is very seldom, if ever, that the Government seeks the opinion of the presiding judge of the court under this section.

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[1] *Sarat Chandra Rabha* v. *Khagendranath*, (1961) 2 S.C.R. 137, 138.

[2] This section, as recently amended by the Administration of Justice Act, 1960, reads—

"Nothing in this Act shall affect the prerogative of mercy, but the Secretary of State, on an application made to him by a person convicted on indictment or without any such application, may, if he thinks fit at any time, either—

(a) refer the whole case to the Court of Criminal Appeal and the case should then be treated for all purposes as an appeal to that court by the person convicted; or

(b) If he desires the assurance of the Court of Criminal Appeal on any point arising in the case, refer that point to the Court of Criminal Appeal for their opinion thereon, and the Court shall consider the point so referred and furnish the Secretary of State with their opinion thereon."

Nature of the other powers.

29.5. As mentioned earlier, Articles 72 and 161 of the Constitution first refer to the power to grant pardons, reprieves, respites or remissions of punishments, and then, to the power to suspend, remit or commute the sentence, of any person convicted of any offence. "Reprieve" means to take back or withdraw a sentence for a time, the effect being simply to suspend the execution of the sentence. It is no more than a temporary postponement and, in England, is used as the first step in commuting a death sentence. The term "respite" means delaying the punishment, specially in the case of a death sentence, and means much the same as a reprieve. It would seem that granting a reprieve or respite of punishment is practically indistinguishable from suspending the execution of the sentence awarded by a court for a temporary period. "Remission" originally meant a pardon under the Great Seal and a release but latterly it came to mean the same as a reduction of the quantum of punishment (*e.g.*, amount of the fine imposed or term of imprisonment awarded) without changing its character. "Commutation" means the alteration of a sentence of one kind into a sentence of a less severe kind, as indicated in section 402 of the Code.

Scope of Section 401 not to be enlarged.

29.6. The use of these two sets of expressions in Articles 72 and 161 of the Constitution is traceable to section 295 of the Government of India Act, 1935. Sub-section (1) of this section referred to the power of the Governor-General-in-Council to suspend, remit or commute the sentence of any person convicted by a Court, while sub-section (2) referred to the right of the Crown to grant pardons, reprieves, respites or remissions of punishments. The Constitution has lumped together both these powers and placed them on the same footing. The overlap that obviously exists does not harm. There is, however, no need to enlarge the scope of section 401 of the Code so as to cover expressly pardons, reprieves and respites besides suspensions and remissions.

General provision as to effect of remission or commutation of sentence not desirable.

29.7. The question of inserting in the Code a provision on the lines of section 69 of the Criminal Justice Act, 1948, was raised during the discussions before us. This section provides that "where Her Majesty pardons any person who has been sentenced to death on condition that he serves a term of imprisonment, that person shall be deemed to have been sentenced by the Court before which he was convicted to imprisonment for the said term. It was suggested for example that if a person was sentenced to imprisonment for a term by the court and a part of this sentence was remitted by the State Government, or the sentence was commuted to one of fine, the convicted person should be deemed to have been sentenced to the shorter term of imprisonment or, as the case may be, to fine only by the Court. This could be of practical importance because many Acts provide for collateral disqualifications in the case of a person convicted for an offence and sentenced to imprisonment for a specified minimum term. We have, however, come to the conclusion that the gravity of the offence for which the law provides such disqualification should depend on the sentence awarded by the Court and not on the view which the State Government may take while remitting or commuting

the sentence. In any event, this is essentially a question of policy and if such an amendment is considered desirable in the context of a particular special law, it may more appropriately be made in that law.

Provision for general amnesty not necessary.

29.8. Another suggestion was that there should be a provision for "general amnesty" which would relieve the appropriate Government from the necessity of passing separate orders of remission and release in every individual case. In our opinion, an amendment of the Code for this purpose is not necessary. Once the policy of granting a "general amnesty" for certain categories of convicted prisoners is decided upon by the Government, it is hardly desirable that the Government should pass a general order and leave it to be applied to individual cases by the prison authorities.

Section 401 (4A).

29.9. Sub-section (4A) was inserted in section 401 by the Amendment Act of 1923 "to make it clear that the power to remit sentences conferred by section 401 can be exercised in the case of orders of a penal nature, *e.g.*, under section 565 of the Code."[1] It covers also sentences passed by tribunals constituted under regulations and ordinances.[2] Though a literal or strict application of the provisions of sub-sections (1) to (4) to the cases mentioned in sub-section (4A) may not always be satisfactory, it has not created any practical difficulty. We do not think any clarificatory amendment of sub-section (4A) is required.

We find that an Uttar Pradesh amendment of 1948 has added the words "or other authority" after the words "criminal court" in sub-section (4A) in order to confer power on the State Government to modify orders passed by quasi-judicial or executive authorities under other laws. In our opinion, however, the Code is not the proper place to make such a provision. It would be more appropriate to provide for it in the special law under which the other authority can pass orders restraining the liberty of a person or imposing a liability on him.

Power to commute sentences.

29.10. Sub-section (1) of section 402 enables the appropriate Government to commute sentences without the consent of the person sentenced. This general provision has, however, to be read with section 54 and 55 of the Indian Penal Code which contain special provisions in regard to commutation of sentences of death and of imprisonment for life. The definition of "appropriate Government" contained in sub-section (3) of section 402 is substantially the same as that contained in section 55A of the Indian Penal Code. It would obviously be desirable to remove this duplication and to state the law in one place. In the present definition of "appropriate Government" in section 402(3), the reference to the State Government is somewhat ambiguous. It will be noticed that clause (b) of section 55A of the Indian Penal Code specifies the particular State Government which is competent to order commutation as "the Government of the State within which the offender is sentenced".

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[1] Statement of Objects and Reasons, dated 16th February, 1921.

[2] Report of the Select Committee, dated 26th June, 1922.

Section 402 revised : sections 54, 55 and 55A of I.P.C. to be omitted.

29.11. We, therefore, propose that section 54, 55 and 55A may be omitted from the Indian Penal Code and their substance incorporated in section 402 of the Criminal Procedure Code. This section may be revised as follows :—

Power to commute sentence.

"402. (1) The appropriate Government may, without the consent of the person sentenced,—

(a) commute a sentence of death, for any other punishment provided by the Indian Penal Code;

(b) commute a sentence of imprisonment for life, for imprisonment of either description for a term not exceeding fourteen years or for fine;

(c) commute a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced or for fine;

(d) commute a sentence of simple imprisonment, for fine.

(2) In this section and in section 401, the expression "appropriate Government" means—

(a) in cases where the sentence is for an offence against, or the order referred to in sub-section (4A) of section 401 is passed under, any law relating to a matter to which the executive power of the Union extends, the Central Government; and

(b) in other cases, the Government of the State within which the offender is sentenced or the said order is passed."

29.12. The power to suspend or remit sentences under section 401 and the power to commute sentences under section 402 are thus divided between the Central Government and the State Government on the constitutional lines indicated in Articles 72 and 161. If, for instance, a person is convicted at the same trial for an offence punishable under the Arms Act or the Explosives Act and for an offence punishable under the Indian Penal Code and sentenced to different terms of imprisonment but running concurrently, both Governments will have to pass orders before the sentences are effectively suspended, remitted or commuted. Cases may occur where the State Government's order simply mentions the nature of the sentence remitted or commuted and is treated as sufficient warrant by the prison authorities though strictly under the law, a corresponding order of the Central Government is required in regard to the sentence for the offence falling within the Union List. The legal provisions are, however, clear on the point and we do not consider that any clarification is required.

29.13. It has been suggested that there are a few types of cases in which the Central Government is vitally concerned though the offence is against a law relating to a matter to which the executive power of the State Government extends and as such the authority to suspend, remit or commute the sentence is the State Government. Important instances are offences investigated by the Delhi Special Police Establishment, offences

involving misappropriation or destruction of, or damage to, Central Government property and offences committed by Central Government servants in the discharge of their official duties. If a State Government chooses to take a lax view of these offences and to exercise its powers of remission and commutation unduly liberally, it is bound to create difficulties of administration for the Central Government. We feel it desirable that in such cases where the Central Govrnment is obviously concerned in the proper enforcement of the penal provisions, including the execution of sentences awarded by Court, the State Government should be required to exercise its powers of remission and commutation only in consultation with the Central Government.

29.14. We, therefore, propose that a new section 402B may be added in this Chapter.

Central Government to be consulted in case of certain sentences.

"402B. The powers conferred by sections 401 and 402 upon the State Government to remit or commute a sentence shall, in any case where the sentence is for an offence—

(i) which was investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946, or

(ii) which involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(iii) which was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty,

be exercised by the State Government only in consultation with the Central Government."

CHAPTER XXX

PREVIOUS ACQUITTALS OR CONVICTIONS

Section 403 and article 20.

30.1. The rules of criminal process, known to lawyers as *autrefois acquit* and *autrefois convict,* find their verbal expression in our Code in section 403 and are considered so important that a separate Chapter is assigned to them. The principle on which the rules rest is that "a man may not be put twice in jeopardy for the same offence". This principle is recognised in our Constitution in article 20. The rule does not rest on any doctrine of estoppel.

Broadly stated the rule is that a person once acquitted or convicted of an offence may not again be tried for the same offence. Article 20 does not in terms maintain a previous acquittal; but section 403 does, and goes on to explain in detail the full implications of the expression "same offence". Seven illustrations accompany this section explaining in concrete terms the different situations which the Courts may have to deal with. No particular difficulty in understanding the meaning of these provisions appears to have been felt and we do not, therefore, suggest any change in the language. Nor is any change necessary in the general scheme employed in section 403.

Section 403 (2).

30.2. Sub-section (2) of section 403 permits a person acquitted of any offence to be afterwards tried for any distinct offence for which he might have been separately charged at the former trial under section 235(1). This is as it should be. A suggestion has, however, been made that the second trial should be held within some specified period of limitation so that the accused is not kept under suspense for ever. We do not think any idea of limitation can be safely introduced into criminal trials, and public interest demands that an offence should be ordinarily punishable whenever the offender can be conveniently tried. We are not, therefore, accepting the suggestion.

Section 403 (5).

30.3. Sub-section (5) of section 403 says: "Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897". This section provides that when an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted under either or any of these enactments, but shall not be liable to be punished twice for the same offence. It has been said in certain decided cases[1] that since prosecution under "either enactment" is permitted under this general provision, it follows that the acquittal of a person under one enactment would not be a bar to his trial under the second enactment, even when the facts constituting the offence were the same. We think these observations go too far, as the intention of section 403 obviously is to prevent the *trial* of a person twice on the same facts. However, out of the

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[1] *Rasool,* A.I.R. 1959 Mys. 136; *K. B. Prabhu* v. *Emp.,* A.I.R. 1944 Mad. 369; *Abdul Ahmad,* A.I.R. 1952 All. 957, 599.

cases we have mentioned, two were actually decided on other grounds, and do not create any hindrance in the way of the view we have expressed. We are not, therefore, proposing any change in the language of sub-section (5) which does not interfere with the main principle underlying section 403.

Explanation to Section 403.

30.4. The Explanation added to the section says that "the dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused or any entry made upon a charge under section 273 is not an acquittal within the meaning of this section". A suggestion has been made[1] for modifying the explanation by excluding an order of discharge made by a Court after enquiry on the merits, the argument being that if the whole evidence has been considered and found insufficient to sustain a conviction, it is not very different from an order of acquittal and ought, in law, to rank with it. The difficulty about this suggestion, however, is that while the line between a discharge and an acquittal is unmistakable, no such line can be drawn between an order of discharge made "on the merits" and an order of discharge made otherwise; and should the consideration of the whole evidence be made the test, then a controversy will arise in most cases whether the "whole evidence" was or was not considered. The prevailing practice is, that if an order of discharge has been made after full and proper consideration of the evidence, the Courts will not permit a reopening of the same matter; and that practice should, in our opinion, be sufficient to prevent any unnecessary harassment. We do not, therefore, recommend any change in the Explanation as regards discharge of the accused. Since we are proposing[2] the omission of section 273, the words "or any entry made upon a charge under section 273" will have to be omitted from the Explanation.

Issue estoppel in criminal cases.

30.5. In a case decided[3] by the Supreme Court in 1956, certain observations were made lending support to a statement of the Privy Council that the maxim *res judicata pro veritate accipitur is* no less applicable to criminal than to civil proceedings. The decision of the case did not depend on any such rule, but those observations have been repeated in a few subsequent cases.[4-5] It has therefore been suggested to us [6] that the Supreme Court has perhaps introduced something new into section 403, Cr.P C. which is not justified and that the Code should in terms forbid the use of the doctrine of *res judicata* or, as it is sometimes called "issue estoppel", in criminal cases. Alternatively, it has been suggested that the view expressed in Pritam Singh's case should be codified and put into section 403.

Should issue estoppel be provided in the Code?

30.6. We think that section 403 has nothing to do with any question of estoppel, and it must stand by itself. That does not, however, rule out the possibility of putting into the Code some

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1 F. 3(2)/56-L.C. Part III, S. No. 52 (Suggestion of a High Court).

2 *See* para. 23.1 above.

3 *Pritam Singh* v. *The State* A.I.R. 1956 S.C. 415, 422.

4 *Manipur Administration* v. *Bira Singh*, A.I.R. 1965 S.C. 87.

5 *Mohinder Singh* v. *State of Punjab*, A.I.R. 1965 S.C. 83, 86.

6 F. 3(2)/55-L.C. Pt. II, S. No. 33(a) (Suggestion of a High Court Judge).

rule of "issue estoppel" if it be otherwise desirable. We feel however that legislation on such a matter would at present be unwise. We find from the reported cases that our Supreme Court and our High Courts have not had proper opportunity yet of considering all the implications of the rule, and any hasty legislation may by its rigidity create difficulties. We may, in this connection, mention what Lord Devlin recently said in the House of Lords :[1]

> "The truth is that for estoppel on issues to work satisfactorily the issues need to be formulated with some precision. In civil suits, this is usually done as a matter of record : in criminal process, it is not. If issue estoppel is going to be introduced into the criminal law, the proper basis for it is a system of special verdicts on separate issues. But that would be to introduce a profound change into the working of our law which I am not prepared at present to countenance.
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> Then since estoppel is available to both parties in civil law, there is the question whether it should be made available to the prosecution in criminal law. No one so far has advocated that it should. But is it necessary in the interests of justice to give the defence unreciprocated advantage ? The defence rightly enjoys the privilege of not having to prove anything; it has only to raise a reasonable doubt. Is it also to have the right to say that a fact which it has raised a reasonable doubt about is to be treated as conclusively established in its favour ?"

These considerations have not yet been weighed in our Courts, and it is we think too early to say what kind of rule would be useful for our conditions. We cannot therefore at present accept either suggestion.

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[1] *Connelly* v. *Director of Public Prosecutions.* (1964) A.C. 1254; (1964) 2 All E.R. 401.

CHAPTER XXXI

APPEALS

Section 404.

31.1. Section 404 lays down the general principle that no appeal shall lie except as provided for by the Code or any other law for the time being in force. No change is needed here.

Section 405.

31.2. Section 405 provides that an appeal from an order rejecting an application under section 89 of the Code shall lie to the court to which appeals ordinarily lie from sentence of the court passing the order. No change is indicated here also.

Section 406.

31.3. Under section 406, a person who has been ordered under section 118 to give security for keeping the peace or for good behaviour may appeal, if such order is made by a Presidency Magistrate to the High Court, and if made by any other Magistrate to the Court of Session. It was suggested that a proviso to this section, omitted by the amendment in 1955, to the effect that in any district specified by the State Government appeals from the orders under section 118 made by a Magistrate other than the District Magistrate or Presidency Magistrate shall lie to the District Magistrate (and not to the Court of Session) should be re-enacted "for the effective control of criminal administration". The suggestion cannot, however, be accepted. It is not in conformity with the scheme of separation to vest appellate powers in the District Magistrate. We do not therefore recommend any change in this section.

Section 406A.

31.4. Section 406A provides that "any person aggrieved by an order refusing to accept or rejecting a surety under section 122 may appeal against such order,

(a) if made by a Presidency Magistrate, to the High Court;

(b) if made by the District Magistrate, to the Court of Session; or

(c) if made by a Magistrate other than the District Magistrate, to the District Magistrate."

In clause (a), the formal substitution of "Metropolitan Magistrate" for "Presidency Magistrate" will have to be made. While no change is necessary in clause (b), we think that in clause (c) also, the appellate authority should be the Court of Session, and not the District Magistrate.[1] The hearing of the appeal is a purely judicial function, and after separation this function ought to be vested in the Court of Session. We accordingly recommend that clauses (b) and (c) should be combined (as in section 406) to read—

"(b) if made by any other Magistrate, to the Court of Session."

Section 407 (Repealed).

31.5. Section 407 which was repealed in 1955, provided for an appeal to the District Magistrate from a conviction by a magistrate of the second or third class. Now, under the amended

[1] The same recommendation was made by the Law Commission in its 14th Report; *see* Vol. 2, page 798, para 2.

section 408, such appeals lie to the Court of Session. We think that these appeals could well be heard by the Chief Judicial Magistrate of the district. This would not only relieve the Court of Session of a certain amount of less important work but also help the Chief Judicial Magistrate in supervising the work of the junior magistrates.[1]

31.6. Section 408 provides that an appeal from a sentence (including a sentence or order under section 380) passed by an Assistant Sessions Judge, District Magistrate or any other Magistrate, shall lie to the Court of Session. The section is subject to two provisos. One lays down that where an Assistant Sessions Judge or a Magistrate empowered under section 30 passes a sentence of imprisonment of over 4 years the appeal shall lie to the High Court; and the other that where a Magistrate convicts a person for sedition under section 124A of the Indian Penal Code the appeal shall lie to the High Court.

In our opinion, all appeals from sentences passed by Assistant Sessions Judges, or Section 30 Magistrates, irrespective of the severity of the sentences, should lie to the Court of Session. There is no need for the special provision that where the sentence passed is one of imprisonment for more than 4 years, the appeal will lie to the High Court. The load on the High Court will be lightened to a small extent by transferring these appeals to the Court of Session. (There will be no Magistrates empowered under section 30 under our scheme).

The second proviso regarding appeal from a conviction by a Magistrate for sedition may also be omitted. Trials for sedition are rare and the appeals in question would be rarer still. In any event there is no good reason why they should not lie to the Court of Session.

The reference in the section to appeals from sentences passed by District Magistrates should be omitted as under the proposed scheme of separation District Magistrates will not hold any trials. The reference to section 380 should be replaced by a reference to section 562 as it is now proposed to combine section 380 with section 562.

Section 409.

31.7. Under section 409(1) an appeal to a Court of Session may be heard by an Assistant Sessions Judge if it is from a conviction on a trial held by a Magistrate of the second or third class. In view of our proposal that all such appeals should lie to the Chief Judicial Magistrate and not the Court of Session, the reference to the Assistant Sessions Judge should be omitted from section 49.

Section 409(2).

Under section 409(2), an Additional Sessions Judge hears only such appeals as the State Government directs or as the Sessions Judge makes over to him. Instead of the State Government, the High Court should be substituted, as control over subordinate courts is vested in the High Courts by the Constitution.

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[1] A similar recommendation was made by the Law Commission in its 14th Report; *see* Vol. 2, page 802, para 16.

31.8. Section 410 provides that any person convicted by a Sessions Judge or Additional Sessions Judge may appeal to the High Court. No changes are necessary here. Section 410.

31.9. Under section 411, any person convicted by a Presidency Magistrate may appeal to the High Court if the sentence is one of imprisonment exceeding six months or of fine over Rs. 200/-. This limit of non-appealable sentences has come in for considerable criticism. It appears to equate Presidency Magistrates with the High Court for whom also the prescribed limit is six months and Rs. 200/- under section 413, and to place them much above the Sessions Judge for whom the limit is fixed at one month and Rs. 50/-. The historical background of this anomalous situation as well as other aspects of the question have been considered by the Commission in an earlier Report,[1] wherein it was recommended that in this respect a Presidency Magistrate should be equated with a Sessions Judge and not with a High Court. We entirely agree with this view. In our opinion, the limit in both cases should be imprisonment not exceeding three months and/or fine not exceeding Rs. 200/-. Section 411.

One of the suggestions received by us is to the effect that appeals from Presidency Magistrates should lie to the Chief Presidency Magistrate, while another recommendation is that appeals from sentences passed by Presidency Magistrates upto a certain limit of imprisonment and fine should be to the City Sessions Court. The main idea behind these suggestions is to reduce the number of criminal appeals to the High Court. We are however unable to accept either suggestion since it would mean making a radical change in the character and status of the Presidency Magistrate's courts which does not seem desirable.

31.10. Section 411A deals with appeals from convictions and acquittals by a High Court in the exercise of its original criminal jurisdiction. Though it is proposed to abolish the ordinary original criminal jurisdiction of High Courts, this section, if retained, will continue to apply to trials held by a High Court in the exercise of its extraordinary jurisdiction. Since such trials are extremely rare, we feel that, in the interests of finality to the proceedings, appeals should lie direct to the Supreme Court and not to another bench of the same High Court, Instead of the present elaborate rules, we would recommend a simple provision to the effect that an appeal shall lie to the Supreme Court from a conviction in a trial held by a High Court on fact as well as law, but there will be no appeal in the event of an acquittal. If the State wishes to appeal from an acquittal by a High Court, it will have to seek leave to appeal under article 136 of the Constitution. Section 411A.

31.11. Under section 412, there is no appeal by a person who is convicted on a plea of guilty by Courts mentioned in the section, "except as to the extent or legality of the sentence". The rationale behind the section is that a person who deliberately pleads guilty cannot be aggrieved by being convicted. The Section 412.

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[1]14th Report, Vol. 2, pages 800-801, para 11.

principle is sound. We would go further. In our view, where a High Court convicts and sentences a person on a plea of guilty, an appeal should not be allowed, even as regards the extent or legality of the sentence. It can hardly be contemplated that the judgment of a High Court would suffer from a serious infirmity in respect of the extent or legality of the sentence. We recommended an amendment of the section to bar an appeal in such cases.

Section 413.

31.12. Section 413 provides that there shall be no appeal in the following cases :—

(i) where the High Court passes a sentence of imprisonment not exceeding six months or a fine not exceeding Rs. 200/-;

(ii) where the Court of Session passes a sentence of imprisonment not exceeding one month; and

(iii) where a Court of Session or District Magistrate or other Magistrate of the first class passes a sentence of fine not exceeding Rs. 50/-.

The Explanation to the section is to the effect that no appeal shall lie from a sentence of imprisonment passed by such Court or Magistrate in default of payment of fine when no substantive sentence of imprisonment has also been passed.

In our view, there should be a general upward revision in the non-appealable limit as regards fine in view of the change in the value of the rupee, and also because it would be a recognition, though indirect, of the modern tendency to consider fine as a good deterrent punishment and a means of compensating the victim of the offence. We recommend that the non-appealable limit of fine be raised from Rs. 200/- to Rs. 1,000/- in the case of High Courts and from Rs. 50/- to Rs. 200/- in the case of Sessions Judges and Magistrates of the first class. (Rs. 200/- is now the limit under section 411 in the case of Presidency Magistrates).

As regards the non-appealable limit of imprisonment the present term of six months in the case of a High Court does not call for any change. But the limit of one month in the case of a Court of Session should be raised to three months. We have recommended under section 411 that the non-appealable limit of imprisonment in trials by a Presidency Magistrate should be reduced from six months to three months.

We are further of the view that there should be no appeal where there is a combination of imprisonment and fine within the limits prescribed in section 413. That is to say, if a sentence of imprisonment upto the period specified in section 413 is combined with a sentence of fine upto the amount specified in that section, there should be no appeal.

It was suggested that there should also be no appeal when the accused person though convicted is not sentenced but released on a bond or probation under the provisions of section 562 of the Code. We are unable to accept the suggestion. No doubt, being released on bond or on probation may not be as

serious a matter as a sentence; nevertheless, the conviction does cast a stigma, and that is sufficient justification for permitting an appeal. Some of the offences to which section 562 applies are serious, and may involve moral turpitude. The person convicted may, therefore, like to clear his reputation, by appealing to a higher Court.

Section 414.

31.13. Under section 414, no appeal lies from a sentence of fine not exceeding Rs. 200/- passed in a summary trial by a first class Magistrate. No change in substance is needed here.

Section 415.

31.14. Under section 415, an appeal may be brought against any sentence referred to in sections 413 and 414 whereby any punishment mentioned in those sections is combined with any other punishment. The language is cryptic, and has caused some difficulty in interpretation.[1] For instance, it does not seem to apply to a case where two sentences of fine which together do not exceed the limit mentioned in section 413 are awarded. In such a case, one has to fall back on section 413, but that section itself is not clear enough on this point, nor does one get any help from section 35(3) which covers only sentences of imprisonment. The position therefore requires to be made clear.

Revision of Section 408 to 415 recommended.

31.15. In the light of the foregoing discussion, we recommend that sections 408 to 415 be revised and replaced by the following sections :—

"Appeals from convictions 408. (1) Any person convicted on a trial held by a High Court.....*may appeal to the Supreme Court*.....

(2) Any person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge or a Metropolitan Magistrate may appeal to the High Court.

(3) Any person convicted on a trial held by an Assistant Sessions Judge....or a Magistrate of the first class, or any person sentenced under section 349 or in respect of whom an order has been made or a sentence has been passed under section 562 by any Magistrate, may appeal to the Court of Session.

(4) Any person convicted by a Magistrate of the second class may appeal to the *Chief Judicial Magistrate.*

No appeal in certain cases when accused pleads guilty. 409. Notwithstanding anything hereinbefore contained, where an accused person has pleaded guilty and has been convicted *on such plea,* there shall be no appeal—

(a) *if the conviction* is by a High Court; or

(b) *if the conviction* is by, a Court of Session, Metropolitan Magistrate or Magistrate of the first class, except as to the extent or legality of the sentence.

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[1] *See* discussions or case-law in *Banwari* v. *Rex* A.I.R. 1949 All. 216.

No appeal in petty cases. 410. Notwithstanding anything contained in section 408 there shall be no appeal by a convicted person in *any of the following cases*, namely :—

(a) where a High Court passes only a sentence of imprisonment *for a term* not exceeding *six months or of fine not exceeding one thousand rupees, or of both such imprisonment and fine;*

(b) where a Court of Session or a Metropolitan Magistrate passes *only* a sentence of imprisonment *for a term* not exceeding *three* months or *of fine* not exceeding *two hundred rupees, or of both such imprisonment and fine;*

(c) where a Magistrate of the first class passes *only* a sentence of fine not exceeding two hundred rupees; or

(d) where, in a case tried summarily, a Magistrate empowered to act under section 260 passes *only* a sentence of fine not exceeding two hundred rupees :

Provided that an appeal may be brought against any such sentence if any other punishment is combined with it, but such sentence shall not be appealable merely on the ground—

(i) that the person convicted is ordered to furnish security to keep the peace; or

(ii) that a direction for imprisonment in default of payment of fine *is included in the sentence; or*

(iii) *that more than one sentence of fine is passed in the case, if the total amount of fine imposed does not exceed the amount hereinbefore specified in respect of the case.*

Appeals to Courts of Session how heard. 411. (1) Subject to the provisions of sub-section (2), an appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge...

(2) An Additional Sessions Judge .... shall hear only such appeals as the Sessions Judge of the division may, *by general or special order*, make over to him or as the *High Court may, by special order, direct him to hear.*"

Section 415A.

31.16. No change is required in section 415A.

Section 417 Appeals against acquittal.

31.17. Section 417 deals with appeals in case of acquittal sub-section (1) gives the State Government unrestricted right of appeal against any order of acquittal whether original or appellate, and a similar power is given to the Central Government by sub-section (2) in cases investigated by the Delhi Special Police Establishment. The Courts expect, however, that these powers will be exercised with restraint, and since the Courts are as a rule reluctant to interfere with acquittal orders, such appeals are in fact filed after a good deal of scrutiny. Sub-section (3) permits a private complainant in a case instituted on complaint to appeal against acquittal, but only after obtaining special leave from the High Court : all the appeals under section 417 lie to the High Court. The provisions for acquittal appeals are, in a sense, unusual, but experience shows that in the existing set up

of our Courts they are necessary to avoid miscarriage of justice, and that is why the Code requires that all such appeals must be heard by the High Court. The suggestion[1] that Sessions Judges could be entrusted with the responsibility of deciding such appeals has not attracted us, as it is, we think, only in the High Courts that a uniform standard for dealing with such appeal can be maintained.

It has also been suggested that, apart from the State and the complainant in complaint cases, other interested persons such as the first informer to the police[2] or the victim of a crime[3] or his relatives may be given a right of appeal, in suitable cases. We are unable to agree, as in criminal proceedings we do not want to recognise any interest except that of the public, and of course, to some extent, that of a complainant who actually initiates the proceedings in court. It is, therefore, not necessary to expand the scope of section 417 in that direction.

Section 417 (5).

31.18. Sub-section (5) of section 417 says that if an application for special leave by a complainant has been refused by the High Court, no appeal by the State in that same cases will lie, — and quite properly, for while considering the application for special leave, the High Court will have examined the judgment under appeal and presumably found it good. It has been suggested[4] that there should be an express provision for the converse case, namely, that when an appeal by the State has been dismissed, no application for special leave by a complainant should be competent. This, however, is already a necessary consequence, for, if an appeal has been dismissed, no question of admitting or considering another appeal on the same matter can arise, and it is unnecessary to burden the code with any express provision to that effect.

Further appeal to Bench from decision of a single Judge not necessary.

31.19. Another suggestion for our consideration is a proposal[5] (in a Private Member's Bill), that in case a single Judge of a High Court accepts an appeal against acquittal and convicts the respondent, he should have a right to appeal to two Judges of the same High Court. The idea here is to introduce what in civil case is called a "Letters patent" appeal. We are not convinced that any useful purpose will be served by making any such provision in the Code. It is quite simple for any High Court to provide by rule that acquittal appeals should be heard by the Judges, and the object behind this proposal can be amply served by that arrangement.

Limitation need not be extended.

31.20. The time allowed for an acquittal appeal by the State is now ninety days[6]. Some time ago, it was six months. It has been suggested[7] that the period should be extended, but we are unable to find any justification for it.

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[1] F. 3(2)/55-L.C., Part II, page 231, S. No. 30(t), (Suggestion of a Collector).

[2] F.3(2)/55, Part III, S. No. 69 and F.3(2)/55, Part I. S. No. 72.

[3] F. 3(2)/55, Part I. S. No. 49.

[4] F. 3(2)/55-L.C., Part III, S. No. 52 (Bar Council of Madras).

[5] Bill of Shri K. V. Raghunath Reddy (No. 11 of 1963) clause 8, and Rajya Sabha Debates, 3-9-1965, col. 162. 182-184, 207.

[6] Article 114, Limitation Act, 1963 (Old article 157).

[7] F. 3(2)/55-L.C., Part III, S. No. 50(b). [One I. G. Police].

Provision for appeal to enhance sentence.

31.21. It will be noticed that although section 417 permits the State Government to appeal against an order of acquittal, it does not permit any appeal against a conviction when the punishment imposed may be grossly inadequate. Any error in sentencing can be remedied only by the exercise of the revisional powers of the High Court. This is somewhat unsatisfactory. There seems no reason why the State Government should not be able to appeal against an inadequate sentence, nor why such an appeal cannot be handled by the ordinary court of appeal. Cases of inadequate sentences are frequently occurring, and we consider the ordinary court of appeal should, in each case where the State considers it proper to lodge an appeal, be able to deal with it. We, therefore, propose to add a new section in this Chapter as section 417A, thus :

"Appeal by the Government against sentence.

"417A. (1) *The State Government may, in any case of conviction on a trial held by any Court other than a High Court, direct the Public Prosecutor to present an appeal against the sentence on the ground of its inadequacy.*

(2) *If such conviction is in a case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act,* 1946, *the Central Government may also direct the Public Prosecutor to present an appeal against the sentence on the ground of its inadequacy.*

(3) *An appeal under this section shall lie to the Court to which an appeal by the person convicted in the case would lie under section* 408."

Section 418-Omission recommended.

31.22. Section 418 contains provisions which will be entirely superfluous with the abolition of jury trials. The Statement with which the section opens, namely, that an appeal may lie on a matter of fact as well as a matter of law, derives relevancy from the exception that follows to the effect that, in the case of a jury trial, the appeal shall lie only on a matter of law. The explanation is again with reference to jury trials, making it clear that there could be an appeal in such trials for reducing the sentence on the footing that the alleged severity of the sentence shall be deemed to be a matter of law. Sub-section (2) applies only to trials by jury. We recommended the omission of the entire section 418.

Section 419, 420 421 Jail appeals and appeals presented through pleaders.

31.23. An appeal has to be presented either by the appellant or his pleader as section 419 requires, but in case the appellant is in jail, he can present it to the officer in charge of the jail who has to forward it to the appellate court as is provided in section 420. Such appeals are usually called "jail appeals". Section 421 provides that the appellate court may, after reading the petition of appeal and the copy of the judgment accompanying it, find that there is no ground for interference and on that the court can dismiss the appeal summarily, but before doing so, the Court must afford opportunity to the appellant or the pleader to be heard except in the case of a jail appeal. In other words, a jail appeal can be summarily dismissed without hearing any one, but an appeal presented in person or through a pleader cannot be so dismissed.

Right to present one appeal only.

31.24. It is obvious that the right vested in the appellant is to present one appeal, although there are different methods of presenting it, and strictly speaking, if one method is availed of and one appeal either under section 419 or section 420 is presented, no other appeal can be lodged.

Position when two appeals are presented.

31.25. In practice, however, it appears that frequently both appeals are presented and are dealt with as two appeals about the same matter. Thus, an appellant in jail sends an appeal through the jail superintendent and later a pleader instructed on his behalf presents another appeal against the same order. No practical difficulty arises in, as is normally the case, both the appeals are dealt with at the same time. Sometimes, however, through oversight, one appeal is disposed of and then the other appeal comes up for disposal, causing considerable embarrassment to the appellate Court.[1] At times a jail appeal is summarily dismissed and then an appeal filed through counsel comes up for hearing when some arguable question is raised, and the Court is not certain if it can proceed with the appeal. If the appeal is in the High Court, its inherent jurisdiction can perhaps be invoked,[2] but a large number of appeals lie to the Court of Session where no such solution is available.

Supreme Court's ruling and possible hardship therefrom.

31.26. In a recent case, the Supreme Court[3] has ruled that if a jail appeal under section 420 is summarily dismissed, then after the dismissal of that appeal, no appeal under section 419 is competent. In that particular case, the second appeal was presented after the jail appeal had been dismissed; but it is not unlikely that the Courts will apply the same rule to a pending appeal and hold that if a jail appeal is dismissed summarily, no other appeal, although pending at that time, can be heard. This, we think, may lead to hardship. If we were satisfied that a jail appeal received the same attention by the appellate Court as any other appeal, we would have been content to leave the matter as it stands, hoping that the appellate Courts will so arrange their work that such two appeals are always heard together. We have information, however, that except perhaps in the High Courts, "jail appeals" are not considered with particular care, and in many cases, the grounds of appeal drafted in jail do not attract sufficient attention and, even if there be any point in the appeal, it is liable to be missed. Our law, entitles an accused person to obtain legal assistance and present his case in Court through a competent pleader,[4] and we are anxious that the spirit of this rule should be preserved.

Recommendation

31.27. We therefore propose to make a legal provision that a jail appeal must not be summarily dismissed till the time for filing an ordinary appeal has expired. This will ensure that an appellant wishing to avail of legal assistance will have presented an appeal under section 419 before his appeal, if any, presented under section 420 comes up for disposal. We are further providing that, if in spite of this, a jail appeal happens to be dismissed summarily, that would not debar the Court from considering an appeal under

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[1] *Cf. Sundar Lal*, A.I.R. 1968 All. 329

[2] Section 561A.

[3] *Pratap Singh*, (1961) 2 S.C.R. 509, 512; A.I.R. 1961 S.C. 588.

[4] Section 340.

section 419 on the merits, provided such appeal is otherwise duly presented and the Court is satisfied "that the interests of justice require that it should be heard".

Reason for summary dismissal to be recorded.

31.28. It will be noticed that section 421 authorises the appellate Court to summarily dismiss an appeal without stating its reasons. In the case of High Courts, this causes no difficulty; but in the case of Sessions Courts, it does, as their orders are liable to be revised by the High Court, and it would be very helpful if their reasons existed on the record. We suggest therefore that an appellate Court, other than a High Court, should record its reasons.

Provision of section 421 recommended.

31.29. Section 421 may accordingly be revised as follows :—

"*Summary dismissal of appeal.* 421. (1) *If upon examining the petition of appeal and copy of the judgment received under* section 419 or section 420, the Appellate Court.... considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily :

Provided that—

(a) no appeal presented under section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same; and

(b) *no appeal presented under section* 420 *shall be dismissed summarily until the period allowed for preferring such appeal has expired.*

(2) Before dismissing an appeal under this section the Court may call for the record of the case, but shall not be bound to do so.

(3) *An Appellate Court other than the High Court dismissing an appeal under this section shall record its reasons for doing so.*

(4) *Where an appeal presented under section* 420 *has been dismissed summarily under this section and the Appellate Court finds that another petition of appeal duly presented under section* 419 *on behalf of the same appellant has not been considered by it, that Court may, notwithstanding anything contained in section* 430, *if satisfied that it is necessary in the interests of justice so to do, hear and dispose of such appeal in accordance with law.*"

Section 422.

31.30. Section 422 provides that if an appeal is not dismissed summarily, the Court shall give notice of the appeal to the appellant or his pleader and to the Public Prosecutor, and in case of an appeal under section 411A(2) or section 417, to the accused. If the Public Prosecutor applies, he will be furnished with a copy of the grounds of appeal; but nothing is said about the accused being given such a copy. No mention is made of a private complainant who may have instituted the proceedings in the trial Court. We think it proper that in such cases, he should be entitled to appear. It would also be proper to provide that, along with the notice of hearing, a copy of the grounds of appeal should be

(3) *Where the only ground for appeal from a conviction is the alleged severity of the sentence, the appellant shall not, except with the leave of the Court, urge or be heard in support of any other ground.*"

Appeal against acquittal conviction for a different offence.

31.34. Clauses (a) and (b) of section 423(1) deal with appeals from acquittal and appeals from conviction respectively, and it will be convenient to deal with these two clauses separately. Under clause (a), in an appeal from acquittal, the Appellate Court can, *inter alia*, find the accused guilty. This power is not limited to finding the accused guilty of the particular offence of which the accused was charged or acquitted. Subject to an important limitation (to be presently noticed), this power is wide enough to enable the Appellate Court to find the accused guilty of a different offence.[1]

The suggestion of a Bar Council[2] to the effect that the Appellate Court's power should be expressly restricted to convicting the accused of the offence of which he was charged, is not acceptable to us, because, as pointed out by the Supreme Court in the case noted below,[3] sections 236 and 237 control the exercise of Appellate Court's powers also. That court cannot convict the accused of an entirely different offence, whether the appeal is against acquittal or against conviction.

Power to order re-hearing of appeal.

31.35. The powers of the appellate court, in an appeal from an order of acquittal, are to "reverse such order and direct that further *inquiry* be made, or that the accused be *retried* or committed for trial, as the case may be, or find him guilty, and pass sentence on him according to law." In this connection, the question arises whether the appellate court can, in cases where the appeal is from an appellate order of acquittal, direct a re-hearing of the appeal? The answer depends on the meaning of the expressions "inquiry" and "re-tried". Where the defect is not in the proceedings of the trial court, but in those of the first appellate court, the question becomes material. There is a suggestion of the Madras Bar Council[4] for the insertion of a provision enabling the High Court to direct a re-hearing of the appeal, so as to save the time of the trial court and avoid unnecessary harrassment of the accused, when the mistake lies with the appellate court, owing to its passing a wrong order.

Some decisions hold that the power to order re-hearing of the appeal exists even under the present provisions,[5] while there is one decision to the contrary.[6] In a Madras case,[7] the question was referred to, but not decided, and the order was passed under section 439 read with clauses (a), (c) and (d) of section 423(1). That the High Court can do so in exercise of its powers of revision is not doubted.[8] The High Court can in revision set aside the appellate order of acquittal and direct a re-hearing of the appeal without ordering a "re-trial" of the original case.[9]

1 *Ramaswami* v. *The State*, (1958) S.C.R. 779; A.I.R. 1958 S.C. 56.
2 B.3(2)/55-L.C. Part II, p. 258 (Madras Bar Council).
3 *State* v. *Hardi Narayan* (1962) 2 S.C.R. 934; A.I.R. 1962 S.C. 240; (1962) 3 S.C.R. 416; (1962) 1 Cr. L.J. 287.
4 B.3(2)/55-L.C. Part II, S. No. 52, p. 258.
5 *Ganesh Khanderie*, (1889) I.L.R. 13 Bom. 505, 515; *Chandra Singh*, (1912) 18 Cr. L.J. 737 (Lah.).
6 *Emp.* v. *U/Kodoe*, A.I.R. 1936 Rang 369, 370.
7 *Public Prosecutor* v. *Raver Unitiri*, A.I.R. 1914 Mad. 50, 51.
8 *Raghunath* v. *Pati Ram*, A.I.R. 1937 Nag. 394, 396.
9 *Bachcha Singh* v. *Bachacha*, A.I.R. 1925 Oudh 321.

Such directions to the lower appellate court to re-hear an appeal are issued only in those rare cases where there is a pronounced tendency on the part of the Court to deny to the appellant a reasonable opportunity of being fully heard or to write slipshod judgments without fully discussing all the questions of law and fact that may arise out of the judgment under appeal. We do not consider that an amendment is necessary for this purpose. This may be left to the discretion of the High Court.

31.36. In appeals against convictions, the powers of the Appellate Court are governed mainly by clause (b) of sub-section (1) of Section 423. In this clause, the powers mentioned in sub-clauses (1) and (2) are important.

Appeal against conviction-Reversing finding and ordering re-trial.

When under sub-clause (1) the Appellate Court reverses the finding and sentence, it has two courses opens it may acquit or discharge the accused, or it may order the accused to be re-tried or committed for trial. In an important judgment of the Supreme Court[1] it was held that the character of the appellate proceedings and their scope and extent are determined by the nature of the appeal preferred before the Appellate Court. If an appeal is preferred against the acquittal, and no appeal is filed against the conviction, it is only the order of acquittal which is considered by the Appellate Court. On the other hand, if the order of conviction is challenged and the order of acquittal is not challenged, it is only the order of conviction which is considered by the Appellate Court.

Further, the Supreme Court held that except under section 429, it is not open to the High Court, in an appeal against conviction, to order re-trial of the accused on charges of which the accused had been acquitted by the trial Court, though it could reverse the conviction and order a re-trial for the offence of which the accused had been convicted.

Meaning of "altering the finding".

31.37. As regards sub-clause (2) also, in the same judgment of the Supreme Court, the meaning of the expression "alter the finding" has been discussed at length, and the construction placed on it is that the power to alter the finding is confined to offences for which the accused could have been convicted under sections 236 to 238. Since clause (b) begins with the words "in an appeal from a conviction", the expression "alter the finding", it is emphasised, means "alter the finding of conviction". It does not confer a power to reverse a finding of not guilty because appeals from acquittal are dealt with separately in clause (a). We have referred to the judgment of the Supreme Court in detail because it has set at rest the previous conflict of decisions.[2]

Appeal from conviction for less serious offences implied acquittal of offence charged.

31.38. Situations also arise in which the accused is convicted of an offence less grave than that for which he was prosecuted. In such cases, the view taken is that he is deemed to have been acquitted of the graver offence. Thus, where a person is charged with an offence under section 302 but convicted under section 304 of the Indian Penal Code, there is an implied acquittal of the

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[1] *State* v. *Thadi Narayan*, A.I.R. 1962 S.C. 240; (1962) 2 S.C.R. 904.

[2] *See e.g. Bawa Singh* v. *Emp.* I.L.R. (1942) Lah. 129; A.I.R. 1941 Lah. 455 (F.B.) and *Zamer Qasim* v. *Emp.*, A.I.R. 1944 All. 137, 155, 156 (F.B.).

first offence.[1] If, therefore, the accused appeals against the conviction and the State does not appeal against the acquittal, the Appellate Court cannot "alter the finding" into one of conviction[2] under section 302, Indian Penal Code.

Section 423 (1A) enhancement of sentence of Appellate Courts other than the High Court.

31.39. As a general rule, the Appellate Court hearing an appeal against a conviction has no power to enhance the sentence. But an exception was made by the amendment of 1955. Under sub-section (1A), as inserted by that amendment, where the High Court is the Appellate Court, it can enhance the sentence after giving notice to the accused. The High Court can also enhance the sentence under its revisional jurisdiction.[3]

During our consideration of section 423(1A), the question of giving power to the Sessions Judge (when hearing appeals) to enhance the sentence was raised. It was stated that Magistrates often award very lenient sentences. When the Session Judge, while hearing an appeal from a conviction, especially for an anti-social offence, finds that the sentence is grossly inadequate, he is required to refer the question of enhancement to the High Court, causing undue delay and additional expense to the parties concerned.

It may be mentioned here, that in the 14th Report,[4] while proposing widening of the revisional jurisdiction of the Sessions Judge, petitions against acquittal and petitions for enhancement of sentence were specifically excluded from the scope of the proposal. But, it appears to us that the arguments set out in that Report for widening the revisional jurisdiction of Sessions Judges apply as much to the enhancement of sentence as to the widening of revisional jurisdiction. Power to hear appeals against acquittal is an extraordinary power, and it is understandable that it may not be proper to give it to a lower court. But the power of enhancement of sentence does not stand on the same footing. Sessions Judge and Chief Judicial Magistrates may be safely entrusted with this power, and the High Court need not be troubled by frequent references.

We recommend that sub-section (1A) of section 423 may be omitted and clause (b) of sub-section (1) amended, conferring on all appellate courts a power to enhance the sentence after giving the accused an opportunity of showing cause against such enhancement.

Power to appeal for enhancement of sentence.

31.40. We have proposed above[5] the insertion of a new section under which the State Government may, where there is a conviction, appeal on the ground of inadequacy of the sentence. The powers of the Appellate Court in such appeals should be the same as in appeals from a conviction. Accordingly, clause (b) of section 423(1) should begin with the words "in an appeal from a conviction or for enhancement of sentence."

Limit of sentencing powers of the Appellate Court.

31.41. While on the question of sentence, we may refer to the recent judgment of the Supreme Court where it was held[6] that the Appellate Court cannot impose a higher sentence than

[1] *Kishan Singh* v. *Emp.* 55 I.A. 390; I.L.R. 50 All. 722; A.I.R. 1928 P.C. 254.

[2] *Tara Chand* v. *The State*, A.I.R. 1962 S.C. 130, 131 paragraph 5.

[3] Section 439(6).

[4] 14th Report, Vol. 2, p. 826, paragraph 6.

[5] *See para.* 31.21.

[6] *Jagat Bahadur* v. *State of M.P.*, (1966) S.C.R. 322; A.I.R. 1966 S.C. 945.

that which could have been inflicted by the Court of the first instance. We recommend the insertion of an express provision in the section giving statutory recognition to this decision in order that the point may not be lost sight of by the lower appellate courts.

Section 423(2).

31.42. Sub-section (2) of section 423 may be omitted, as it relates to trials by jury.

Revision of section 423 recommended.

31.43. Section 423 may accordingly be revised as follows :—

Powers of Appellate Court in disposing of appeal.

"423. After hearing the appeal, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

(a) in an appeal from an order of aquittal, reverse such order and direct that further inquiry be made, or that the accused be retried or committed for trial as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction *or for enhancement of sentence*—

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, *alter the nature, or the extent, or the nature and the extent, of the sentence, whether so as to enhance or to reduce the same* :

(c) in an appeal from any other order, alter or reverse such order;

(d) make any amendment or any consequential or incidental order that may be just or proper;

Provided that in an appeal from a conviction, the sentence shall not be enhanced under sub-clause (iii) of clause (b) unless the accused has had an opportunity of showing cause against such enhancement;

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.

Section 424 Is order dismissing appeal summarily a judgment

31.44. With reference to section 424, we considered the question whether an order under section 421 dismissing an appeal summarily is or is not a "judgment" for the purposes of section 424. In a Supreme Court decision[1] relating to section 439(6), the majority view was that the order under section 421 was a "final order", while S.R. Das J. (as he then was) described it as a "judgment". In another Supreme Court decision[2] holding that the summary dismissal of a jail appeal was a bar to hearing a represented appeal, the dismissal of an appeal under section 421 was described as an "order", and held to be "final" within the meaning of section 430. In yet another Supreme Court case[3], holding that a high Court was not bound

[1] *U. J. S. Chopra*, (1955) 2 S.C.R. 921; A.I.R. 1955 S.C. 633 (*Bhagwati and Immam JJ*) (Das J. contra).
[2] *Pratap Singh*, (1961) 2 S.C.R. 509, 512; A.I.R. 1961 S.C. 586, 588.
[3] *Chittaranjan*, A.I.R. 1963 S.C. 1696, 1700.

to give reasons for the summary dismissal of an appeal, section 421 did not fall to be considered.

The question whether, in the case of a dismissal of an appeal under section 421, a "judgment" should be recorded by Courts other than High Courts, has not yet been settled by the Supreme Court. There has been in the past a sharp conflict of judicial opinion[1] as to whether an order under section 421 was a "judgment" or not. It is, however, unnecessary to discuss them at length, since the amendment we have suggested above[2] in section 421 (requiring every Appellate Court, other than a High Court, to record reasons for the order) will render the question academic.

Section 424, proviso.

31.45. It was suggested by a High Court Judge[3] that the proviso to section 424 should be amended requiring the appellant to remain in attendance in court on the date on which the appellate judgment was delivered. It was said that this would facilitate his recommittal to jail promptly if his appeal was dismissed. We do not, however, consider it necessary to make such an amendment. The proviso to section 424 is in the nature of an exception to the general rule enacted in section 366(2). It is always open to the Appellate Court to direct the attendance of the appellant on the date fixed for the judgment or to dispense with his attendance if it is not required. The existing law is thus quite sufficient to meet the purpose.

Section 425.

31.46. Section 425(1) requires the order of the High Court on appeal to be certified to the lower court when it is that of a Magistrate, through the District Magistrate. No amendment in this respect has been made by the Bombay and Punjab Acts by which separation was introduced, but it seems to be desirable that where the order appealed against was recorded or passed by a judicial Magistrate, the order of the High Court should be sent through the Chief Judicial Magistrate and where it was by an Executive Magistrate, the High Court's order should be sent through the District Magistrate. The second sentence of s. 425(1) may be revised to read as follows :—

> "If the finding, sentence or order was recorded or passed by a Judicial Magistrate, other than the Chief Judicial Magistrate, or by an Executive Magistrate, other than the District Magistrate, the certificate shall be sent through the Chief Judicial Magistrate or the District Magistrate, as the case may be."

Section 426.

31.47. No changes are needed in sub-sections (1) and (2) of section 426.

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[1] *Rash Behari Das* v. *Bal Gopal*, (1893), I.L.R. 21 Cal. 92, 95; *Q.E.* v. *Bhimappa*, (1894) I.L.R. 19 Bom. 732, 734; *Emperor* v. *Lal Bihari*, (1916) I.L.R. 38 All. 393, 394; *State* v. *Kalu*, A.I.R. 1952 Madhya Bharat 81, 90.

[2] *See* paras; 31.28 *and* 31.29.

[3] F. 3(2)/55-L.C. Part II, S. No. 33(a), p. 126.

With reference to sub-section (2A), the following suggestion[1] of the Ministry of Home Affairs was duly considered by us :—

> "It has been brought to the notice of the Government of India after the amendment of sec. 426(2A) in 1955 that the power of courts in respect of grant of bail is restricted only to bailable offences. This often leads to anomalous positions. A Court which sentences an accused to two years rigorous imprisonment, e.g., for cheating, has power to release him on bail pending orders of the Appellate Court, but it has no power to release on bail an accused convicted e.g., for theft, though the sentence may be only for one month. In the case of persons accused of non-bailable offences the court has discretion to release an accused on bail unless the offence is one punishable with death or life imprisonment. It has been suggested that same discretion should be allowed to courts exercising powers under sec. 426(2A). This matter was considered when the Code was being amended in 1955, and it was considered that sub-section 2(A) of section 426 be amended with a view to authorise the convicting court to release the convicted person on bail for a short period, not exceeding 14 days, in order to enable him to appeal and obtain an order of bail from the Appellate Court provided that—
>
> (1) such a convicted person was on bail on the date of his conviction; and
>
> (2) his sentence of imprisonment is not more than two years.
>
> This proposal however did not find a place in the amended Code. The proposal is referred to the Law Commission for their consideration.
>
> It has also been pointed out that the wording of the section 426(2A) is somewhat ambiguous, as it refers to persons sentenced to imprisonment and nothing is said about the persons sentenced to fine and imprisonment. It has been stated that some courts have interpreted that the section does not apply to cases in which a person is awarded both fine and imprisonment. The Law Commission will, no doubt, consider whether any amendments are required to the section to remove this ambiguity."

We consider that after conviction there is no justification for making a distinction between bailable and non-bailable offences, and we recommend that for the purposes of sub-section (2A) bailable and non-bailable offences should be dealt with on the same footing. We are, further, of the view that sub-section (2A) should apply only where imprisonment upto one year is ordered (whether for a bailable or non-bailable offence). The two years' limit (suggested by the Home Ministry) is, in our view, unduly high. An Appellate Court would

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[1] Govt. of India, Ministry of Home Affairs. F.3(2)/55-L.C., S. No. 27, Home Ministry File No. 14/8/57-Judl. II.

not ordinarily release the appellant on bail, where he has been sentenced to imprisonment for two years. We recommend that the opening clause of the sub-section may be amended to read—

> "When any person **** is sentenced by a Court to imprisonment *for a term not exceeding one year,* and an appeal lies from that sentence . . . ."

In our view this sub-section does not exclude cases where in addition to imprisonment, a sentence of fine also is awarded and hence we suggest no alteration in that respect.

Section 426(2B).

31.48. Sub-section (2B) was inserted in 1945, when special leave could be granted only by the Privy Council which was far away. The Adaptation Order of 1950 substituted "Supreme Court" for "Privy Council" without considering whether there is any practical need for the provision. The Supreme Court is not far away, and when the party has taken the trouble and incurred the necessary expense in obtaining special leave from the Supreme Court, he could easily request that Court, while granting special leave, to give appropriate interim relief. We recommend the omission of the sub-section (2B).

We have also considered the suggestions[1-2] to amend sub-section (2B) enabling the High Court to grant interim relief to a person during the interval between the date of the dismissal of his appeal by the High Court and the date of grant of special leave by the Supreme Court. In our view any such widening of the scope of the sub-section is neither necessary nor desirable. With the quick means of transport available nowadays, it should not be difficult for a party to approach the Supreme Court and obtain appropriate interim relief without delay.

Application of section 426 to security cases.

31.49. There is a sharp conflict of judicial opinion as regards the applicability of section 426 to persons who have been directed to execute bonds for keeping peace or maintaining good behaviour under sec. 118 and to those who have been committed to prison on failure to execute such bonds. The cases[3] noted below may be seen. It is unnecessary to discuss the relative merits of those decisions. An order under sec. 118 undoubtedly affects the liberty of a subject, and we consider it proper that during the pendency of an appeal against that order, the Appellate Court and the High Court should have power to stay the execution of the order and, if the appellant is in custody, to direct his release on bail. It is true, as pointed out by a High Court Judge[4] that there should be some safeguard for keeping peace or maintaining good behaviour when the appellant is on bail. This can be provided by requiring

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[1] *Gore Lal* v. *State*, A.I.R. 1958 All. 667, 672.

[2] F.3(2)/55-L.C., S. No. 8, 26. (Home Ministry file No. 16/16/56-J.II). (Suggestion of the Ministry of Home Affairs regarding grant of bail to person to whom certificate of fitness for application has been granted).

[3] *Jagir Singh* v. *Emp.* A.I.R. 1930 Lah. 529 (Tapp J.); *Charan Mahto* v. *Emp.*, A.I.R. 1930 Pat. 274. (Macpherson and Dhavle JJ.); *Katwaroo* v. *Emp.*, A.I.R. 1932 All. 680; *Ram Nath* v. *Nanak Chand*, A.I.R. 1932 All. 686; *Darsu* v. *Emp.* I.L.R. 57 All. 264; A.I.R. 1934 All. 845 (Bennett J.) : *Emp.* v. *Masuria*, A.I.R. 1936 All. 107, 109.

[4] F. 3(2)/55-L.C. Part II, S. No. 33(a).

the interim bail bond in such cases to be of the same type as Forms X and XI of Schedule V, with slight alterations so as to provide also for his appearance on the date fixed by the Appellate Court. It is, however, expected that before accepting such bail bond, the Court will satisfy itself not only about the solvency of the bailor and the sureties but also about their power, to control the actions of the appellant.

We recommend the addition of a sub-section to section 426 as follows :—

> "(4) *When any person is ordered to give security for keeping the peace or for maintaining good behaviour under section* 118, *the provisions of sub-sections* (1) *and* (2) *shall, so far as may be, apply in relation to such person as they apply in relation to a person convicted of an offence.*"

Section 427

31.50. No change is needed in section 427 except the omission of the reference to "section 411A, sub-section (2)".

Section 418

31.51. With reference to section 428, it was pointed out that the Sessions Judge, sitting in appeal from a judgment of the Assistant Sessions Judge, has no power to direct the latter to record additional evidence. He can either record it himself, or direct a Magistrate to do so. We do not think that the position requires any change. Such instances would be rare, and there is no anomaly if the function of recording evidence is entrusted to a Magistrate. Moreover Magistrates are available in many outlying places where an Assistant Sessions Judge is not posted. It will be more convenient and less expensive to the parties if they are required to bring their witnesses before the nearest Magistrate rather than before the Assistant Sessions Judge.

Section 429
Meaning of the "case."

31.52. Section 429 is intended to provide for a contingency where a Bench of two Judges of a High Court are equally divided in their opinion regarding an appeal heard by them. The "case" is required to be laid before a third Judge, and the judgment or order shall follow his opinion. There is a sharp difference of judicial opinion regarding the true scope and content of the word 'case'. Does it include the entire appeal or is it restricted only to those charges in respect of which difference of opinion has arisen? Is it restricted only to those convicted or acquitted persons regarding whom the Judges have differed? Will it also apply to those instances where, though the two Judges may agree about the final order to be passed, yet they may differ in respect of the findings ? Thus, one Judge may desire to acquit the accused on the ground that he exercised the right of private defence, whereas his colleague may be inclined to acquit on the ground that the prosecution has failed to establish its case beyond reasonable doubt. The Allahabad and Calcutta decisions, where these questions have been discussed, are cited below.[1]

Explanation of term not desirable.

31.53. We are unable to accept a suggestion[2] that an Explanation should be inserted to clarify that the expression "case" means only the points in respect of which the Judges are divided.

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[1] *Subedar* v. *State*, A.I.R. 1956 All. 529, 538, 539 *Subedar Singh* v. *Emp.*, A.I.R. 1943 All. 272 *Nemai* v. *State*, A.I.R. 1966 Cal. 194.

[2] F.3(2)-55-L.C. Part II. S. No. 33(a)—Suggestion of a High Court Judge.

In our view, it is better to leave this question to the discretion of the Bench hearing the case, rather than enact a rigid statutory provision on a subject which primarily pertains to, and can be more satisfactorily dealt with by, the practice of the High Courts.

Is third Judge bound to accept concurrent view of referring Judges on other points ?

31.54. In some cases there has been a discussion as to whether the third Judge ought to consider himself bound by the views expressed by the two referring Judges, on points on which there was no difference between the two Judges. Ashutosh Mookerjee J. had observed in one case[1], that the term "case" in section 429 is the case of the prisoner as to whom the Judges are equally divided in opinion, and not merely the point or points on which they are so divided. But in a later Calcutta case,[2] Woodroffe J. had expressed the view (*obiter*) that the third Judge could not differ with the two Judges on a point agreed upon by them, unless there were strong reasons for doing so. Our attention was also drawn, in this connection, to the corresponding provisions in the Letters Patent,[3] and in the Code of Civil Procedure,[4] under which the view of the majority of all the Judges, including those who first heard the case, is to prevail.

The subject is one in respect of which a general rule applicable to all cases may not be advisable. The position in criminal cases is different from that in civil cases, where clearcut issues can be framed, and a demarcation of the points of difference can be done more easily. This is not practicable in most of the criminal cases where the findings are closely inter-mixed and not easily severable. The position as now understood is that the third Judge brings to bear his independent opinion.[5] As was observed by the Supreme Court,[6] it is for the third Judge to decide on what points he shall hear arguments if any, and this postulates that the third Judge is completely free in resolving the difference as he thinks fit.

In our view, no change in the Code is needed on this point. It should be left (as at present) to the discretion of the third Judge to decide how far he will or will not disturb the view expressed unanimously by the two Judges on particular points.

Possible anomaly in certain cases.

31.55. But there is one aspect of the matter which requires consideration. If the opinion of the third Judge is to prevail, an anomalous position may occasionally be created. For example, in an appeal against conviction, Judge A may be for acquitting the accused; Judge B may be for convicting the accused for a lesser offence; Judge C (the third Judge to whom the matter is referred under section 429), may be for maintaining the conviction. In such cases, the third Judge's view would be really a minority view, and yet would prevail.

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[1] *Sarat Chandra* v. *Emp.*, (1911) I.L.R. 38 Cal. 202.

[2] *Grande Venkata Ratnam* v. *Corporation of Calcutta*, A.I.R. 1919 Cal. 862.

[3] See clause 36, Letters Patent of Bombay, Calcutta and Madras High Courts.

[4] Section 98, Code of Civil Procedure, 1908.

[5] *Cf. Repana*, A.I.R. 1961 A.P. 70.

[6] *Dharam Singh* v. *State*, (1962) Suppl. 3 S.C.R. 769, 772, 782, 783 see also *Babu* v. *State*, A.I.R. 1965 S.C. 1467, 1470.

31.56. It may be noted that efforts have been made in the past to amend section 429. A Bill was introduced in 1914 to substitute, for section 429, the following section— Amendment of section 429 considered in the past.

> "When the Judges composing the Court of Appeal are equally divided in opinion, *the case shall be reheard before them* and another Judge of the Court, and the judgment or order shall follow the opinion of the majority of the Judges so re-hearing the case."[1]

The reasons for the amendment were thus stated :

> "At present when the Judges composing the Court of Appeal in the High Court are equally divided in opinion the case is laid before a third Judge. In order to prevent the possibility of the third Judge interferring with the unanimous decision of the previous two on any point of the case, it is provided that the whole case should be re-heard before a third Judge and the judgment given in accordance with the opinion of the majority." This matter was considered by the Lowndes Committee which suggested[2] that, instead of the amendment mentioned above, the following proviso be added to section 429 :—
>
> "Provided that, if either of the Judges composing the Court of Appeal so require, the appeal shall be re-heard before them and another Judge, or if the Chief Justice or the Judicial Commissioner so directs, before three other Judges and the judgment or order shall follow the opinion of the majority of the Judges so re-hearing the case."[3]

The Committee stated that they would prefer to retain section 429 in its existing form, but would add a proviso on the lines of the amendment proposed by them to section 378 and for the same reasons.[4] This amendment, however, was not accepted by the Select Committee which considered the Bill in 1922. "In view of the fact that the difficulty which the amendment is intended to meet is probably of rare occurrence", they preferred to leave the law as it was.[5]

31.57. Subsequent experience[6] has, however, shown that the problem is not so rare as was thought in 1922. While in most cases, the procedure laid down in section 429 is satisfactory, it has led to difficulties in special cases. We think it is desirable to provide that if either of the Judges first hearing the appeal so requires, or if after reference the third Judge so requires, the case should be re-heard and decided by a Bench of three or more Judges. It will be for the Chief Justice to decide who will Amendment recommended.

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[1] Gazette of India, (1914), Part V, page 111.

[2] Gazette of India, (1914), Part V, page 111.

[3] Gazette of India, (1917), Part V, page 107.

[4] *See* para. 27.9 above.

[5] Gazette of India, (1922), Part V, pages 263 and 264; Report of the Select Committee, under clauses 99 and 113.

[6] *See* the case-law discussed in *Subedar* v. *The State*, A.I.R. 1956 All. 529.

constitute the fuller Bench. We recommend that section 429 be amended on exactly the same lines as section 378,[1] to read as follows :—

Procedure where judges of court of appeal are equally divided

429. *When any such appeal is heard before a Bench of two Judges, and they are* . . . divided in opinion, *the appeal* with their opinions . . . . shall be laid before another Judge of the same Court, and that Judge, after such hearing . . . . as he thinks fit, shall deliver his opinion, and the judgment or order shall follow that opinion :

Provided that if either of the Judges constituting the Bench, or where the appeal is laid before another Judge under this section, that Judge, so requires, the appeal shall be re-heard and decided by a Bench of three or more Judges.

Section 430—Meaning of "Final"

31.58. Section 430 reads as follows :—

"Judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in section 417 and Chapter XXXII."

The exact scope and significance of the provision that judgments and orders shall be "final" has been the subject of interesting discussion in courts, and much ingenuity has gone into its interpretation. Primarily, the object of the provision would appear to be to make it clear that there is no further appeal from an appellate decision, re-emphasising the principle of section 404. But section 430 has apparently been regarded as of some relevance in emphasising also that a review or reconsideration of an appellate decision is not permissible, though the language of section 430 is different from that of section 369 which is the main provision prohibiting a review. Section 430 has also been construed as emphasising that the summary disposal of an appeal bars the matter being re-opened, at least where no question of jurisdiction is involved[2].

Cross appeals.

31.59. Though section 417 has been expressly mentioned in section 430, controversy has arisen as to whether the final disposal of an appeal against conviction bars the hearing of an appeal against acquittal arising out of the same case. The decisions of the Punjab High Court and the Gujarat High Court noted below may be seen.[3-4] It is desirable to clarify the law by inserting an explanation. In view of the new provision we have recommended giving the Government a right to appeal against the inadequacy of sentence.[5] This explanation has also to provide that the disposal of the appeal of the accused against his conviction shall not bar the hearing of the appeal of the Government regarding sentence. Further, it is necessary to make

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[1] *See* paras 27.6, 27.7.

[2] *See* discussion as to section 421.

[3] *State* v. *Mansha Singh*, A.I.R. 1958 Punjab 233 (F.B.).

[4] *State* v. *Diwanji*, A.I.R. 1963 Gujarat 21, 27, paragraphs 13, 15 and 16 (D.B.).

[5] Section 417A (Proposed).

it clear that section 30 does not affect the new provision[1] proposed by us whereunder, notwithstanding the summary dismissal of a jail appeal, the power of the appellate court to hear a represented appeal is saved.

Amendment recommended.

31.60. Section 430 may be re-drafted as follows :—

Finality of judgments and orders on appeal.

"430. Judgments and orders passed by an Appellate Court upon an appeal shall be final, except in the cases provided for in section 417, *sub-section* (4) *of section* 421 and Chapter XXXII.

Provided that notwithstanding the final disposal of an appeal against conviction in any case, the Appellate Court may hear and dispose of, on the merits—

(a) *an appeal against acquittal under section* 417, *arising out of the same case, or*

(b) *an appeal for the enhancement of sentence under section* 417*A, arising out of the same case, except where the question of enhancement has already been considered by the Court in the appeal against conviction.*[2]"

Section 431—principle underlying.

31.61. Section 431 deals with the abatement of appeals. The section deals in the first part with appeal against acquittals, and in the second part with other appeals under the Chapter, but excluding an appeal from a sentence of fine. The first class of appeals abates on the death of the accused, and presents no difficulty. The second class of appeals finally abates on the death of the appellant, except an appeal from a sentence of fine. A sentence of fine does not abate on the death of the person sentenced, as it is not a matter which affects a person only, but affects his property. This principle was enacted in the section to override an earlier decision of the Bombay High Court[3] on the Code of 1882, holding that the appeal of the person sentenced by the Sessions Judge to imprisonment and fine abated on his death during appeal.

Decision of Supreme Court following the English rule.

31.62. In an appeal to the Supreme Court under article 136 of the Constitution in respect of a sentence of imprisonment for life, the appellant died during appeal and his legal representatives sought leave to continue the appeal. The Supreme Court refused to grant leave, on the principle that such a sentence would not affect his property.[4] Though section 431 did not apply in terms to the case, the Court said that it would not recognise a kind of interest which the legislature had not recognised. The English rule that law courts do not recognise any interest other than pecuniary interest seems to be the basis of this decision. Though in a majority of cases, where the appellant, who is sentenced

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[1] Section 421(4).

[2] *See* section 423(1)(b).

[3] *In re Nabi Shah*, (1894) I.L.R. 19 Bom. 714 (Jardine and Ranade JJ.).

[4] *B. Gajapathi Rao* v. *State of Andhra Pradesh*, A.I.R. 1964 S.C. 1645, 1647, 1653, paragraphs 3, 4, 5, 18; (1964) 7 S.C.R. 25.

to imprisonment, dies during the pendency of the appeal, the interest of his legal representatives in the appeal may be purely sentimental, there are exceptional cases, where the interest may also be pecuniary. Thus, if the conviction is on a charge of murder of a near relation, whose heir or one of whose heirs is the alleged murderer, he (if the conviction is not set aside) will be disqualified from inheriting his property.[1-2] If he dies during the pendency of the appeal, his heirs have a pecuniary interest in prosecuting the appeal. If the appeal succeeds, their right of inheritance to the property of the deceased through the appellant will be saved.

So far as revision is concerned, it has been held by the Supreme Court[3] that the High Court can exercise the power of revision in respect of an order made against the accused person even after his death. The decision of the Madras High Court[4] cited below may not be correct in view of the decision of the Supreme Court which does not appear to have been cited before that High Court.

Amendment suggested in a private Member's Bill.

31.63. An amendment to section 431 was suggested in a private Member's Bill[5] as follows :—

"11. Section 431 of the principal Act shall be re-numbered as sub-section (1) thereof and—

(i) in the sub-section as so renumbered, after the words "except an appeal from a sentence of fine" the words and figures "and an appeal under section 417" shall be inserted;

(ii) after the section as so re-numbered, the following sub-section shall be inserted, namely,—

"(2) On the death of the appellant, an appeal under sub-section (3) of section 417 may be prosecuted by any aggrieved person with the permission of the court to which an appeal lies."

The reasons for the amendment were elaborately explained by the mover of the Bill[6], but we need not quote them in full.

Amendment recommended.

31.64. The main object of the amendment was to provide a machinery whereby the children or the members of the family of a convicted person who dies during appeal could test the conviction and get rid of the odium which would otherwise attach to them. We think that the principle of the amendment is eminently sound, and recommend that the law should be amended accordingly. We would, however, give the right to continue

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1 Section 25, Hindu Succession Act, 1956.

2 As to Muslim law, see Mulla, Muhammadan Law, (15th Edn.) article 58.

3 *State of Kerala* v. *Naravani Amma,* (1962) Supp. (I) S.C.R. 63; A.I.R. 1959 S.C. 144, 148, para 7.

4 *Balasubramania Mudaliar* v. *Doraikannu Ammal,* A.I.R. 1966 Mad. 154.

5 Shri K. V. Raghunatha Reddy's Bill (The points made in the Bill have been referred to the Law Commission).

6 Rajya Sabha Debates, 3rd September, 1963, columns 185 to 187.

the appeal not to an "aggrieved person" (as was proposed in the amendment), but to near relatives, *viz.* the parents, spouse, children, brother and sister of the deceased appellant.

We would also provide a time-limit within which the near relative should seek the leave of the appellate court to continue the appeal. The new section[1] recommended by us as to appeal by the Government for enhancement of sentence may also be included in the proposed amendment. Reference to section 411(2) may be omitted, as it is unnecessary now.[2]

Section 431 may, in the light of the discussion above, be amended to read as follows :—

Abatement of appeals

"431. (1) Every appeal under . . . . section 417 or *section* 417*A* shall finally abate on the death of the accused.

(2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant :

Provided that where the appeal is against a conviction and sentence of imprisonment and the Appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the appellate court for leave to continue the appeal; and if leave is granted, the appeal shall not abate.

Explanation—In this section, "near relative" means a parent, spouse, lineal descendent, brother or sister."

Appeals to the Supreme Court under Article 134 of the Constitution.

31.65. Before finishing with this Chapter on appeals, we have to consider a suggestion with reference to Article 134(1)(a) of the Constitution. This provides that an appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court if the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death. In a Private Member's Bill[3] recently introduced in Parliament, it is proposed that this very limited jurisdiction of the Supreme Court should be enlarged to cover cases where the High Court has, after reversing an order of acquittal, sentenced a person to imprisonment for life or for ten years or more. This Bill also proposes an identical enlargement of the appellate jurisdiction of the Supreme Court under Article 134(1)(b).

Constituent Assembly Debates on Article 134.

31.66. A study of the Constituent Assembly Debates on article 134 of the Constitution shows that initially the idea of the Constitution-makers was *not* to confer on the Supreme Court any right of appeal in criminal matters except by special leave. The Supreme Court was to have only the jurisdiction which the Privy Council used to have in criminal matters, namely, to intervene when it felt there was a miscarriage of justice, and to exercise this jurisdiction on the basis of a special leave to appeal. Subsequently, two exceptions were made and incorporated in

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[1] Section 417A.

[2] See para 31.10 above.

[3] Bill No. 81 of 1968 by Shri Anand Narain Mulla, M.P.

sub-clauses (a) and (b) of clause (1) of the article. Though a number of suggestions were made that the Supreme Court should have a considerable appellate jurisdiction over the High Courts in criminal matters, they were all turned down by the Constituent Assembly. It decided to leave any such proposal to Parliament to consider in due course and, if necessary, to legislate under clause (2) of the article.

Commission's view on proposed enlargement of Supreme Court's jurisdiction.

31.67. The High Court has thus been made the final court in criminal matters subject to two very limited exceptions. The first is that if the High Court on appeal reverses an order of acquittal of an accused person *and* sentences him to death, he has a right of appeal to the Supreme Court. The obvious intention is to restrict such appeals broadly to capital offence cases. Even where the man has been acquitted by the trial court of a capital offence and on appeal the High Court finds him guilty but sentences him to imprisonment for life instead of death, article 134(1)(a) does *not* give him a right of appeal. We feel that this further limitation is too stringent and not easily justifiable and that the convicted person sought to have a right of appeal in such cases. It has to be remembered that their number is bound to be much larger than the number of cases in which the death sentence is passed by the High Court *after* setting aside an order of acquittal by the Court of Session.

We, however, do not think it would be wise to extend further this right of appeal to cases where the High Court after reversing an order of acquittal sentences the accused person to imprisonment for ten years or a longer period. Offences for which the law prescribes a punishment of ten years' imprisonment or more are quite numerous, and if the proposal in the Bill is to be accepted, it will certainly lead to a large increase in the number of appeals to the Supreme Court making it, more or less, an ordinary court of second appeal in criminal matters. In our opinion, the High Courts' position as the final court in all criminal matters, subject to appeal only in exceptional circumstances should be maintained. We may mention here that in an earlier Report[1] the Law Commission did not agree with a proposal to extend the appellate jurisdiction of the Supreme Court to all cases where the death sentence had been awarded and confirmed by the High Court. They stated that "for over a century such cases have been dealt with by the High Courts subject to the superintendence of the Privy Council under its special leave jurisdiction and there is no reason why the High Court should not continue to deal with such cases in the same manner."

New section proposed.

31.68. We accordingly propose the following new section :—

"417B. Where a High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to imprisonment for life, he may appeal to the Supreme Court."

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[1] 14th Report, Vol. I, page 52.

31.69. Cases of the type mentioned in article 134(1)(b) are of such rare and infrequent occurrence that, apart from principle, it will not make any material difference whether its scope is widened to include cases where the High Court sentences the accused to imprisonment for life or for a long term or even for a short period. We have, therefore, recommended above that any person convicted in a trial held by a High Court may apeal to the Supreme Court unless the sentence passed by the High Court is one of imprisonment for a term not exceeding six months or of fine not exceeding one thousand rupees.

Jurisdiction under article 134 (1) (b).

[1] See paras 31.10 and 31.12 above.

CHAPTER XXXII

REFERENCE AND REVISION

Introductory.

32.1. Ordinarily, the judgment or order of a criminal court is open to correction only appeal; but all such orders are not under the law appealable, and to avoid the possibility of any miscarriage of justice, in such cases, another process called 'revision' has been devised by the Criminal Procedure Code, and detailed rules governing the exercise of the reversional power are contained in sections 435 to 440.

Section 432(1).

32.2. Before, however, considering those powers, it is necessary to mention two other provisions contained in section 432 which enable an inferior court to consult the High Court on a matter of law in certain circumstances. Sub-section (1) of that section provides that if a criminal court (not being a High Court) has to decide whether a particular enactment is constitutionally valid, and feels that it is not, but finds that neither the High Court to which the court is subordinate nor the Supreme Court has pronounced on that enactment, the court should make a reference to the High Court for the decision of that question. The intention here is that the validity of laws possibly in conflict with the Constitution should be decided authoritatively and quickly. This is a satisfactory method, although of course not many occasions arise for the adoption of this course.

Section 432 (2).

32.3. Sub-section (2) of section 432 provides that a Presidency Magistrate may refer any question of law arising before him to the High Court for decision. Other Magistrates and courts have no such power to consult the High Court. The reasons for confining this method to the Presidency Magistrate are that their judgments are directly appealable to the High Court and many judgments are not appealable at all; and, apart from this, these courts are located in the same place as the High Court. It has been said that this distinction between Presidency Magistrates and others should discontinue, the suggestion being that all courts should have the power of consulting the High Court on questions of law. We are satisfied that such a course would place too heavy a burden on the High Courts, without any corresponding advantage. The reference to "Presidency Magistrate" will be replaced by "Metropolitan Magistrate".

Reference by High Court to Supreme Court not necessary.

32.4. Another suggestion[1] requiring more careful consideration is that a High Court should be empowered to refer a question of law to the Supreme Court if the High Court finds that other High Courts have, on that question expressed different views. It does, of course, happen,—and not infrequently—that a particular provision of law is understood by one High

[1] Suggestion of Shri B. C. Sen, Retired Public Prosecutor, Calcutta; F.3(2)/55-L.C. Part II, S.No. 11, and his book "Criminal Trials", pages 299-300.

Court in one sense and by another High Court in a different and possibly opposite sense; and since there are a number of High Courts, differences of opinion on such matters are bound to arise. The argument behind the present suggestion is that conflicting opinions of different High Courts make the law uncertain, and the uncertainty should be quickly resolved at the instance of the High Court itself and not left to the initiative of the parties who may or may not be disposed to approach the Supreme Court. It is, of course, desirable that the law should be certain; but it is even more important that the law should be settled in a satisfactory manner. Our High Courts are competent enough to settle the most difficult questions of law that may arise, and there is no reason to think that they need the assistance of the Supreme Court at every step. That different High Courts may, on occasions, entertain different views on the same matter is inevitable; but we do not consider it such a calamity as the suggestion seems to assume. On the other hand, the entertainment and expression of different views leads to a clarification of the real problem to be solved, and the Supreme Court should be allowed the advantage of considering all the different views when a sufficiently important case actually arises and one or other of the parties feels sufficiently interested to move the Supreme Court. Meanwhile, of course, the law in each State or area subject to the jurisdiction of a High Court remains clear and certain.

Looking at the suggestion from the practical point of view, we feel that, if accepted, it might well flood the Supreme Court with references of this kind, which may have to be decided hastily and somewhat unsatisfactorily. We are, therefore, not disposed to accept the suggestion.

Section 433.

32.5. In section 433 the reference to "the Magistrate" should be replaced by reference to "the Court".

Scheme of revisional powers-sections 435 to 439.

32.6. We then come to the revisional powers. In general terms, the scheme for the exercise of revisional powers, is this. Under section 435, the High Court, the Sessions Judge and the District Magistrate have concurrent power to call for and examine the record of proceedings before a Magistrate, and see if any illegality or impropriety has been committed. (The section also mentions the Sub-divisional Magistrate, but he is now to be deleted from the scheme). If it is found that any complaint has been wrongly dismissed under section 203 or any accused person wrongly discharged, then a further inquiry into the case can be ordered by the examining authority (section 436). Further, if it is found that any accused person should have been committed for trial to the sessions court but has been wrongly discharged, the authority examining the record can order a committal to be made (section 437). In case the illegality or impropriety is of some other kind, the matter has to be considered by the High Court (section 438), and the High Court can make any order it thinks proper. The powers of the High Court under section 439 are very wide; it has all the powers of a court of appeal and may enhance the sentence. The only restriction is that is cannot change an acquittal into a conviction. although of course it can order a re-trial. There is little doubt

that it is necessary that the High Court should have these wide revisional powers, and experience shows that they are being exercised with care and in the interest of justice.

Suggestion to vest powers in Session Courts.

32.7. It has been suggested that some of these powers can be safely entrusted to the Session Courts and that would relieve some of the congestion of work in the High Courts. In the 14th Report,[1] the Law Commission said :

> "A further measure which will relieve congestion in this category of work needs consideration. Could some of the revisional powers now being exercised by the High Courts be entrusted to sessions judges? The Judicial Reforms Committee of Uttar Pradesh[2] recommended that sessions judges should be given full powers to hear and determine all criminal revisions except revisions against orders of acquittal and revisions for enhancement of sentences.
>
> The evidence before us generally favoured the grant of revisional jurisdiction to this extent to the sessions judge. There was general agreement that in most petty matters a party applying for revision labours under a disadvantage in that he has to take the matter to the High Court. The view was also expressed that there was no reason why sessions judges who are entrusted with the trial of every important case and are competent to impose even the penalty of death should not be empowered to deal with minor matters in revision and be required to submit them to the High Court for its final orders. It is anomalous that a sessions judge should be able to deal with and dispose finally an appeal from a sentence passed by a first class magistrate, but that he should not be competent to revise an order passed by a third class magistrate.
>
> We are, therefore, of the view that sessions judges may well be invested with powers to pass final orders in revision in all matters other than petitions against orders of acquittal and for enhancement of sentence."

Commission's view.

32.8. Somewhat similar views have been expressed in some suggestions received by us.[3-4-5] We have given a good deal of thought to this matter, and considered in detail the implications of the recommendation, but we have considerable doubt its practical value. As we have said, the revisional power given to the High Courts is wide; not only are the judgments and final orders subject to examination, but also interlocutary decisions. The High Court is able to maintain one single standard for interference in such matters; but if this power descends to the courts

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[1] 14th Report, Vol. 2, page 826.

[2] Report of the U.P. Judicial Reforms Committee, (1950-51), page 63.

[3] Report of the U.P. Committee for Investigation into the Causes of Corruption (1963), page 55 and pages 242-243.

[4] F.3(2)/55-L.C. Pt. II, E.No. 33 and 35 (Suggestion of two State Governments).

[5] F.3(2)/55-L.C. Pt. III, S.No. 49(a) (Suggestion of a High Court Judge).

of session, it is very doubtful if a uniform standard can be maintained. There is, then, the plain fact that the High Court can and does, by its prestige, make its decisions acceptable to a large number of people, which would not be the case with the courts of session. At the same time, we think that if session courts are allowed to interfere with the proceedings in the magistrates' courts while they are pending, the result would be large number of revision petitions for that purpose. It is true, that a sessions court can, on appeal, reverse the decision of a magistrate of the first class but cannot revise the decision of the third class magistrate. This seeming anomaly, however, loses its point when it is remembered that the decision of a court of session is still open to correction by the High Court, as is the judgment of the Magistrate of the third class. The fact is, that a party who can afford the expense, is generally not satisfied till it has obtained the verdict of the High Court, and the delegation of any power of the High Court to the sessions court might merely mean that the same work will have to be done twice over at two levels. It has to be remembered that no statutory provision can bar the right of a party to approach the High Court for doing justice in a criminal matter; and if, at present, that power of the High Court under articles 226 and 227 of the Constitution is not freely invoked, it is because the revisional power under section 439 of the Code of Criminal Procedure vests in the High Court, and is enough for practical purposes. Nor are we satisfied that criminal revisions form such a large part of the congestion of work in the High Courts that some relief in that respect would justify disturbing the present scheme, which is not shown to have worked unsatisfactorily.

Changes necessary in view of separation of judiciary.

32.9. Because of the separation of the judiciary from the executive, some changes have to be made in the revisional powers of the courts. The Chief Judicial Magistrate will, of course, in respect of the judicial magistrates exercise the powers now vesting in the District Magistrate; but in respect of executive magistrates exercising certain judicial functions, power must remain with the District Magistrate, and we are providing for that. It is not, however, proper that the Magistrate, who will now be an executive officer only, should have the power to finally decide anything. His power will be limited to sending a report to the High Court for decision, with his recommendation. The Sessions Judge, however, will have power in respect of all Magistrates. In the result, section 435 will have to be revised as follows :—

Power to call for records of inferior Courts.

"435. (1) The High Court or any Sessions Judge or *Chief Judicial Magistrate* may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purposes of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court and may, when calling for such record, direct that the execution of any sentence or order be suspended, and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation—All Magistrates, whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 437.

(2) If an application under sub-section (1) has been made either to the Session Judge *or to the Chief Judicial Magistrate,* no further application shall be entertained by the other of them.

(3) *The District Magistrate shall have and may exercise all the powers of the Sessions Judge under sub-section* (1) *in respect of any proceeding before an Executive Magistrate.*

(4) *If an application under this section has been made either to the Sessions or to the District Magistrate, no further application shall be entertained by the other of them.*

Revision of order dismissing a complaint.

32.10. One suggestion made to us regarding section 436 was that, before an order dismissing a complaint under section 203 is disturbed, notice should go to the accused person so that he can urge what he likes in support of the dismissal order. This was sought to be supported by the principle of natural justice. We do not, however, see how such an accused person can be called a "party to the proceedings" at that stage, and the Supreme Court has ruled[1] that it is hardly proper to permit him to intervene in the proceedings. Further, in a number of cases, it will happen that notice to him will mean unnecessary trouble and expense to a person who may be wholly innocent. If a Magistrate has, on considering the facts, found that there is no ground for proceeding against any person and therefore dismissed the compliant summarily, there is hardly any reason for the revising Court to call any one to Court as an accused or as a respondent until of course, after a further inquiry has been made, and that inquiry justifies the issuing of process.

32.11. Only a few formal amendments are required in section 436, 437 and 438, as follows :—

(i) In section 436, for the words "District Magistrate" the words "Chief Judicial Magistrate" shall be substituted.

(ii) In section 437, for the words "District Magistrate" the words "Chief Judicial Magistrate" shall be substituted; for the words "committed for trial" the words "committed to the Court of Session for trial" shall be substituted; and in the proviso for the words "why the commitment should not be made" the words "why the order should not be made" shall be substituted.

(iii) In section 438(1), after the words "Sessions Judge" the words "Chief Judicial Magistrate" shall be inserted.

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[1]*Chandre Deo,* A.IR. 1963 S.C. 1430; (1964) 1 S.C.E., 639.

section 439(3) to be omitted.

32.12. Section 439 empowers to revise any order made by a Criminal Court, and to do so not only if moved by a party or by the Sessions Judge or the District Magistrate, but also on its own motion irrespective of how the order may have come to its notice. Sub-section (3) provides that the Higih Court may not impose any sentence heavier than might have been inflicted by a first class Magistrate, unless the sentence under revision was passed by a Magistrate acting under section 34, in which case there is no such limitation. The ordinary rule in respect of an appellate court is that it cannot impose a sentence heavier than the trial court could have done[1]; and we think that the same limitation should apply when the revisional power of the High Court is exercised. We propose to do this by deleting sub-section (3) from section 439, and thus leaving the High Court with the ordinary powers of an Appellate Court. As all such Courts will have the power to enhance a sentence on proper appeal,[2] the words "and may enhance the sentence" will be omitted from section 439(1).

Section 439(6) to be omitted.

32.13. Sub-section (6) of section 439 says that a person required to show cause why his sentence should not be enhanced is entitled to show that his conviction is unsustainable although he may not have appealed against his conviction. The principle underlying this rule is sound; but as we are separately providing for "enhancement of sentence" through an appeal,[3] this sub-section would be redundent, and we, therefore, propose to omit it.

There was a suggestion[4] that the High Court should have power under section 439 to convert an order of acquittal into one of conviction. We do not think that that would be at all proper. An order of acquittal is, on appeal, capable of being altered to an order of conviction[5], and that is sufficient for dealing with erroneous acquittals.

No other change is necessary in the scheme of revisional powers.

Section 440 finally revised.

32.14. Section 440 may be finally revised to read as follows :—

option of Court to hear parties.

> "440. *Save as otherwise expressly provided by this* Code no party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision *but* the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader....."

Sections 441-442.

32.15. Section 441-442 need no change.

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[1] *Jagat Bahadur*, A.I.R. 1966 S.C. 945, 947; (1966) 2 S.C.R. 822.

[2] See para 31.39 to 31.43 above.

[3] See para 31.39 to 31.43 above.

[4] Home Ministry File No. F. 27/3/55-Judl. II, App. 1, Item 76 (Suggestion of the Inspector General of Police, Orissa).

[5] Section 417.

CHAPTER XXXIV

LUNATICS

Introductory.

34.1. Chapter XXXIV comprising sections 464 to 475 deals with the case of lunatics accused of crime. The procedure to be followed where the accused is unfit to stand trial due to unsoundness of mind is laid down in sections 464 to 468 and 473, while the case of accused persons who are fit to stand trial but has been insane at the time of committing the crime is dealt with in sections 464 to 471. The remaining two sections 474 and 475 contain provisions common to both cases.

Section 464 to 468.

34.2. No changes of substance are required in the first five sections. In section 465, the reference to "commitment" and "jury" will have to be omitted. This section may be revised as follows :—

Procedure in case of person tried by Session or High Court being lunatic.

> "465. (1) If at the trial of any person before a Court of Session or a High Court, he appears to the Court to be of unsound mind and consequently incapable of making his defence x x x, the Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if x x x the Court, x x x is satisfied of the fact, it shall record a finding to that effect and shall postpone further proceedings in the case x x x.
>
> (2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court."

Question of appeal against finding of unfitness to plead considered.

34.3. A question of some importance which arises for consideration in this connection is whether the accused should be given the right to appeal from a finding that he is unfit to stand trial due to insanity.

A plea of insanity is usually taken by the accused. But such a plea can be taken by the prosecution also and if the court upholds the plea, the result may be detention of the accused under section 466. It was suggested before us that in such a case, it is desirable that the accused should be given a right of apeal. It is seen that in England, a recommendation for giving the accused a right of appeal, in such a situation was made by the Criminal Law Revision Committee,[1] and has been carried out by the Criminal Procedure (Insanity) Act of 1964.

In our opinion, however, there is no need for such a provision in India. Almost invariably the plea of insanity is taken by the defence and it can have no grievance if its plea is accepted by the Court. In the rare event of such a plea being raised by the prosecution, and accepted by the Court, the general power of revision provided in the Code will be sufficient to safeguard the interest of the accused. We, therefore, do not recommend any provision for appeal in this matter.

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[1] 3rd Report of the Criminal Law Revision Committee— "Criminal Procedure (Insanity)" (1963), Cmd. 2149, page 12, para 29.

34.4. Section 469 deals with inquiries and trials before Magistrates of an accused person who, though fit to stand trial, is found to have been insane at the time he committed the crime, while section 470 lays down that when such a person is acquitted on the ground of insanity, the finding shall state specifically whether he committed the act alleged. Here also, the question whteher the accused should be given a right of appeal against such a finding has to be considered. Where the accused is declared guilty but insane, he cannot appeal against the finding, because he is acquitted. It was suggested to us that the accused should be given a right of appeal against such a finding. It was stated that there are two special considerations to be borne in mind in this connection. The first is that though the plea of insanity is ordinarily taken by the accused (in which case he would not appeal when the decision is in his favour), it is possible that the prosecution may take the plea, and in such a case, the absence of a right of appeal against the finding of "guilty but insane" may mar his whole life. Secondly, the defence might take not only the plea of insanity, but also a plea of innocence on the merits; and if the plea of insanity succeeds, the accused cannot appeal even if he has been found guilty on the merits. **Section 469 and 470.**

Our attention was drawn, in this connection, to a number of English decisions[1] and it was stated that similar situations can occur in India also. The Criminal Law Revision Committee in England had recommended[2] giving the right of appeal to the accused in such cases and the recommendation has been carried out by the Criminal Procedure (Insanity) Act, 1964.

In our opinion, the power of revision given by the Code is wide enough to cover such cases, and a change in the law is not needed. As we have already stated, cases where courts enter a finding of insanity against the accused except on his own plea are too rare to merit any special provision to cover them.

34.5. Under section 471(1), when a person is acquitted on the ground that he was insane at the time of the commission of the offence and the finding states that the accused did commit the act alleged, the Magistrate or Court shall order such person to be detained in safe custody in such place and manner as the Magistrate or Court thinks fit, and shall report the action taken to the State Government. Under the proviso to the section the detention of the accused in a lunatic asylum must be in accordance with rules made by the State Government. **Section 471.**

An order of the Court delivering the accused to the custody of his relatives appears to be illegal[3] as the law stands at present. The contrary view taken in an earlier case,[4] was based

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[1] *Felstead* v. *R.*, (1914) A.C. 534 (H.L.); *R.* v. *Duke*, (1963) 1 Q.N. 120; (1961) 3 All Eng. Report 737, 738, 739 (C.C.A.); *R.* v. *Jefferson*, (1908) 1 Criminal Appeal Reports 95; *R.* v. *Larkins*, (1911) 6 Criminal Appeal Reports 194; 55 S.J. 501.

[2] Criminal Law Revision Committee, Third Report, "Criminal Procedure (Insanity)", (1963), Cmd. 2149, page 5, paragraph 9.

[3] *Superintendent and Legal Remembrancer* v. *Srish Chandro, I.L.R. 56* Cal. 308; A.I.R. 1928 Cal. 653, 654; *Public Prosecutor* v. *Kandaswami*, I.L.R. 1952 Mad. 485; A.I.R. 1953 Mad. 355.

[4] *A. B. Mahammad* v. *Emp.*, A.I.R. 1922 Mad. 54, 55.

on the language of the section as it stood then, where the word "kept" was used. The word now used is "detained" and implies curtailment of liberty.[1]

It has been suggested that if the person found guilty is sane at the time of acquittal, his friends and relatives should be allowed to keep him, after executing a bond with suitable conclusion for keeping the peace for five years thereafter. Delivery of the convicted person to the relatives is a matter which can, at present, be dealt with under section 475 by the State Government only. The Court can, no doubt, state in its report, that it will be safe to release the accused.[2] But even if the accused is sane throughout the trial, he cannot be released under section 471.

In England, the Criminal Law Revision Committee[3] while observing that the Home Office is in a better position than a Court to investigate questions relating to treatment of the accused, and that in such matters uniformity of practice was desirable, nevertheless recommended that in both cases i.e., when there is a "special verdict" (guilty but insane), and when there is a finding of unfitness to plead, the Court should have a discretion not to make an order for detention if it considers on medical evidence that it is safe for the public to order the immediate release of the accused.

We feel that the recommendations of the English Committee are applicable to Indian conditions also. At least, the mandatory provision in section 471 should be replaced by a provision which would leave some discretion to the Court. The primary object of the detention order under section 471 is rehabilitation of the accused (now acquitted) and to prevent any trouble if he should relapse into insanity. It cannot be denied that the accused will receive more personal attention and care from his own relatives and friends than in a public lunatic asylum; and where his relatives or friends are ready to look after him and also undertake to ensure that he causes no injury to himself or others, there seems no reason why the accused should not be released to their custody. It can, no doubt, be said in favour of the present provision that if it is found after observation in the hospital that the person concerned is not a danger to others, he would be released under section 475. Even then, there should be no objection to a discretion being given to the Court.

We recommend that sub-section (1) of section 471 be revised and amplified, and sub-section (2), which contains a provision common to sections 466 and 471, be made into a separate section, as follows :—

Person acquitted on such ground to be detained in safe custody.

"471. (1) Whenever the finding states that the accused person committed the act alleged, the Magistrate or Court before whom or which the trial has been held, shall, if such

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[1] *Public Prosecutor* v. *Nallyyappa*, I.L.R. (1948) Mad. 827; A.I.R. 1948 Mad. 291.

[2] *Provisional Government* v. *Krishna Gopal Maratha*, I.L.R. 1945 Nag. 551; A.I.R. 1945 Nag. 77, 78.

[3] Criminal Law Revision Committee, Third Report, "Criminal Procedure (Insanity)", Cmd. 2149, pages 13, 14, paras. 30-34.

act would, but for incapacity found, have constituted an offence,—

(a) order such person to be detained in safe custody in such place and manner as the Magistrate or Court thinks fit; or

(b) *order such person to be delivered* to any relative or friend of such person.

(2) No order for the detention of the accused in a lunatic asylum shall be made *under clause (a) of sub-section* (1), otherwise than in accordance with such rules as the State Government may have made under the Indian Lunacy Act, 1912.

(3) *No order for the delivery of the accused to a relative or friend shall be made under clause (b) of sub-section* (1) *except upon the application of such relative or friend and on his giving security to the satisfaction of the Magistrate or Court that the person delivered shall—*

(a) *be properly taken care of and prevented from doing injury to himself or to any other person; and*

(b) *be produced for the inspection of such officer, and at such times and places, as the State Government may direct.*

(4) *The Magistrate or Court shall report to the State Government the action taken under sub-section* (1).

471A. The State Government may empower the officer in charge of the jail in which a person is confined under the provisions of section 466 or section 471, to discharge all or any of the functions of the Inspector General of Prisons under section 473 or section 474." **Power of State Government to empower officer in charge to discharge.**

No changes are required in the remaining sections of this Chapter.

CHAPTER XXXV

PROCEEDINGS IN THE CASE OF CERTAIN OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE

Analysis of chapter.

35.1. Chapter 35 of the Code deals with proceedings relating to certain offences affecting the administration of justice. Having already provided that[1] a criminal court shall not take cognizance of certain offences except on a complaint made by the court concerned, the Code now lays down what procedure the court concerned should adopt when such on offence appears to have been committed. There are, broadly speaking, three types of procedure provided in the Chapter for these offences :—

(i) complaint by the court concerned, dealt with in sections 476, 476A, 476B, 479A and 482;

(ii) commitment to the High Court or Court of Session, after inquiry by the court concerned, provided in sections 478 and 479; and

(iii) punishment by the Court itself, dealt with in section 480, 481, 485, 485A and 486.

As regards the last type of procedure, the specific provisions on the subject are followed by a general rule,[2] providing that in other cases, no criminal court (other than a Judge of a High Court) shall try any person for any offence referred to in section 195, when such offence is committed before itself or in contempt of its authority or is brought under its notice etc. in the course of a judicial proceeding.

It may also be noted that punishment of the offender is not obligatory, and the court is not bound to carry to its conclusion a proceeding initiated under these types of procedure. In certain cases,[3] the court may, in its discretion, discharge the offender or remit the punishment, on his submission to the order or requisition of such court or on apology being made to its satisfaction.

For certain purposes, registering officers appointed under the Indian Registration Act can also be given powers of civil courts[4] under the specified sections.

The offences to which the Chapter applies are, broadly speaking, of three types—(i) perjury; (ii) forgery; and (iii) disobedience to orders of the court or other species of contempt of the authority of the court. Of the three types of procedure which we have mentioned above, the first—complaint to a criminal court—is permissible in all cases, while the second and third types of procedure are permissible for certain specified

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1 Section 195(1), Clauses (b) and (c).

2 Section 487.

3 Section 484.

4 Section 483.

offences—depending upon the gravity of the offence,[1] nature of the offence—i.e. need for prompt action so as to remove obstructions which hinder the progress of the case[2] or the circumstances in which the offence is committed,[3] rendering immediate punishment necessary in order to maintain the dignity and prestige of the court—for example, where offences constituting certain types of contempt are committed in the view or presence of the court.

Bearing the scheme of the Chapter in mind, we shall now consider the changes needed in each section.

35.2. Section 476 is intended to be complementary to section 195. The scope should, therefore, be neither wider nor narrower than that of clauses (b) and (c) of sub-section (1) of section 195. But there is a discrepancy between the wording of section 195 and section 476; and this has led to a controversy as to the exact scope of section 476; and this controversy has given rise to another controversy whether the presiding officer of a court can make a complaint under section 476 in cases not strictly falling within the earlier section. We propose certain verbal changes in section 476 in order to emphasise that this section 476 applies only to the offences to which clause (b) or clause (c) of section 195(1) applies. We also think it desirable that section 476 should specifically cover abetment etc. of those offences, since section 195 applies to them also.[3] **Section 476.**

Section 476 speaks of "a civil, revenue or criminal court", while section 195 uses the expression "court", and defines it.[4] We propose to use the expression "court" in section 476 also, and to provide that it has the same meaning as in section 195.

The last paragraph of section 476(1) provides that for the purposes of sub-section (1), a Presidency Magistrate shall be deemed to be a Magistrate of the first class. This can be provided for briefly and more directly in the main paragraph. We recommend a drafting change for the purpose.

Under the proviso to section 476(1), the complaint in the case of a High Court is to be signed by such officer as the High Court may appoint. In the case of other courts, the complaint is to be signed by the presiding officer as provided in section 476(1), main paragraph. We wish to deal with both these matters in one sub-section, as they relate to the same subject. We recommend a verbal alteration to achieve this object.

35.3. Under section 476(2), the Court to which a complaint is made under section 476 shall proceed "as if upon complaint under section 200". It was suggested during our discussions that since a complaint is made under section 476 by a respon- **Section 476 (2)**

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[1] E. G. section 478, applicable to offences exclusively triable by the High Court or Court of Session.

[2] E.G. sections 485 and 485A.

[3] Section 480 and 482.

[3] See section 195(4).

[4] See section 195(2).

sible judicial officer (and after inquiry in most cases), the Court to which the complaint is made need not and should not hold another inquiry under Chapter 16 but should issue process under section 204. It was urged that when a superior Court had made a complaint, it was inappropriate that a Magistrate should again hold an inquiry or dismiss it under section 203. We, however, felt that there was no justification for totally dispensing with an inquiry under section 202. The Court making the complaint under section 476 may not have made a thorough inquiry, and the Court taking cognizance of the offence under section 195 might like to have more materials before issuing process. The nature of the jurisdiction to be exercised by the Magistrate under sections 202 and 203 is not always similar to the nature of the proceedings held by the complaining Court under section 476. For instance, under section 202, further "Investigation" may be ordered, whereas an "inquiry" under section 476 is of a limited nature. It would not be correct to assume that one will serve the purpose of the other in every case.

Section 476 (3).

35.4. Under section 476(3), the trying Magistrate has a discretion to adjourn the case if there is an appeal in the main case. Some delay is caused by such stay; but we think that the nature of the proceedings under section 476 is such that such delay is inevitable. We do not recommend any change in this respect. It has even been suggested[1] to us that stay should be mandatory in case of appeal but we would not like to substitute such a rigid provision either.

Section 476A.

35.5. No change of substance is required in section 476A.

Section 476B-right of appeal should remain.

35.6. Section 476B provides for an appeal when a court makes or refuses to make a complaint under section 476. It has been suggested[2] by a High Court Judge that the right of appeal should be taken away. We are unable to accept the suggestion. We recognise that the existing provision may cause some delay. Nevertheless, it is a salutary one, and should not be disturbed. Abolition of the provision relating to appeal[3] may lead to an anomalous position. If, for example, a court makes a complaint under section 476 to the effect that a document produced in evidence before the court was a forged one, and the appellate court, after hearing the appeal in the main case, comes to the conclusion that it was not a forgery, then the position of the appellate court would be helpless, if its power to direct a withdrawal of the complaint already made under section 476 is taken away (as proposed). Complaint of forgery is an offshoot of the main case, and its fate will in most cases depend on the view taken on the merits in the main case. This position is inescapable. We are conscious of the fact that where the offence of forgery is alleged to have been committed in a civil suit, that suit may take a decade for its final disposal, and till then the complaint filed after an inquiry under section 476 may have to be kept pending. However unfortunate the effect of prolonged proceedings may be on the effective punishment of

[1] F. 3(2)/55-L.C. Part XIII, S. No. 808 (Suggestion of a High Court Judge).

[2] F. 3(2)/55-L.C. Part II, S. No. 33(a) (Suggestion of a High Court Judge).

[3] Section 476B.

the offender, the difficulty is inherent in the nature of the offence and in the procedure contemplated by section 195. The only satisfactory solution seems to be to speed up the hearing of civil appeals and revisions.

Section 476B and appeals to Supreme Court.

35.8. It has been held by the Supreme Court[1] that an appeal lies under section 476B to the Supreme Court from an order of a division bench of the High Court directing a complaint under section 476. In our view, this position should be altered by excluding the High Court from the scope of section 476B. So far as the High Court is concerned, there is no need for an independent right of appeal against its decision to make a complaint.

Section 476 and revision.

35.9. Orders under section 476, 476A and 476B are, at present, regarded as subject to revision. In our view, the right of appeal confered by section 476B is enough, and there should be no further proceeding by way of revision against such orders. An order under section 476 or under section 476A should be final, subject to the appeal provided for by section 476B; and an order under section 476B should be final, being itself an order passed on appeal. It is also necessary to set at rest the controversy as to whether the provisions of the Code of Civil Procedure or of the Code of Criminal Procedure will apply where the order of a Civil Court passed under section 476 is challenged in revision.

Sections 476, 476A and 476B recast.

35.10. We accordingly propose that section 476, 476A and 476B should be recast as follows :—

Procedure in cases mentioned in Section 195.

"476. (1) When, upon an application made to it in this behalf or otherwise, any..... *Court* is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in sub-section (1) *or sub-section* (4) *of section* 195[2] which appears to have been committed in or in relation to a proceeding in that Court *or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court,* such Court may, after such preliminary inquiry, if any, as it thinks necessary—

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate;

(e) bind over any person to appear and give evidence before such Magistrate.

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[1] *M. S. Sheriff,* (1954) S.C.R. 1144, 1147; A.I.R. 1954 S.C. 397.

[2] The reference is to the revised section 195; see para 15.101 above.

(2)[1] The power conferred on a Court by sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub-section (2) of section 195.

(3)[2] A complaint *made under this section* shall be signed—

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint; and

(b) *in any other case,* by the presiding officer of the Court.

(4) *In this section, "Court" has the same meaning as in section* 195.

Appeal.

476A. (1)[3] Any person on whose application any Court *other than a High Court* has refused to make a complaint under sub-section (1) or sub-section (2) of section 476 or against whom such a complaint has been made by such Court, may appeal to the Court to which such former Court is subordinate within the meaning of sub-section (2) of section 195, and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint or, as the case may be.. make the complaint which such *former Court* might have made under section 476, and if it makes such complaint, the provisions of that section shall apply accordingly.

(2)[4] *An order under this section, and subject to any such order, an order under section* 476, *shall be final, and shall not be subject to revision.*

Procedure of Magistrate taking cognizance.

476B. (1)[5] A Magistrate to whom a complaint is made under section 476 or section 476A *shall proceed to deal with it* in the manner provided in Chapter XVI.

(2)[6] Where it is brought to the notice of such Magistrate, or of any other Magistrate to whom the case may have been transferred, that an appeal is pending against the decision arrived at in the judicial proceeding out of which the matter has arisen, he may, if he thinks fit, at any stage adjourn the hearing of the case until such appeal is decided."

Power to order costs.

35.11. A Bombay Amendment[7] of the Code makes a useful provision conferring power to award costs in proceeding under

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[1] *cf.* Section 476A.
[2] *cf.* Proviso to section 476(1).
[3] *cf.* section 476B.
[4] New provision.
[5] *cf.* sections 476(2) and 482(2).
[6] *cf.* section 476(3).
[7] Section 476-C, inserted by Bombay Act 46 of 1948, reads as follows :—

"476-C. A Criminal Court dealing with an application made to it for filing a complaint under section 476 or 476A, and a Court dealing with an appeal under section 476B and the High Court dealing with an application in revision shall have power to make such order as to costs as may be just :

Provided that no such order shall be made against the Government or any public servant acting on behalf of the Government."

section 476 and connected sections. We propose to adopt it with a few modifications. The new section which should come next after section 476A may be as follows :—

"476AA. Any Court dealing with an application made to it for filing a complaint under section 476 or with an appeal under section 476A shall have power to make such order as to costs as may be just." **Power to order costs.**

35.12. Sections 478 and 479, which deal with commitment by civil courts, may be omitted. These sections are rarely resorted to. The Civil Court can make a complaint to the Magistrate even where the offence is triable exclusively by the Court of Session. **Section 478 and 479 omitted.**

35.13. Section 479A was inserted in 1955 with the object of "eradicating the evils of perjury". The section has brought into being a procedure for making a complaint in case of perjury—a procedure which excluded[1] that provided by section 476. Ever since its introduction the section has been a source of trouble. First, there was a controversy as to whether it was exclusive of section 476 or merely provided an additional alternative. That the former is the correct view is now well-settled. But the main question which naturally arises is whether this section marks an improvement over section 476. If speedy punishment of perjury is the aim, then the section does not go far enough, because, though it bars an appeal against a complaint made by the court, it does not give power to the court itself to punish perjury. **Section 479A unsatisfactory.**

Moreover, action under the section cannot be taken after judgment is pronounced. Where a complaint "can be" made under the section, action cannot be taken[2] under section 476, so that if the court, by reason of forgetfulness or insufficient material, does not make a complaint on the termination of the proceedings, action cannot be subsequently taken under section 476, and the offender escapes unpunished—a result hardly intended by the legislature. This is a positive harm done by this section.

35.14. A mere repeal of the section, however, without some provision for punishing perjury will not be a satisfactory solution. Some provision whereby perjury of a flagrant and unchallengable type could be effectively punished summarily without seriously prejudicing a fair trial of the person concerned, is desirable. Adopting the recommendation made by the Commission in the 14th Report,[3] for the insertion of a section for punishing perjury committed by a witness making contradictory statements on oath on two different occasions, we propose the insertion, in place of section 479A, of a different section the salient features of which are as follows :— **New provision for flagrant perjury proposed.**

(i) any criminal court, other than that of a Magistrate of the second class should have power to punish summarily the offence of giving false evidence committed by a witness who makes contradictory statements on oath;

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[1] See section 479A(6).

[2] Section 479A(6).

[3] 14 Report, vol. 2, page 833, paragraph 5.

(ii) maximum punishment should be 6 months' imprisonment or fine up to 500 rupees or both;

(iii) the court's order should be appealable;

(iv) the new procedure should be without prejudice to action under section 476;

(v) it should be limited to contradictory statements on oath made on two different occasions and should not cover contradictions between statements made in examination and cross-examination.

We are not unaware of the risks involved in giving power to punish perjury to the very Court before which it is committed. The original section 477 (deleted in 1923) gave a power to the Court of Session to punish perjury. The Select Committee in 1922 deliberately[1] omitted this section on the ground that it is not desirable that a court which has instituted the proceedings should dispose of the case itself. The provision which we recommend is of a very limited character, being confined to obvious cases of perjury and authorising a small punishment. Even this procedure will be discretionary, so that where the Court is of opinion that perjury, even though committed by contradictory statements on oath, is likely to raise complicated questions, or deserves more serious punishment than that permissible under the proposed section, or is otherwise of such a nature that the ordinary procedure[2] is more appropriate, the court will not proceed under the proposed section.

It may also be noted that the proposed section is confined to contradition between the statement on oath of the witness in court at the trial and his previous statement on oath recorded under section 164 or section 200 or section 202 in the same case. It was suggested in our discussion that various other kinds of statements, such as statements made in the affidavit in the same case under section 145 or in the course of additional evidence recorded under the orders of the Appellate Court, etc. might also be covered, but in our view these contradictions should be left to be dealt with by the ordinary procedure for punishment of perjury by way of complaint under Section.

We accordingly propose the following revised section 479A—punishment of perjury by way of complaint under section 476.

Summary procedure for punishment for giving false evidence by making contradictory statements.

"479A. (1) If in any trial before a Court of Session or of a Magistrate of the first class, a witness makes on oath a statement which contradicts his previous statement on oath recorded under section 164 or section 200 or section 202 and it appears to the Court that the witness has, by making such contradictory statements, committed an offence punishable under section 193 of the Indian Penal Code, it may, if satisfied that it is expedient in the interests of justice that the witness should be tried summarily for the offence, take cognizance of the offence, and, after giving the offender an opportunity of showing cause why he should

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[1] Report of the Select Committee (26th June, 1922) under clause 126.
[2] Section 476.

not be punished under this section, sentence him to imprisonment for a term not exceeding six months or fine not exceeding five hundred rupees or both.

(2) In every such case the Court shall follow, as nearly as may be practicable, the procedure prescribed for summary trials.

(3) Nothing in this section shall affect the power of the Court to make a complaint under section 476 for the offence where it does not choose to proceed under this section."

Sections 480 to 482.

35.15. Sections 480 to 482 which prescribe the procedure for punishing contempt when committed *ex facie curiae* do not require any changes or comments.

Section 483.

35.16. Section 483 empowers the State Government to direct that any Registrar or Sub-registrar shall be deemed to be a Civil Court for the purposes of sections 480 to 482. It was suggested that similar power should be given to the State Governments to apply sections 480 and 482 to all Tribunals. We are unable to accept this suggestion. If such a provision is considered necessary, it should be included in the special law constituting such Tribunals.

Section 484.

35.17. No change is needed in section 484.

Section 485.

35.18. In section 485, the words "and in the case of a Court established by Royal Charter, shall be deemed to be guilty of a contempt" occurring at the end may be deleted. The power of a State High Court to punish for contempt is governed by article 215 of the Constitution and need not be provided for again in this section.

Section 485A amended.

35.19. In section 485A(2) the words "in which an appeal lies" may be omitted in view of the changes which we propose[1] in section 263.

Section 486 revised.

35.20. In section 486(1), which provides for appeals from convictions for contempt, we propose to exclude the High Courts but add a reference to the proposed new section 479A. In regard to sub-sections (3) and (4) we are of the view that appeals from all the authorities mentioned therein should lie to the Court of Session. Although City Sessions Courts in the presidency towns are not ordinarily vested with appellate jurisdiction, we think that in this particular case the power should vest in them instead of in the High Courts.

Section 486, amended on the above lines, will read as follows—

Appeals from convictions in contempt cases.

"486. (1) Any person sentenced by any Court *other than a High Court* under section 479A, section 480, section 485 or section 485A may, notwithstanding anything hereinbefore contained, appeal to the Court to which decrees or orders made in such Court are ordinarily appealable.

(2) The provisions of Chapter XXXI shall, so far as they are applicable, apply to appeals under this section, and

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[1] See para 22.8 above.

the Appellate Court may alter or reverse the finding, or reduce or reverse the sentence appealed against.

(3) An appeal from such conviction by a Court of Small Causes.... shall lie to the Court of Session for the sessions division within which such Court is situate.

(4) An appeal from such conviction by any.... Registrar or sub-Registrar *deemed to be a civil court by virtue of a direction issued under section* 483 *shall lie to the Court of Session for the sessions division within which the office of such Registrar or Sub-Registrar is situate."*

Section 487 amended.

35.21. In sub-section (1) of section 487, a reference to the proposed new section 479A may be added. In view of the abolition of commitment proceedings, sub-section (2) is not necessary and may be omitted.

CHAPTER XXXVI

MAINTENANCE OF WIVES AND CHILDREN

Introductory.

36.1. The primary justification for placing in the Criminal Procedure Code provisions relating to maintenance of wives and children, which is a civil matter, is that a remedy more speedy and economical than that available in civil courts is provided for them. It may also be said that these provisions are aimed at preventing starvation and vagrancy leading to the commission of crime.

Section 488 (1).

36.2. As the functions of Magistrates under section 488 are of a judicial character, the reference to the District Magistrate and Sub-divisional Magistrates in sub-section (1) may be omitted.

Does "child" mean a minor ?

36.3. Section 488(1) speaks of neglecting or refusing to maintain the "wife" or "child". Some controversy[1] exists as to whether the expression "child" means a minor, or whether it includes any son or daughter unable to maintain himself or herself. It has been suggested[2] that a daughter or son of *whatever age* should be entitled to maintenance under section 488.

No doubt, the right under section 488 will, if this view is adopted, be wider than that enjoyed under personal law. For example, under the Hindu Adoptions and Maintenance Act, 1956[3] a child can claim maintenance only so long as the child is a minor. This was also the rule of Hindu Law regarding sons.[4] According to Muslim law also, a father is bound to maintain his sons until puberty and daughters until marriage, but not adult sons unless disabled by infirmity or disease.[5] But, having regard to the primary object of section 488—namely, prevention of vagrancy—a wider view on the subject is desirable. The emphasis should be on the inability to maintain itself and not on the age of the child.

In fact, the existing wording amply supports a wider interpretation. The position was lucidly explained in the undermentioned Patna case[6] with which we agree. Other cases on the subject are also noted[7] below.

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[1] See *Saraswati* v. *Madhavan*, A.I.R. 1961 Ker. 297 (reviews case-law).

[2] Amendment Bill introduced by Shri Ajit Singh Sarhadi. (Lok Sabha Bill 41 of 1959) introduced on 14th August, 1959. (Discussed in Lok Sabha on 2-12-1961 and referred to the Law Commission, F.3(2)/55-L.C. Part II, S.No. 39).

[3] See section 20(2).

[4] Trevalyan, Hindu Law, (1912), page 200; *Chanviragavda* v. *District Magistrate*, A.I.R. 1927 Bom. 91, 92; *Bhoopati* v. *Basant Kumari*, (1936) I.L.R. 63 Cal. 1098, 1111.

[5] Mulla, Mahamedan Law, (1961), page 303; Fyzee, Outlines of Mohammadan Law, (1963), page 205.

[6] *Khidani* v. *Legan Singh*, A.I.R. 1921 Pat. 379(1).

[7] *Bhagat Singh* v. *Emp.*, (1910) 26 P.R. 1910 Cr.; 6 I.C. 960; 11 Cr. L.J. 427; *Krishnaswamy Iyer* v. *Chandravadana*, (1918) I.L.R. 37 Mad. 565; 25 M.L.J. 349; *Thambuswamy Pillay* v. *Ma Louse*, (1917) 9 L.B R. 37 I.C. 311; 10 Bur. L.T. 209.

Married daughters.

36.4. Another question that has arisen is, as to how far section 488 applies to married daughters. According to one view, a person who can claim maintenance from another source cannot apply under section 488[1]. On this reasoning, a married daughter cannot claim maintenance from her father. But a contrary view has been taken in a Bombay case,[2] in which a married daughter of 15 years was awarded maintenance against the father under section 488. The Bombay case cites other cases to the same effect.[3] Here again, we think that the controversy should be set at rest by *amending section* 488(1) so as to ensure that a married daughter can claim maintenance from her father. No doubt, she has got her rights against the husband. A Hindu wife is entitled to be maintained by her husband during her life-time.[4] Under Muslim law[5] also, the husband's duty to maintain commences when the wife attains puberty. Section 488 also gives her a right against her husband. But there may be hard cases where the husband is not willing to maintain her, and a power to make an order against the father is desirable to meet such hard cases.

Aged parents.

36.4. A suggestion[6] has been made to the effect that a provision for maintenance of parents should be made in cases where they are unable to maintain themselves. It is true, that under section 20(1) of the Hindu Adoptions and Maintenance Act, 1956, a Hindu is bound to maintain his or her aged or infirm parent so far as the parent is unable to maintain himself or herself out of his or her own earning of other property. Under the Muslim law also[7], there is an obligation to maintain one's parents (subject to certain exceptions not material here). We are, however, of the view that the Criminal Procedure Code is not the proper place for such a provision. There will be considerable difficulty in the amount of maintenance awarded to parents apportioning amongst the children in a summary proceeding of this type. It is desirable to leave this matter for adjudication by Civil Courts.

Appeals.

36.5. Several persons have suggested that an order under section 488 should be made appealable. A right of appeal will, however, result in unduly protracted proceedings and defeat the primary object of this section, which is to provide a speedy for destitute wives and children. The aggrieved party has the remedy of moving the Civil Court to get the order modified or varified[8]. Hence, a right of appeal is not desirable.

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[1] *Chanditan* v. *Chakkayayyan*. I.L.R. 39 Mad. 957; A.I.R. 1917 Mad. 275.

[2] *Banchhod Das* v. *Emp.*, A.I.R. 1949 Bom. 36, 37 (Jabagirdar and Sen JJ.).

[3] A.I.R. 1925 Mad. 491; I.L.R. 48 Mad. 503 (Girl of 14 years).

[4] Section 18(1), Hindu Adoptions and Maintenance etc. Act (78 of 1956).

[5] Mulla, Mahomedan Law, (1961), page 238; Fyzee, Outlines of Mohammadan Law. (1964), page 202.

[6] Suggestion of Shri Ajit Singh Sarhadi, vide his Amendment Bill introduced on 14th August, 1959 (Lok Sabha Bill 41 of 1959) discussed in Lok Sabha and referred to the Law Commission, F.3(2)/55-L.C. Pt. II, S.No. 39.

[7] Mulal, Mahomedan Law, (1968), paras. 371, 372; Fyzee, Outlines of Mohammadan Law. (1964), page 206.

[8] Section 489(2).

36.6. In the light of the above discussion, sub-section (1) of section 488 may be amended to read as follows :— **Section 488(1) amended.**

> "(1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child *of any age* unable to maintain itself, *whether the child be married or unmarried,* a Magistrate of the first class may (rest as in the present sub-section)."

36.7. It has been suggested by two High Court Judges with reference to section 488(3), that if the husband suffers from any contagious venereal disease it should be considered just ground for the wife's refusal to live with him, and this should be expressly mentioned in the section. We do not consider it necessary or desirable to enumerate exhaustively the various grounds which would justify a wife's refusal to live with her husband. These may be left to the decision of the courts. The Madras decision[1] noted below may be seen in this connection. **Section 488 (3).**

36.8. A suggestion has been made[2] that the words "or if they are living separately by mutual consent" occurring in section 488(4) should be omitted, but we do not think this can be accepted. If the parties are living separately by mutual consent, they may be expected to make the necessary arrangement regarding their maintenance, and if the husband does not carry out the arrangement, the remedy in the Civil Court should be sufficient. **Section 488 (4).**

In section 488(4), the words "living in adultery" have been almost uniformly interpreted as indicating an adulterous course of life, as distinguished from a single lapse from virtue. It has been suggested[3] that a *single* act of adultery should be enough to disentitle the wife to maintenance. We are unable to accept the suggestion. Hardships are bound to arise if the wife is totally debarred from the remedy under this section because of a single lapse from virtue. Further, to deprive her of maintenance for an occasional lapse may force her to lead a sinful life and give her no chance to redeem herself.

39.9. Section 488(5) requires the Magistrate to cancel his order in certain contingencies. The question whether in a case where the wife has obtained an extra-judicial divorce sanctioned by custom, the Magistrate can cancel his order at the instance of the husband has arisen. Conflicting decisions of High Courts on this point are mentioned below[4]. To resolve this controversy, we suggest that the Magistrate should decide the question under section 488(5). For this purpose after the words "live with her husband" in this section, the words "or has been lawfully divorced by her husband otherwise than by order of a Court" may be inserted. **Section 488 (5).**

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[1] *Sellammal* v. *Muthuvira,* A.I.R. 1943 Mad. 647. (Kuppuswamy Ayyar J.)

[2] Suggestion of Shri S. S. More, received through the Home Ministry.

[3] Amendment Bill introduced by Shri Ajit Singh Sarhadi (Lok Sabha Bill 41 of 1949); introduced on 14th August, 1959 (referred to Law Commission, F.3(2)/55-L.C. Pt. II, S.No. 39).

[4] *Shah Abu* v. *Ulfat Bibi,* (1896) I.L.R. 19 All. 50. 55 (F.B.); *In re Punjalal* A.I.R. 1928 Bom. 224; *Janni Bibi,* A.I.R. 1955 Andhra Pradesh i; *In re Mohammed Rahimulla,* A.I.R. 1947 Mad. 46; *Mohomed Ismail* v. *Sarammal,* A.I.R. 1960 Ker. 262.

Section 488 (8.)

36.10. Under sub-section (8), the place where the wife resides after desertion by the husband is not material as regards the venue of the proceedings, though the place where the husband resides—even temporarily—is relevant. Often deserted wives are compelled to live with their relative far away from the place where the husband and wife last resided together. They would be put to great harassment and expenditure, unless the venue of the proceeding is enlarged so as to include the place where they may be residing on the date of the application.

With reference to sub-section (8), there is the following controversy. Is it sufficient if the husband resides in the district in which the proceedings are taken, or is it further necessary that the court in which the proceedings are instituted must itself be one having jurisdiction over the place where the husband resides? The Bombay view[1] is, that a proceeding under section 488 instituted in any competent court within the *district* in which the husband resides, or is, or in which he last resided with his wife. This is also the Patna view[2] and the Kerala view[3]. The Madras High Court[4] has, however, taken a different view. In our opinion, the Bombay view is correct, as the wording of the sub-section does not seem to justify the addition of any further restriction. We think that the language is clear and needs no amendment on this point.

Sub-section (8) of section 488(8) may be redrafted as follows :—

> "(8) Proceedings under this section may be taken against any person in any district—
>
> (a) where he is, or
>
> (b) where he or *his wife* resides, or
>
> (c) where he last resided with his wife or, as the case may be, with the mother of the illegitimate child."

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[1] *Shantabai* v. *Vishnupant Atmaram,* A.I.R. 1965 Bom. 107, 108, paragraph 4 (Kotval J.).

[2] *Baleshwari Devi* v. *Bikram Singh,* A.I.R. 1968 Pat. 383, 384, paragraph 2 (K. K. Dutta J.).

[3] I.L.R. (1961) 2 Ker. 702; (1962) 1 Cr. L.J. 40, 41.

[4] *Sakuntala* v. *Thirumalayya,* (1966) 2 Mad. L.J. 326.

CHAPTER XXXVII

History of section 491.

DIRECTIONS OF THE NATURE OF A *HABEAS CORPUS*

37. 1. Chapter 37 consists of a single section which confers on the High Courts the power to issue directions of six different types, all of them being in the nature of a *habeas corpus*. The section, as originally enacted in 1898, conferred the power only on "the High Courts of Judicature at Fort William, Madras and Bombay" and the territorial limits within which any of these three High Courts could exercise the power were "the limits of its ordinary original civil jurisdiction" which coincided with the limits of the presidency-towns. The scope of the section was considerably widened by the Criminal Law Amendment Act, 1923. Instead of only the three High Courts at Calcutta, Madras and Bombay, all the High Courts in British India were conferred the power of issuing these directions. Furthermore, instead of being restricted in territorial extent to the limits of the ordinary original civil jurisdiction of the High Court, the power was made exercisable within the limits of its appellate criminal jurisdiction, i.e., within the limits of the Province or Provnces over which the High Court had authority.

Types of directions under section 491.

37.2. The first two of the six directions which may be issued under section 491(1) correspond to the well-known writ of *habeas corpus* and are described in clauses (a) and (b) of the section as follows :—

> "(a) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law;
>
> (b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty;"

The next three clauses (c), (d) and (e) describe the circumstances in which, and the purposes for which, prisoners detained in any jail within the jurisdiction of the High Court could be directed to be brought up before the High Court itself or before some other Court or authority. The last clause (f) empowers the High Court to direct "that the body of a defendant within such limits be brought in on the Sheriff's return of *cepi corpus* to a writ of attachment".

Clauses (a) and (b) rendered superfluous by article 226.

37. 3. It will be noticed that article 226 of the Constitution confers wide and comprehensive powers on the High Courts of States "to issue to any person or authority, including in appropriate cases any Government, directions, orders or writs, including writs in nature of *habeas corpus, mandamus, prohibitio, quo warranto* and *certiorari*" for any purpose. In view of this provision, clauses (a) and (b) of section 491(1) have been practically rendered superfluous and can be safely omitted.

Clauses (c), (d) and (e) omission recommended.

37.4. We have another Report[1] considered in detail the provisions of clauses (c), (d) and (e) relating to the production of prisoners in Court for various purposes and recommended that these clauses (and also section 542 of the Code) should be omitted and more detailed provisions on the lines of those contained in the Prisoners (attendance in Courts) Act, 1955, should be included in this Chapter as section 491A.

Clause (f) to be omitted.

37.5. Clause (f) which is couched in archaic and obscure language relates to "a writ of attachment" which the High Court may have issued and in regard to which the Sheriff of the presidency-town has submitted "*a return of cepi corpus*". This writ of "attachment" is really a writ of arrest in execution of a civil decree directed to the Sheriff, requiring him to arrest a person named in the writ and to have the "body" of the person produced before the Court on a given date. On this writ the "return" by the Sheriff sets forth what has been done by him under it. The literal meaning of *cepi corpus* is "I have taken the body"; and in its full form *cepi corpus et paratum habeo*, it means "I have taken the body and have it ready".[2] Since the power of arrest in execution of a civil decree is exhaustively dealt with in the Civil Procedure Code and since the original civil jurisdiction of the three Presidency High Courts has been practically abolished, the power under clause (f), section 491(1), is seldom, if ever, required to be used.

Chapter 37 to be replaced by a different Chapter.

37. 6. We, therefore, propose that section 491 be omitted and in its place provisions for securing the attendance of prisoners in Criminal Courts be included in this Chapter as recommended in the 40th Report. The existing Chapter XXXVII may be replaced by the following Chapter :—

CHAPTER XXXVII

ATTENDANCE OF PERSONS CONFINED OR DETAINED IN PRISONS

"491. In this Chapter,—

Definitions.

(a) 'detained' includes detained under any law providing for preventive detention;

(b) 'prison' includes—

(i) any place which has been declared by the State Government, by general or special order, to be a subsidiary jail; and

(ii) any reformatory, Borstal institution or other institution of a like nature.

Power to require attendance of prisoners.

491A. (1) Whenever, in the course of an inquiry, trial or other proceeding under this Code, it appears to a Criminal Court,—

(a) that a person confined or detained in a prison should be brought before the Court for answering to a charge of an offence, or

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[1] 40th Report on the Law relating to Attendance of Prisoners in Courts, paaras 27 *et seq.*

[2] See *Jowitt's* Dictionary of English Law, 1959, Vol. I, p. 332.

(b) that it is necessary for the ends of justice to examine such person as a witness,

the Court may make an order requiring the officer in charge of the prison to produce such person before the Court for answering to the charge or, as the case may be, for giving evidence.

(2) Where an order under sub-section (1) is made by a Magistrate of the second class, it shall not be forwarded to, or acted upon by, the officer in charge of the prison unless it is countersigned by the Chief Judicial Magistrate to whom such Magistrate is subordinate.

(3) Every order submitted for countersigning under sub-section (2) shall be accompanied by a statement of the facts which in the opinion of the Magistrate, render the order necessary, and the Chief Judicial Magistrate to whom it is submitted may, after considering such statement, decline to countersign the order.

Power of State Government to exclude certain persons from operation of section 491A.

491B. (1) The State Government may, at any time, having regard to the matters specified in sub-section (2), by general or special order, direct that any person or class of persons shall not be removed from the prison in which he or they may be confined or detained, and thereupon, so long as the order remains in force, no order made under section 491A, whether before or after the order of the State Government, shall have effect in respect of such person or class of persons.

(2) Before making an order under sub-section (1), the State Government shall have regard to the following matters, namely :—

(a) the nature of the offence for which, or the grounds on which, the person or class of persons has been ordered to be confined or detained in prison;

(b) the likelihood of the disturbance of public order if the person or class of persons is allowed to be removed from the prison; and

(c) the public interest, generally.

Officer in charge of prison to abstain from carrying out order in certain cases.

491C. Where the person in respect of whom an order is made under section 491A—

(a) is by reason of sickness or infirmity unfit to be removed from the prison; or

(b) is under committal for trial or under remand pending trial or pending a preliminary investigation; or

(c) is in custody for a period which would expire before the expiration of the time required for complying with the order and for taking him back to the prison in which he is confined or detained; or

(d) is a person to whom an order made by the State Government under section 491B applies,

the officer in charge of the prison shall abstain from carrying out the Court's order and shall send to the Court a statement of reasons for so abstaining:

Provided that where the attendance of such person is required for giving evidence at a place not more than twenty-five kilometres

distant from the prison, the officer in charge of the prison shall not so abstain for the reason mentioned in clause (b).

Prisoner to be brought to Court in custody.

491D. Subject to the provisions of section 491C, the officer in charge of the prison shall, upon delivery of an order made under sub-section (1) of section 491A and duly countersigned, where necessary, under sub-section (2) thereof, cause the person named in the order to be taken to the Court in which his attendance is required, so as to be present there at the time mentioned in the order, and shall cause him to be kept in custody in or near the Court until he has been examined or until the Court authorises him to be taken back to the prison in which he was confined or detained.

Power to issue commission for examination of witness in prison.

491E. The provisions of this section shall be without prejudice to the power of the Court to issue under section 503 a commission for the examination, as a witness, of any person confined or detained in a prison; and the provisions of Chapter XL shall apply in relation to the examination on commission of any such person in the prison as they apply in relation to the examination on commission of any other person."

CHAPTER XXXVIII

THE PUBLIC PROSECUTOR

Introductory.

38.1. The appointment and functions of the Public Prosecutor are dealt with in this short Chapter consisting of only 4 sections. The Chapter does not give any indication of the actual organisation of the prosecuting agency in the districts. Under section 492, there could be any number of Public Prosecutors; some appointed by the Central Government, others by the State Government, and yet others by the District Magistrate or, subject to his control, by the Sub-divisional Magistrate. Then under section 495, any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person who may do so personally or by a pleader.

Existing prosecuting agency in the districts.

38.2. In practice, however, there is in every district an officer appointed by the State Government who is designated the Public Prosecutor and who, with the assistance of one or more additional Public Prosecutors, conducts all prosecutions on behalf of the Government in the Court of Session. These senior Public Prosecutors are under the general control of the District Magistrate. Prosecution in the magisterial courts is, generally speaking, in the hands of either the police-officers or of persons recruited from the bar and styled Police Prosecutors or Assistant Public Prosecutors all of whom work under the directions of the Police Department.

Section 492.

38.3. In an earlier Chapter,[1] we have recommended that in every district a separate prosecution department should be constituted and placed in charge of a Director of Public Prosecutions, or, if this is not considered feasible, of the Public Prosecutor of the district who should be given a greater authority, a higher status and a wider range of functions than he has at present, and approximating to those envisaged for the Director. Now, section 492 provides for the appointment of several Public Prosecutors in a district all of whom can apparently function at the same time. No qualifications are laid down in the law for a Public Prosecutor and the Government is empowered to appoint any one it likes to be a Public Prosecutor. We think that the Code should provide a better frame-work for organising the prosecuting agencies in the district in a systematic way, and for this purpose, we propose the following two sections in place of section 492 :—

Appointment of Public Prosecutor.

"492. (1) For every district the State Government shall appoint a Public Prosecutor. It may also appoint one or more additional Public Prosecutors for the district.

(2) A person shall only be eligible to be appointed a Public Prosecutor or Additional Public Prosecutor under sub-section (1) if he has been for not less than seven years an advocate and is recommended by a High Court for appointment.[2]

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[1] See paras. 18.24 and 18.25 above.

[2] *Cf.* art. 233(2) of the Constitution.

(3) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, an advocate of not less than ten years' standing as a Special Public Prosecutor.

Appointment of Assistant Public Prosecutors.

492.A(1) The State Government shall appoint in every district one or more Assistant Public Prosecutors for conducting prosecutions in the Courts of Magistrates.

(2) No police-officer shall be eligible to be appointed as Assistant Public Prosecutor under sub-section (1).

(3) Where no Assistant Public Prosecutor appointed under sub-section (1) is available for the purposes of any particular case, the District Magistrate may appoint any other person to be the Assistant Public Prosecutor in charge of that case :

Provided that a police-officer shall not be so appointed—

(a) if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted; or

(b) if he is below the rank of Inspector."

The Public Prosecutors appointed under section 492 will ordinarily conduct cases on behalf of Government in the Sessions Court, while the Assistant Public Prosecutors appointed under section 492A will be for conducting cases in the Courts of Magistrates. Although it is not expressly provided in the latter section that Assistant Public Prosecutors should be legally qualified, we have no doubt that the present trend of appointing, as far as possible, qualified legal practitioners as Assistant Public Prosecutors or Police Prosecutors or Police Prosecutors will be maintained in all States and the provision made in sub-section (3) above (corresponding to sub-section (2) of section 492) will be resorted to less and less in future years.

Section 493 amended.

38.4. Section 493 does not require any change of substance, but an express reference to the Assistant Public Prosecutor besides the Public Prosecutor will be necessary. The section may be modified to read as follows :—

Appearance by Public Prosecutors.

"493. (1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.

(2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under his direction."

Section 494 withdrawal from prosecution only by Public Prosecutor in charge of case.

38.5. Section 494 seems to authorise *any* Public Prosecutor to withdraw from the prosecution with the consent of the Court. The Supreme Court has held[1] that the reasonable interpretation to be placed on this section is that it is only the Public Prosecutor who is in charge of a particular case and is actually conducting

[1] *State of Punjab* v. *Surjit Singh*, (1967) 2 S.C.R. 347; A.I.R. 1967 S.C. 1214.

the prosecution that can file an application under this section seeking permission to withdraw from the prosecution. If a Public Prosecutor is not in charge of a particular case and is not conducting the prosecution, he will not be entitled to ask for withdrawal from prosecution of that case under section 494. If any Public Prosecutor who has nothing to do with a particular case is held entitled to file an application under section 494, the result will be anomalous. The contrary view *viz.*, that the section gives an unqualified right to any person who, in law, is a "Public Prosecutor" to file an application for withdrawal from prosecution was, it appears, strongly urged in the case supported by a few decisions of High Courts. That view was negatived by the Supreme Court.

Previous consent of Central Government provided for in certain cases.

38.6. We have elsewhere referred to a conflict of interests that may possible arise between the Central Government and the State Government in the matter of remitting or commuting sentences.[1] A similar conflict of interests can arise under section 494 in respect of withdrawal of prosecutions. A State Public Prosecutor appointed by the State Government can, if he is in charge of the case, withdraw from the prosecution, though the Central Government may be much concerned in the prosecution of the offenders. This could happen where the offence relates to a matter to which the executive power of the Union extends, or was investigated by the Delhi Special Police Establishment, or involved the misappropriation of destruction of, or damage to, Central Government property, or was committed by a Central Government servant in the course of his official duty.[2] We are of the view that in such cases it is desirable that the consent of the Central Government should be obtained before the Public Prosecutor seeks permission of the Court to withdraw from the prosecution. We recommend the insertion of a proviso to that effect in section 494.

Section 494 revised.

38.7. Section 494 may accordingly be revised to read as follows :—

Withdrawal from prosecution.

"494. (1) The Public Prosecutor or Assistant Public Prosecutor *in charge of a case* may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal,—

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences:

Provided that where such offence—

(i) was against any law relating to a matter to which the executive power of the Union extends, or

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[1] See paragraph 29.13 above.

[2] *Cf.* revised section 402B proposed in para. 29.14 above.

(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946, or

(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty,

and the prosecutor in charge of the case has not been appointed by the Central Government he shall not withdraw from the prosecution without the previous permission of the Central Government."

Section 495 revised.

38.8. In view of the new section 492A regarding Assistant Public Prosecutors and the changes made in section 494, section 495 may be revised as follows :—

Permission to conduct prosecution.

"495. (1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police-officer below the rank of Inspector, but no person, other than the Advocate-General or Government Advocate or a Public Proecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:

Provided that no police-officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader."

CHAPTER XXXIX

BAIL

Broad principles regarding bail.

39.1. The broad principles adopted in the Code in regard to bail are—

(i) bail is a matter of right, if the offence is bailable;

(ii) bail is a matter of discretion, if the offence is non-bailable;

(iii) bail shall not be granted by the Magistrate if the offence is punishable with death or imprisonment for life; but if the accused is a woman, or a minor under the age of 16 years, or a sick or infirm person, the court has a discretion to grant bail;

(iv) the Court of Session and the High Court have a wider discretion in granting bail, even in respect of offences punishable with death or imprisonment for life.

Section 496 person breaking bail bond not to be released on bail.

39.2. Under section 496, the right to bail is absolute in case of bailable offences. It has been suggested[1] that where a person released on bail has absconded or has failed to appear before the Court on the date fixed, he shall not be entitled to bail, when brought to court on any subsequent date. We recommend the acceptance of this suggestion, and further recommend that refusal of bail under such circumstances shall be without prejudice to any action that may be taken under section 514 for forfeiture of the bail bond.

Accordingly, section 496 may be re-numbered as sub-section (1), and the following sub-section may be added as sub-section (2) :—

"(2) Notwithstanding anything contained in sub-section (1), where a person who having been released on bail, has failed to comply with the condition of the bail bond as regards the time and place of attendance, the court may refuse to release him on bail when, on a subsequent occasion in that case, he appears before the Court or is brought in custody. Any such refusal shall be without prejudice to the power of the Court to call upon any person bound by such bond to pay the penalty thereof under section 514."

Section 497 (1).

39.3. With reference to section 497(1), a State Government[2] has suggested that the words "there appears sufficient ground for inquiry into his guilt" be substituted for the words "if there appear reasonable grounds for believing" (that he has been guilty of an offence punishable with death or imprisonment for life). The reason given was, that persons accused of serious offences again committed serious offences during release on bail. We cannot accept the suggestion. It would be unduly restrictive of the power

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[1] F.3(2)/55-L.C. Pt. II, S. No. 36, page 178 (Suggestion of Shri A. K. Roy, Additional Sessions Judge, Asansol).

[2] F.3(2)/55-L.C. Pt. II, S. No. 28 (Amendment Bill proposed by the Government of U.P.).

to grant bail. If the test of "sufficient ground for inquiry" is substituted, it would amount to denial of bail in almost every case. If in a particular case, a person released on bail was reported to have committed a fresh offence, or otherwise misused his liberty, the court may be moved to cancel his bail bond.

A Bar Association[1] has suggested that section 497(1) should be made more liberal by providing that if the offence is not punishable with death, bail ought to be granted. We are afraid that this would be a radical and undesirable change in the law. Offences punishable with imprisonment for life are serious enough to justify the present provision.

Another suggestion[2] is to the effect that in section 497(1), for the words "he may be released on the bail", the following words may be substituted—"*he shall be released on bail* unless the Court for reasons recorded in writing otherwise directs". We are unable to accept this suggestion either. Its acceptance would practically amount to an abolition of the distinction between bailable and non-bailable offences.

Section 497 (3A)

39.4. It has been stated in certain suggestions[3] sent to us that sub-section (3A) of section 497 has created difficulties and should be deleted. This sub-section was inserted in order to avoid hardship to accused persons in non-bailable cases where the proceedings are prolonged beyond a certain period (sixty days). In such cases, the sub-section provides, that the accused shall be released on bail (unless the Magistrate otherwise directs). Having regard to the fact that this provision was inserted only in 1955, we think that much more experience of its working is required before its deletion on the ground of practical difficulties can be recommended.

Grant of bail with conditions new sub-section (1A) in section 497.

39.5. Cases often arise under section 497, where, though the court regards the case as fit for the grant of bail, it regards the imposition of certain conditions as necessary in the circumstances. In an earlier Report[4] the Commission examined the position as to whether such a power exists now and recommended an amendment of section 497 for the purpose. We agree with the recommendation and propose that the following sub-section may be added in the section after sub-section (1) :—

"(1A) When a person accused or suspected of the commission of an offence punishable with "imprisonment which may extended to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code, or of the abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-

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[1] F.3(2)/55-L.C. Part II, S. No. 34(a) (Delhi Bar Association).

[2] Home Ministry File No. 27(5)/54-Judl. App. IV, Item (8).

[3] F.3(2)/55-L.C. Pt. I, S. No. 17 (Views of certain Inspector Generals of Police as summarised in the consolidated note sent by the Intelligence Bureau, Ministry of Home Affairs).

[4] 36th Report on sections 497 and 498 of the Code and grant of bail with conditions.

section (1), the Court may impose any condition which it considers necessary—

(a) in order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or

(b) in order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or

(c) otherwise in the interests of justice."

Delay in Investigation.

39.6. It has been suggested[1] that a sub-section should be inserted in section 497 to the effect that where the investigation is delayed beyond 60 days, the accused (in non-bailable cases) should be released on bail. We may, in this connection, point out that where the investigation is delayed[2], the question of the detention of the accused will come up for review automatically before the Court; the Court will be free to pass such orders as it thinks fit, and is not precluded from ordering release on bail if that is an appropriate course in the circumstances of the case. We do not think that a rigid provision is necessary on this subject.

Section 497 (5) and section 498)

39.7. Section 497(5) and section 498 relate to similar matters, and can be considered together. Further, section 498 is a composite section in which two distinct maters, which are not closely connected, have been put in one sentence. In the interests of clarity[3] a re-casting of these provisions appears to be desirable. The main ideas found in section 497(5) and section 498 are—

(i) power of a Court which has released a person on bail to direct his arrest and to commit him to custody—section 497(5), in part;

(ii) special powers of the High Court and Court of Session—

(a) to order release of any person section 498(1), second part; and

(b) to order that a person released on bail under section 497 or section 498(1) be arrested and to commit him to custody—earlier part of section 497(5) and section 498(2);

(iii) amount of the bond not to be excessive, and power of the High Court or Court of Session to reduce the bail required by a police officer or a Magistrate—section 498(1), in part.

It will be noticed that the first is a general power conferred on all courts; the second is a special power of the superior courts; and the third is an ancillary power.

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[1] F.3(2)/55-L.C. Pt. III, S. No. 21 (Suggestion of Himachal Pradesh Administration).

[2] See discussion relating to section 344.

[3] *Cf.* criticism of section 498 in *Amir Chand*, A.I.R. 1950 E.P. 53, in the judgment of Khosla J.

We propose to put the first as section 497(3A), so that it will appear immediately after the first three sub-sections,—the sub-sections which relate to release on bail. [In consequence, existing sub-section (3A) will require re-numbering as sub-section (3B)].

The second will, in view of its importance, form a separate section—section 497B.

The third may be retained in section 498.

Along with this re-arrangement of the provisions, some changes in their content are also desirable.

First, as regards the power of a court to cancel bail granted by it, the relevant part of section 497(5) is obviously intended to apply to the High Court or Court of Session also, when bail is granted by that Court. The words *"every other Court"*, however, create a contrary impression, and we propose to substitute the words "any court" in their place, to correct this impression.

As regards the second proposition stated above, the power of the superior courts fails under two heads—

(a) power to direct release on bail and

(b) power to direct arrest of a person released on bail.

The power under head (a) above is expressed in section 498(1) where it says that "the High Court or Court of Session may, *in any case whether there be an appeal on conviction or not, direct that any person be admitted on bail*". The words "in any case" are, apparently, intended to emphasise that the power is wide enough to embrace both bailable and non-bailable offences. We think that the language should be made more precise. The power is meant to apply to a person accused of an offence and in custody, and the words "admit to bail" have been judicially construed as having the same meaning as "release on bail[1]".

Lastly, the words "whether there be an appeal on conviction or not" are unnecessary and confusing, and should be omitted.

The power under head (b) is now contained partly in sub-section (5) of section 497, where it authorises the superior courts to "cause any person who has been released under this section to be arrested" and "to commit him to custody"—and partly in sub-section (2)—where it authorises the superior courts to "cause any person who has been admitted to bail (under section 498) to be arrested" and "to commit him to custody". Together, these two cases cover cancellation by a superior courts of the bail granted to a person—

(i) released on bail by an inferior court[2] in a case relating to non-bailable offence; or

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[1] See discussion in Amir Chand, A.I.R. 1950 E.P. 53.

[2] Section 497(5), in so far as it relates to cancellation of bail by the court which granted it, has been already dealt with.

(ii) released on bail in a case where the release was ordered under its special power by the superior court itself.

They do not cover concellation of bail granted in a case relating to a bailable offence[1] under section 496.

Now, it is well-established that the High Court has power to cancel bail even where it was granted in a case relating to a bailable offence. The existence of this power of the High Court has been put beyond doubt by a series of decisions of the Supreme Court[2], and of the High Courts[3]. The absence of an express provision in this respect was described as a "lacuna" in one of the judgments of the Supreme Court[4], and we think that, instead of leaving the matter to the inherent powres of the High Courts, it should be expressly provided for in this Chapter, and the power could be given to Courts of Session as well. For this reason, release under section 496 is expressly proposed to be mentioned in the amendment which we suggest regarding section 498.

As regards the third proposition—amount of bail and reduction thereof—no changes are necessary in the substance of the powers as provided in section 498(1).

A suggestion has been made by two High Court Judges[5] to the effect that the trial court should also have power to cancel bail at the close of arguments, even if the bail was granted by a superior court. We presume that the object behind the suggestion is to cover cases where, at the close of the arguments, the court considers it very likely that it will sentence the accused to imprisonment. We would, however, prefer to leave the law as it is. When the judgment is pronounced, the accused will be required to attend the court to hear the judgment pronounced.[6] Ordinarily, no serious mischief could be caused by the accused remaining on bail in the interval.

Where a Court 'A' grants bail in a case and the case is subsequently transferred to Court 'B', can Court 'B' cancel the bail granted by court 'A' ? This question arose in a Bombay case[7], where the High Court approved of the cancellation by the transferee court. But the judgment lays stress on the inherent power of the court, and it was suggested to us that this leaves the position doubtful, and that some clarification may be desirable. We do not, however, think it necessary to suggest an amendment. As a general rule, it is implied that a trans-

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[1] The scope of section 496 is somewhat wider, as it applies to "any person other than a person accused of a non-bailable offence". But we are concerned here with a person accused of a bailable offence.

[2] *Talab*, (1958) S.C.R. 1226; A.I.R. 1958 S.C. 376; Ratilal Bhanji A.I.R. 1967 S.C. 1639 (judgment of Bachawat J.).

Pampapathy (1967) 1 S.C.R. 115; A.I.R. 1967 S.C. 286 (Judgment of Ramaswami J.).

[3] See for example Panna Lal AIR 1967 All. 394, 397.

[4] Talab (1958) SCR 1226; AIR 1958 SC 376.

[5] F.3(2)/55-L.C. Pt. II. S. No. 33(b), page 137, (Suggestion of two High Court Judges).

[6] Section 366(2).

[7] *Emp.* v. *Routmal*, I.L.R. 1941 Bom. 38; A.I.R. 1940 Bom. 41.

feree court can deal with the case in the same manner as the original court, and this implication need not be expressed.

Revised sections 497 (3A), 498 and 498A.

39.8. In the light of the above discussion, we recommend that in section 497, after sub-section (3), the following sub-section be inserted :—

"(3A) Any Court which has released a person on bail under sub-section (1) or sub-section (2) may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody."

Existing sub-section (3A) may be renumbered as sub-section (3B) and existing sub-section (5) may be omitted. Instead of section 498, we may have the following sections—

Special powers of High Court or Court of Sessions regarding bail.

"498. (1) A High Court or Court of session may direct—

(a) that any person accused of an offence and in custody be released on bail; or

(b) that any condition imposed by the Magistrate when releasing any person on bail be set aside or modified[1], or

(c) that any person who has been released on bail under clause (a) or under section 496 or section 497 be arrested and commit him to custody.

(2) When a person accused or suspected of the commission of an offence punishable with imprisonment for a period which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code, or of the abetment of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1) by the High Court or Court of Session, that Court may impose any condition which it considers necessary—

(a) in order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or

(b) in order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or

(c) otherwise in the interests of justice[2].

Amount of bond and reduction thereof.

"498A. (1) The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case and shall not be excessive.

(2) The High Court or Court of Session may direct that the bail required by a police officer or Magistrate be reduced."

Anticipatory bail.

39.9. The suggestion for directing the release of a person on bail prior to his arrest (commonly known as "anticipatory

[1] See 36th Report.
[2] See 36th Report.

bail") was carefully considered by us. Though there is a conflict of judicial opinion about the power of a Court to grant anticipatory bail, the majority view is that there is no such power under the existing provisions of the Code. The necessity for granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false causes for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. In recent times, with the accentuation of political rivalry, this tendency is showing signs of steady increase. Apart from false cases, where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail, there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail.

We recommend the acceptance of this suggestion. We are further of the view that this special power should be conferred only on the High Court and the Court of Session, and that the order should take effect at the time of arrest or thereafter.

In order to settle the details of this suggestion, the following draft of a new section is placed for consideration :—

Direction for grant of bail to person apprehending arrest.

"497A. (1) When any person has a reasonable apprehension that he would be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section. That Court may, in its discretion, direct that in the event of his arrest, he shall be released on bail.

(2) A Magistrate taking cognizance of an offence against that person shall, while taking steps under section 204(1), either issue summons or a bailable warrant as indicated in the direction of the Court under sub-section (1).

(3) If any person in respect of whom such a direction is made is arrested without warrant by an officer in charge of a police station on an accusation of having committed that offence, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, such person shall be released on bail."

We considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted. But we found that it may not be practicable to exhaustively enumerate those conditions; and moreover, the laying down of such conditions may be construed as prejudging (partially at any rate) the whole case. Hence we would leave it to the discretion of the court and prefer not to fetter such discretion in the statutory provision itself. Superior Courts will, undoubtedly, exercise their discretion properly, and not make any observations in the order granting anticipatory bail which will have a tendency to prejudice the fair trial of the accused.

Section 499.

39.10. With reference to section 499, various suggestions[1]-[2] have been received by us regarding the procedure for verification of sureties, *e.g.*, that in every case the court must make an inquiry regarding sufficiency of the sureties; or that house tax and income tax receipts should be enough to vouch for solvency of the sureties. In our opinion, these are matters which can be more conveniently dealt with by rules and practice rather than by elaborate provisions in the Code. We do not, therefore, suggest any amendment in this respect.

In consequence of the recommendation[3] regarding grant of bail with a condition, it is desirable to add the following sub-section in section 499 :—

> "(1A) Where any condition is imposed for the release of any person on bail, the bond shall also contain that condition.

Sections 500 to 502.

39.11. No changes are needed in sections 500 to 502.

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[1] Suggestion of the Intelligence Bureau, Home Ministry F.3(2)/55-L.C. Pt. IV, S. No. 122.

[2] F.3(2)/55-L.C. Part II, S. No. 33. page 99 (Suggestion of the Government of U.P.).

[3] See para. 39. above.

CHAPTER XL

COMMISSIONS FOR THE EXAMINATION OF WITNESSES

Introductory.

40.1. Chapter 40 lays down the procedure for issuing commissions for the examination of witnesses and for the execution of such commissions. Different provisions are made in the Chapter for witnesses in the territories to which the Code extends, witnesses in areas in India but outside those territories and witnesses outside India. It also provides for the execution in India of foreign commissions.

Section 503 provision for payment of expenses of accused.

40.2. Section 503 is the main section under which a commission may be issued when the examination of a witness is necessary for the ends of justice and his attendance cannot be procured without an amount of delay, expense or inconvenience which under the circumstances of the case, would be unreasonable. It has been suggested[1] that the following proviso may be added to section 503 :—

> "Provided that the accused's counsel is present and the expenses of the same are borne by the prosection or the Government."

As regard presence of the pleader, the Code already contains a provision.[2] As regards expenses, while we do not think that an order for paying expenses should be made a condition precedent to the issue of a commission in every case, we do appreciate that the Court should have a discretion to require payment by the prosecution of such expenses[3] as the Court considers reasonable to enable the accused and his counsel to participate in the examination on commission. Such payment should however be confined to cases where a commission is issued for the examination of a prosecution witness. We recommend the addition of a sub-section (2) as follows :—

> "(2) The Court may, when issuing a commission for the examination of a witness for the prosecution, direct that such amount as the Court considers reasonable to meet the expenses of the accused, including the pleader's fees, be paid by the prosecution."

Section 503, prov so.

40.3. While the issue of a commission is discretionary under the main paragraph of section 503, the proviso makes it mandatory where "the examination of the President or the Vice-President or the Governor of a State as a witness is necessary for the ends of justice." The principle on which the proviso seems to be based is that the head of the State should not be summoned in Court. The proviso is mandatory. Even if the President, the Vice-President or the Governor wishes to be examined in

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[1] Home Ministry File No. 25/5/54-Judl. Appendix II, Item 43 (Suggestion of Shri P. S. Sundarayya).

[2] Section 506(2).

[3] For the present law as to costs, see *Abdul Aziz*, A.I.R. 1958 Raj. 127.

the Court, that cannot be done. The proviso was enacted in 1954 to override the view taken in a Punjab case[1] in which refusal by a special judge to issue a commission for the examination of a Governor was upheld by the High Court. No change is necessary in the proviso.

Section 504.

40.4. Sub-section (1) of section 504 provides that a commission for the examination of a witness in the territories to which the Code extends shall be directed to the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction the witness is to be found. In view of the separation of powers such commissions should be issued to the Chief Judicial Magistrate. Even in the very rare cases in which an Executive Magistrate thinks it proper to issue a commission, it can be addressed to the Chief Judicial Magistrate. Sub-section (1) may be amended to read as follows :—

> "(1) If the witness is within the territories to which this Code extends, the commission shall be directed to the Chief Metropolitan Magistrate or Chief Judicial Magistrate, as the case may be, within whose local jurisdiction the witness is to be found."

No amendments are needed in sub-sections (2) and (3) of the section.

Section 505 revised.

40.5. In section 505(1), which relates to the execution of commissions, for "District Magistrate", it will be necessary to substitute "Chief Judicial Magistrate", as a consequence of the change proposed[1] to section 504(1). There seems to be no need for a slightly different wording in sub-section (2) and the two sub-sections may be combined.

Accordingly, section 505 may be revised to read as follows :—

Execution of commission.

> "505. Upon receipt of the commission, the Chief Metropolitan Magistrate or *Chief Judicial* Magistrate, or such Metropolitan or Judicial Magistrate as he may appoint in this behalf, shall summon the witness before him or proceed to the place where the witness is, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in trials of warrant cases under this Code."

Sections 506 to 508A.

The remaining sections of this Chapter do not call for any comments or amendments.

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[1] *State* v. *Krishnaswami,* A.I.R. 1954 Punjab 294.

[2] See para. 40.4 above.

CHAPTER XLI

SPECIAL RULES OF EVIDENCE

Introductory.

41.1. The framers of the Code were aware that the evidence of certain experts in the service of Government would be frequently required in criminal courts, and if these experts were to be treated as ordinary witnesses whose sworn statement in court alone could be legal evidence, they would be spending most of their time giving evidence. Also, the number of such experts was so small that they could not be always conveniently spared for attending the courts. Special rules of evidence were therefore framed for them. They are placed in Chapter 41 of the Code.

In framing them, the cardinal rules of evidence have been kept in view and the number of experts kept at the minimum. Thus, according to section 509, a civil surgeon or other medical witness is now exempted from appearing in the Court of Session if he has given evidence in the committing court; and his recorded statement in that court is by a special rule made evidence at the trial, the safeguard being that the trial court (*i.e.*, the Court of Session) can, if it thinks fit, summon and examine the witness. By section 510, the report of a Chemical Examiner is made evidence without the Chemical Examiner being at all called to give evidence in Court, again the safeguard being that he can at the discretion of the Court be called and examined. The same rule applies to the report of the Chief Inspector of Explosives, the Director of Finger Print Bureau or an officer of the Mint. Various suggestions have been made to include other experts in this list. It is, we think, necessary that we proceed in this direction with some caution, for, although past experience does not show any abuse of these special provisions, it would be unwise to make them general.

Section 509.

41.2. Regarding section 509, which enables the Court of Session to accept as evidence the statement of a medical witness made in the committing court, it has been suggested[1] that the time of such experts could be further saved, if the report could be treated as evidence without the expert's appearance in Court. We do not think there is anything to be gained by such a procedure. In a serious case, medical evidence can be all important, and a court will rarely find it unnecessary to call the medical witness to court to give oral evidence. On the other hand, there is considerable danger that the opinion of such experts may in such circumstances become somewhat irresponsible. An extreme suggestion[2] made is that the report of a medical witness should be made conclusive evidence, a suggestion not worthy of serious consideration.

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[1] Suggestion received through the Home Ministry—F. 3(2)/55-L.C. Pt. V, C. No. 200.

[2] Suggestion received through the Home Ministry—F. 3(2)/55-L.C. Pt. V. C. No. 200.

Suggestions to include reports of other experts in section 510.

41.3. Regarding section 510, the main suggestion is that many other experts could with advantage be included, so that they could be saved the need of appearing in Court. Thus, suggestions have been received for adding the following officers to those mentioned in section 510(1) :—

(i) Technical staff of the Veterinary College, Mathura[1] (in relation to reports as to whether flesh is of a cow or other animal with reference to the Prevention of Cow Slaughter Act);

(ii) Government handwriting experts[2] and Government medical officers[3] (the latter in relation to injuries report and *post mortem report*);

(iii) Director-General of Central Forensic Laboratories and Directors of State Forensic Laboratories.[4] (It is stated that though the term "Chemical Examiner" may include a good portion of the work of the Director of Forensic Laboratory, there may be other investigations like ballistics, physics or biology, which may not call for chemical examination);

(iv) Director and other technical experts of the Haffkeins Institute;[5]

(v) Any expert of the Finger Print Bureau, instead of only the Director.

Recommendation in 25th Report.

41.4. As we have said[6], it would not be wise to make this special provision applicable to every expert. The present provision takes in only those experts who, because of their small number and situation, require special treatment, and we are satisfied that this consideration alone would justify it. In the present list are :—

(i) any Chemical Examiner or Assistant Chemical Examiner;

(ii) the Chief Inspector of Explosives;

(iii) the Director of the Finger Print Bureau; and

(iv) any officer of the Mint.

The report of any of these experts on any matter duly submitted to him for examination or analysis is good evidence. We think that responsible officers in the Government Security Press and the office of the Controller of Stamps stand in a very similar position. The Commission has, in an earlier Report,[7] recommended that a new section (section 509A) should be inserted in the Code,

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[1] Suggestion of Government of U.P., received through the Home Ministry—F. 3(2)/55-L.C. Pt. VI, S. No. 308.

[2] F. 3(2)/55-L.C. Pt. II, S. No. 33, page 99.

[3] Suggestion of Shri S. K. Sengupta District Prosecutor, Bihar. F. 3(2)/55-L.C. Pt. I, S. No. 72.

[4] Resolution of Conference of Inspectors-General of Police and comment of the State Government of Madhya Pradesh thereon (received through the Home Ministry).

[5] Suggestion of the Government of Bombay, received through the Home Ministry—F. 3(2)/55-L.C. Pt. I, S. No. 3.

[6] See para. 41.1. above.

[7] 25th Report (Report on Evidence of Officers about forged stamps, currency notes etc.).

covering the case of such officers. The need for a separate section arose because the Commission felt it necessary to provide that if any such expert is called to court, he should not be compelled to disclose any confidential information on which the report might be based, the resaon being that the disclosure of such information may facilitate the forging of currency notes or revenue stamps. The same consideration applies to the officers of the Mint.

New section 509A proposed.

41.5. We propose that the new section 509A should be in the following terms :—

Evidence of officers of Mint etc.

"509A. (1) Any document purporting to be a report under the hand of any such gazetted officer of the Mint or of the India Security Press[1] (including the office of the Controller of Stamps) as the Central Government may, by notification in the Official Gazette, specify in this behalf, upon any matter or thing duly submitted to him for examination and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code, although such officer is not called as a witness.

(2) The Court may, if it thinks fit, summon and examine any such officer as to the subject-matter of his report :

Provided that no such officer shall be summoned to produce any records on which the report is based.

(3) Without prejudice to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, no such officer shall, except with the permission of the Master of the Mint, the Controller of the India Security Press or the Controller of Stamps and Stationery, as the case may be, be permitted—

(a) to give any evidence derived from any unpublished records on which the report is based; or

(b) to disclose the nature or particulars of any that applied by him in the course of the examination of the matter or thing."

Section 510 revised.

41.6. Section 510 will deal with other expert reports where security is not a consideration. We propose to add two more experts in that list, namely,—

(i) the Director of the Haffkeins Institute, Bombay; and

(ii) the Director of the Central Forensic Laboratory.

We are not convinced that handwriting experts employed by Government should be treated in the same way. Their evidence is almost always subject to controversy and no special value can be attached to their reports merely because the expert is employed by Government. Nor can we justify the extension of this provision to cover ordinary medical or veterinary experts. The procedure here is very special and must be confined to special experts.

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[1] The Controller of Stamps who is in charge of distribution is a part of the India Security Press. Printing of stamps is also done there.

In an earlier Report[1], the Commission noted that section 510(2), as amended in 1955, makes it obligatory for the Court to summon the Chemical Examiner or other officer mentioned in sub-section (1), if either party so desires. The Commission regarded this provision as unsatisfactory and recommended that it should be left to the discretion of the court to summon such officers. We agree with this recommendation and are suggesting an amendment to implement it.

Section 510 may be revised to read as follows :—

Reports of certain Government scientific experts.

"510. (1) Any document purporting to be a report under the hand of a *Government scientific* expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, summon and examine any such *expert* as to the subject-matter of his report.

(3) *This section applies to the following Government scientific experts, namely,—*

(a) any Chemical Examiner or Assistant Chemical Examiner to Government;

(b) the Chief Inspector of Explosives;

(c) the Director of the Finger Print Bureau;

(d) *the Director, of the Haffkeins Institute, Bombay;*

(e) *the Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory*[2]."

Section 510A and 511.

41.7. No change is needed in sections 510A and 511.

Section 512. amended.

41.8. Section 512 deals with a case which cannot be tried because the accused person has absconded and there is no prospect of his arrest in the near future. A Magistrate competent to try or commit him for trial can, in such circumstances, record the evidence produced by the prosecution; and that evidence can be later used at the trial of the accused when he is arrested, in case the witness who made that statement is not available to give evidence. This provision has proved useful, and does not need amendment.

The situations in which evidence recorded under sub-sections (1) and (2) of section 512 can be later utilised are described in different terms in each sub-section, but it appears that the distinction is deliberate. Sub-section (2) is meant for a case where the offender is unknown and the offence is a serious one. We do not propose to disturb the distinction.

We propose, however, that in sub-section (1), the words "cannot be found" be added after the words "if the deponent is

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[1] 14th Report, Vol. 2, pages 848-849, para. 26.

[2] There are, at present, three Central Forensic Science Laboratories at New Delhi, Calcutta and Hyderabad, and State Forensic Science Laboratories at several places.

dead or is incapable of giving evidence", in order to make the provision comprehensive, and also, for the word "attendance", the word "presence" be substituted. These two amendments will bring the wording of this provision into conformity with that of section 33 of the Evidence Act.

It was further suggested to us that the situation where the deponent is kept out of court by an adverse party should also be covered by this provision. It would obviously be difficult to determine who is an adverse party and there would be allegations and counter-allegations which are bound to create difficulties. This suggestion was therefore not accepted.

CHAPTER XLII

BONDS

Introductory.

42.1. Chapter 42 of the Code contain provisions for bonds, or rather for the forfeiture of bonds, while the provisions for the execution of bonds of various kinds are to be found scattered all over the Code. The main provision regarding forfeiture is in section 514, which, in substance, says that if a bond is forfeited to the satisfaction of the court concerned, the penalty mentioned in the bond may be recovered from the party liable to pay it, and the mode of recovery mentioned is attachment and sale of movable property, and, failing that, by sending the party concerned to civil jail for six months.

Section 514(1)

42.2. Sub-section (1) of section 514 empowers the Court by which a bond has been taken or a Presidency Magistrate or Magistrate of the first class, to order its forfeiture, if satisfied that its terms have been violated; and when the bond is for appearance before a Court, the Court has similar powers. A doubt has sometimes arisen[1] whether, in the case of a bond for appearance in a particular Court, that Court alone can forfeit it or whether any Magistrate of the first class has the power. As a matter of policy, we think that this power should, in the case of a bond for appearance before a Court, be confined to that Court, as that Court is in the best position to judge the gravity of the breach of condition causing forfeiture. Occasionally, some doubt has also arisen[2] whether a bond for appearance before a Court can be forfeited by the order of a Court to which the case was later transferred. It is only proper that the transferee Court should have the same power to deal with such a bond as the first Court had when the case was in that Court. We propose to clarify both these points by a suitable amendment.

It has been suggested[3] that, apart from the bonds mentioned in the Code—and they are mainly for appearance in Court or for good behaviour or for keeping the peace—a provision should be made to authorise the police to take a bond for the production of movable property in Court in case the property, because of its bulk or other reason, cannot conveniently be removed from where it happen to be. The normal procedure[4] is that the police seizing any property must report the seizure to a Magistrate who can then make such order as he thinks fit. It may, however, happen in certain circumstances that the property cannot be at once seized in a physical sense, and it may

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[1] *Hardwari Lal* v. *The State*, A.I.R. 1959 All. 751.

[2] *Mustaqi-Mud-Din*, A.I.R. 1926 All. 297; *Ballabh Das*, A.I.R. 1943 Bom. 178, 179 (D.B.); *Karali Charan Chatterjee*, A.I.R. 1949 Pat. 196, 197.

[3] Suggestion of the Government of Madhya Pradesh received through the Home Ministry [F. 3(2)/55-L.C. Pt. IV, S. No. 65].

[4] See section 523.

be useful to provide that the police may let it remain in the custody of a surety on his executing a bond to produce the property in Court when asked to do so. Once such a provision is made, it would be quite simple to provide for the forfeiture of the bond. We suggest, therefore, that section 523 should be suitably amended to provide for such a bond. As far as section 514(1) is concerned, any such bond should be equated to a bond for appearance before a Court.

We may mention two more suggestions which we have not found it necessary to adopt. One is[1] that a provision should be made for the forfeiture of a bond which Government sometimes takes under section 401 from a person whose sentence Government decides to suspend or remit. Such a bond is not mentioned in the Code, nor is it taken by a Criminal Court, and it would be hardly proper to provide for its forfeiture through a Criminal Court. The second suggestion is that the liability of a surety in respect of a bond should not be enforced if the principal has in respect of that bond paid the penalty.[2] We do not think, however, that the ordinary rule[3] that the liability of a surety should be co-extensive with the principal's liability should be applied to criminal jurisdiction, where the object of a bond is different.

Section 514, (2) and (3).

42.3. We note that a Maharashtra amendment[4] of the Code has replaced the existing sub-sections (2) and (3) of section 514 by a simple provision which equates the procedure for recovery of the penalty under a forfeited bond with the procedure for the recovery of a fine imposed by a Court. We propose to adopt this amendment in the Code.

Revised sub-sections (1) and (2).

42.4. We propose accordingly that sub-sections (1), (2) and (3) of section 514 be replaced by the following:—

> "(1) Where a bond under this Code is for appearance, or for production of property, before a court and it is proved to the satisfaction of that Court, or of any Court to which the case has subsequently been transferred, that the bond has been forfeited,
>
> or where, in respect of any other bond under this Code, it is proved to the satisfaction of the Court by which the bond was taken, or of any Court to which the case has subsequently been transferred, or of the Court of any Magistrate of the first class, that the bond has been forfeited,
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> the court shall record the grounds of such proof, and may call upon any person bound by such bond to pay

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[1] *M. Homi* v. *Deputy Commissioner*, A.I.R. 1953 Pat. 302, 305. The case went up to the Supreme Court on appeal: A.I.R. 1955 S.C. 478; (1955) 2 S.C.R. 78; but this point was in issue. As to another case in which such a bond was taken, see *Sohan Singh*, A.I.R. 1955 Punj. 156 (D.B.).

[2] See *Narain Sahai* v. *Emp.*, A.I.R. 1946 All. 333, 336, (F.B.) in which conflicting decisions on the point are discussed.

[3] See section 128, Contract Act.

[4] See Maharashtra Act 22 of 1960, section 2.

the penalty thereof or to show cause why it should not be paid.

Explanation.—A condition in a bond for appearnace, or for production of property, before a Court shall be construed as including a condition for appearance, or as the case may be, for production of property, before any Court to which the case may subsequently be transferred.

(2) if sufficient cause is not shown and the penalty is not paid, the Court shall proceed to recover the same as if such penalty were a fine imposed under this Code."

Section 514 (4).

42.5. Sub-section (4) of section 514 provides that if the penalty is not paid and cannot be recovered by attachment and sale of property, the Court may order the person, who is bound under the bond, to imprisonment in civil jail for six months. We feel that imprisonment in these circumstances is out of accord with modern thinking and propose to omit sub-section (4).

Section 515.

42.6. Section 515 provides for appeals against orders passed under section 514 by Magistrates. These are, at present, made appealable to the District Magistrates, but in view of the separation of the judiciary we consider that all such appeals should lie to the Session Judge.

Section 515 may accordingly be revised to read as follows :—

"515. All orders passed under section 514 by any Magistrate shall be appealable to the Sessions Judge, or, if not so appealed, may be revised by him."

CHAPTER XLIII

DISPOSAL OF PROPERTY

Introductory.

43.1. Regarding the disposal of property, Chapter 43 provides for the passing of interim orders for the custody and disposal of the property pending inquiry or trial and of final orders at the conclusion of the inquiry or trial.

The property in respect of which such orders can be passed may be—(i) property regarding which an offence appears to have been committed, or (ii) property which appears to have been used for the commission of an offence, or (iii) any property or document produced before the court or in its custody.

There are detailed provisions in regard to property seized by the police. Such property, again, may be of various classes, such as[1], articles found upon search of a person arrested,[2] property alleged or suspected to be stolen, or[3] property found under circumstance which create suspicion of the commission of an offence.

The modes of disposal of the property are, again, numerous, and the particular mode is, for obvious reasons, left to the discretion of the court. Thus "disposal" of the property may be by destruction, confiscation delivery to any person claiming to be entitled to possession of the property, restoration to person dispossessed, or sale, etc.

Section 516A.

43.2. Section 516A provides that when any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence, is produced before any Criminal Court during any inquiry or trial, the court may make such order as it thinks fit for the proper custody of the property pending the conclusion of the inquiry or trial. The court is empowered to make such interim order because, in some cases, it becomes necessary to preserve the property either as evidence[4] or in order to make a proper order after the case is over.

Suggestion to bar attachment by civil court in certain cases.

43.3. In a suggestion[5] received by us, it is stated that sometimes property attached (*i.e.* property seized) in criminal cases of cheating, criminal breach of trust etc. is attached by civil courts also and appropriated in execution of decrees collusively obtained

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[1] See sections 51, 53 and 153(2).

[2] See sections 51, 54(1), fourthly, 94(1), 98(1), 165(1) read with 103 and 550. The chronological order is sections 54, 51, 550 and 528. See discussion in *Kasturi Lal*, A.I.R. 1965 S.C. 1039, 1043, (1965) 1 S.C.R. 375. As to procedure, see section 103(2).

[3] See sections 94(1) to 99A, 165 and 554. As to procedure see section 103. . .

[4] See *Rajendra v. Sama*, A.I.R. 1931 Cal. 455, 456 (Rankin C.J. and Costello J.).

[5] F. 4(2)/55-L.C. Part I, S. No. 59 (Suggestion of District Government Counsel, Moradabad).

against the accused. It is suggested that it is necessary to protect such money from attachment by civil courts, and for this purpose provision should be made in section 516A, that pending the conclusion of the inquiry or trial, such property shall not be liable to attachment under orders of a civil court, and after the conclusion of the trial, it shall be subject to the orders of the criminal court.

We are not in favour of the suggestion. The correct procedure in such cases would be for the complainant or informant (or other person claiming to be the owner) to file a claim or objection under the Code of Civil Procedure,[1] in the proceeding for attachment. There is no need to amend section 516A, for the purpose.

Documentary and material exhibits in the inquiry or trial.

43.4. Section 516A does not cover all property that comes into possession of the Court for the purposes of an inquiry or trial. For instance, property which is produced merely as evidence of crime is not covered. In many States, express provision for the disposal of such property is not necessary since the High Court Rules provide for interim custody and final disposal of all documents and articles produced before any Court for the purpose of evidence. These are marked as documentary exhibits or material exhibits. But it will be noticed that this class of property is expressly mentioned in section 517(1). There may be some States where the High Court Rules do not provide for the custody and disposal of such property. We therefore suggest that section 516A should be made comprehensive so as to include material and documentary exhibits in the case which may not have been used for the commission of the offence or regarding which no offence may appear to have been committed.

Amendment of section 516A.

43.5. The opening clause of section 516A may accordingly be amended to read—"When any property is produced before any criminal court during any inquiry or trial".

Section 517(1).

43.6. Section 517 empowers the Court to make, at the conclusion of an inquiry or trial, orders for the disposal of any property or document (i) produced before it, or (ii) in its custody, or (iii) regarding which any offence appears to have been committed, or (iv) which has been used for the commission of any offence. The terms of the section are wider than those of section 516A. The four classes of property are listed disjunctively, so that, provided the inquiry or trial has come to an end, and the property falls within any one of the four categories, the Court has jurisdiction to pass orders under this section.[2]

Disposal of money.

43.7. Difficulties arise in practice when a Criminal Court has occasion to pass orders under section 517 for the disposal of money, *e.g.* bank notes or currency notes. Where there is doubt as to who is really entitled to possession, and the Criminal

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[1] See Order 21, Rule 58, Code of Civil Procedure, 1908.

[2] See *Bhimji* v. *Emp.*, A.I.R. 1944 Nag. 366, 367. The history of the section is traced in "Disposal of Property" (1903) 8 C.W.N. (Journal) 43, which criticizes *Surendra* v. *Rai Mohan,* I.L.R. 30, Cal. 690, 692.

Court makes an order to the best of its judgment leaving the doubtful question of title to be decided by the Civil Court, the property may disappear before an effective decision of the Civil Court is obtained. To quote from a judgment[1] of the Andhra Pradesh High Court :—

> "In cases like the present, where it is extremely doubtful whether the petitioner and his co-accused are really entitled to possession of the currency notes, if they should be, in pursuance of the normal rule, allowed to take back these notes, the persons who might really be entitled thereto may, even if they succeed in the Civil Court, be unable to recover the property from the petitioner. The property may, in the meanwhile, vanish into thin air. It is doubtful even if the Civil Court could direct the disposal of these moneys with it, pending adjudication of the right to them.
>
> I think it is desirable that the Criminal Procedure Code should make a provision applying to cases like this one, for instance, enabling a Magistrate to keep the property with him for a definite period of time, pending the filing of a civil suit relating to it, and directing him to deliver the property to the Civil Court on being asked by that Court, after the institution of the suit. There may alternatively be a provision placing it at the disposal of the Government, pending a suit. If very valuable movable property is, under the general rule, returned to persons who may not be really entitled to it, serious loss may result to the true owners, because it can disappear very easily."

In that case, the High Court rejected the argument that such a power already existed, and dissented from the cases[2] cited in support of that argument.

Suggestion by a Bar Council.

43.8. A Bar Council has suggested that section 517 to 520 should be simplified on the following lines. In cases of conviction of the accused, the property should be directed to be handed over to the owner. If there is a dispute as to ownership, the court should hold a summary inquiry and, if unable to come to a decision, refer the matter to a civil court whose decision will be followed. If the trial ends in acquittal, the property should be handed over to the person from whose possession it was taken. But if such person was an accused and he disclaims any ownership of property, the property should be handed over to the owner. In such a case security should be taken from the party to whom it is given. The appellate or revisional court may be statutorily required to pass an order either of confirmation or reversal of the order passed by the trial court when such court disposed of the main criminal case. A right of appeal may be given to the party aggrieved by the

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1 *Tenali Sitiah* v. *State*, A.I.R. 1957 A.P. 1024, 1026 paragraph 11 (Bhimasankaran J.)

2 *Muttiah* v. *Vairaperumal* A.I.R. 1954 Mad. 214; *Kedar Nath* v. *Mohamed Siddiq* A.I.R. 1924 Cal. 455, 456.

order, in case no appeal or revision petition is filed against the conviction or acquittal of the accused.

Principles regarding disposal.

43.9. The principles to be deduced from reported decisions regarding the Court's power under this section may be summarised as follows :—

(i) The ordinary rule is, that if the accused is acquitted of an offence regarding property, the court must restore the property to him if it was recovered from his possession.[1] The criminal court should not enter into questions of title in respect of property.

(ii) The rule is the same as regards cash and currency notes.[2]

(iiii) Ordinarily, the court would not be justified in detaining the property till the decision of the Civil Courts.[3]

(iv) An order for indefinite detention in court custody or in the custody of one of the parties conditional on a civil suit, would not be desirable.[4] The various possible courses to be adopted were analysed in a Madras case.[5]

(v) Even a conditional order of restoration does not seem to be contemplated in ordinary cases. The contrary view was, however, taken in one case.[6]

Commission's views.

43.10. In our opinion, it is not advisable to insert a provision as suggested in the Andhra Pradesh case. Such a provision would go against the scheme of the Code, which contemplates final orders as to disposal by the criminal court either under section 517 or under section 518 read with section 523. It may be left to the discretion of the aggrieved party to move the civil court and obtain interim protection of the property, till final adjudication about its title. For the same reason we are not in favour of the radical revision of the existing section suggested by the Bar Council.

Section 517 (2).

43.11. Sub-section (2) of section 517 provides that when a High Court or a Court of Session makes an order under subsection (1) and cannot deliver the property to the person entitled through its own officers, the Court may direct the order to be carried into effect by the District Magistrate. Since a

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[1] *Sattar Ali* v. *Afzal Mohammed*, (1927) I.L.R. 54 Cal. 283, 285; A.I.R. 1927 Cal. 532; *Srinivasamoorthi* v. *Narasimhulu Naidu*, (1927) I.L.R. 50 Mad. 916, 919; A.I.R. 1927 Mad. 797, 798.

[2] *Pushkar Singh* v. *State*, A.I.R. 1953 S.C. 508; *In re Pandhariah*, I.L.R. 40 Bom. 186; A.I.R. 1915 Bom. 265, distinguished in *Akshoy Kumar* v. *Naya Kumar* A.I.R. 1940 Cal. 346.

[3] *Kasiram* v. *Makhanji Dwarka Prasad*, A.I.R. 1937 Pat. 591, 592. *Kantha Mal* v. *Himachal Pradesh Administration*, A.I.R. 1963 H.P. 45 (Reviews case-law).

[4] *Cf.* Observations in *Mohd. Yusuf* v. *Krishna Mohan*, A.I.R. 1938 Cal. 17, 20.

[5] *Muthiah* v. *Vairuperumal*, A.I.R. 1954 Mad. 214, 215 (Reviews case-law).

[6] *Chenga Reddi* v. *Ramaswamy*, A.I.R. 1915 Mad. 588.

High Court seldom tries a case itself and the ordinary original jurisdiction of High Courts is to be completely abolished, this provision is practically unnecessary for them. A Sessions Court also should have no difficulty in getting its order for the delivery of property to a specified person effected through its own officers. We therefore propose to omit sub-section (2).

Section 517 (3).

43.12. In section 517(3), the period of one month may be increased to two months, since the period of limitation is now more than one month for certain criminal appeals. Though in some cases it is 90 days, an increase to two months will suffice to enable a party aggrieved by an order passed under section 517(1) to obtain stay or modification from the appellate or revisional Court. The appeal mentioned in section 517(3) will include an independent appeal against the order regarding disposal of property as well as an appeal in the main case. No elaboration in this respect is necessary here, in view of the re-draft of section 520 we are proposing below.

Section 517 (4).

43.13. Sub-section (4) is put in a negative form and states that nothing in this section shall be deemed to prohibit any Court from delivering any property etc. The object is to enable a Court to deliver the property to any person on his furnishing sufficient security to produce the property if and when required. It appears desirable to put this in the positive form. Since an order made under sub-section (1) is liable to be modified or set aside in revision as well as on appeal, the words "or in revison" should be added at the end.

Section 518. M.

43.14. Section 518 empowers a Court, instead of inquiring into the matter and passing a definite order under section 517 (1), to send on the property to the district Magistrate or to a Sub-divisional Magistrate, and the latter is authorised to dispose of the property in the manner provided in sections 523 to 525. Functions under the latter sections are at present exercisable by Executive as well as Judicial Magistrates, but since these are essentially judicial functions, we are proposing that the police should report any seizure of property to the appropriate Judicial Magistrate and not to an Executive Magistrate. Consequently, the delegation under section 518 should also be to the Chief Judicial Magistrate instead of "to the District Magistrate or to a Sub-divisional Magistrate". With this change it is clear that the delegation should be available only to a Court of Session and not to any subordinate Court. Instead of a separate section, this provision for delegation should properly be made in section 517 itself.

Section 517 and 518 combined and revised.

43.15. It is accordingly proposed that sections 517 and 518 may be combined and revised as follows :—

Order for disposal of property at conclusion of trial.

"517. (1) When an inquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence.

(2) An order may be made under sub-section (1) for the delivery of any property to any person claiming to be entitled to the possession thereof, without any condition or on condition that he executes a bond, with or without surities, to the satisfaction of the Court, engaging to restore such property to the Court if the order made under sub-section (1) is modified or set aside on appeal or revision.

(3) A Court of Session may, instead of itself making an order under sub-section (1), direct the property to be delivered to the Chief Judicial Magistrate who shall thereupon deal with it in the manner provided in sections 523, 524 and 525.

(4) Except where the property is livestock or is subject to speedy and natural decay, or where a bond has been executed in pursuance of sub-section (2), an order made under sub-section (1) shall not be carried out for two months, or when an appeal is presented, until such appeal has been disposed of.

(5) In this section, the term "property" includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise."

Section 519.

43.16. No changes are required in section 519.

Section 520 conflict of decisions.

43.17. The language of section 520 is somewhat ambiguous, and there is a conflict of judicial decisions[1] on its interpretation. One view is that no independent right of appeal is conferred on any party against an order passed under any of the three preceding sections, but where a regular appeal is filed against the judgment of the trial court, the appellate court, while disposing of the appeal, may exercise the powers conferred on the trial court by those sections. The other view is, that section 520 confers an independent right of appeal on a party aggrieved by an order passed under those sections, irrespective of whether the judgment of the trial court is or is not challenged in appeal. There is a similar conflict of decisions[2] on the interpretation of section 522(3).

Commissions' view-independent right of appeal necessary.

43.17a. If there was no intention to confer an independent right of appeal on an aggrieved party, there would have been no necessity to make an express provision as in section 520. Every appellate court has the power to pass consequential and incidental orders by virtue of clause (d) of sub-section (1) of

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1 *Sharfuddin* v. *Sirajuddin*, A.I.R. 1961 Orissa 121, 123. (Reviews cases); *Sheodas* v. *Pir Dan*, A.I.R. 1963 Pun. 167, 168 (Reviews cases); *Shantaram* v. *State*, A.I.R. 1961 M.P. 1, 2; *Ram Abhilakh* v. *The State*, A.I.R. 1961 All. 96.

2 *Savlaram* v. *Dhyaneshwar*, A.I.R. 1942 Bom. 148 (Reviews cases); *Subramania Ganesan*, A.I.R. 1950 Mad. 665 (Reviews cases); *Hari Sahu*, A.I.R. 1951 Orissa 30 (Reviews cases).

section 423. Similarly, a court of revision, by virtue of section 439(1), has the same powers as an appellate court; and hence where the main judgment of the trial court is challenged by way of revision, that court also may pass consequential and inicidental orders for disposal of the property, even though such orders may involve modifying or altering the order of the trial court passed under section 517.

Apart from these considerations, we think that an independent right of appeal must be given, because the party aggrieved by an order under section 517, 518 or 519 may not be the same as the party aggrieved by the main judgment. Thus, if in a prosecution under section 411 of the Indian Penal Code, the case ends in acquittal and the trial court directs the alleged stolen property to be returned to the accused, the State may not care to prefer an appeal against the order of acquittal. But the informant may desire to challenge the order for disposal of property on the ground that it was his property and wrongfully taken away from his possession. Unless an independent right of appeal under section 517 is conferred on him, he will be without any direct remedy. Then again, there may be instances where, apart from the informant or complainant and the accused, there may be a third party who may be entitled to possession of the property or to compensation as provided in section 519. He may be aggrieved by the order passed by the trial court under any of the three preceding sections, and he will be without any remedy unless an express right of appeal is conferred.

Proposal for altering section 520.

43.18. We therefore propose that section 520 should be altered, conferring a right of appeal on any person aggrieved by a court's order under section 517 or 519. This appeal should lie to the court to which appeals ordinarily lie from convictions by the trial court, and on such appeal, the Appellate Court should have the powers now specified in section 520. At the same time, if the main judgment or final order in the original case goes up in appeal or in revision or in a death sentence case for confirmation by the High Court, the Court of appeal, confirmation or revision should obviously have the same powers. [From the practical point of view, it does not seem necessary that a Court of reference should be included in section 520 or in sub-section (3) of section 522].

Possibility of two courts dealing with the matter.

43.19. In making this proposal we are conscious of the awkwardness involved in two courts dealing with the same subject which may happen in some cases. Thus, when an appeal against the main judgment is pending before the appellate court and the aggrieved party also files an appeal under section 520 against the order passed under section 517, it is to be expected that both the appeals will be heard and disposed of by the same court at the same time. This will avoid conflict of findings on the main issues involved in the case. But it may sometimes happen that the appeal under section 520 is heard after the main appeal is disposed of. In the former appeal, the court will be concerned solely with the correctness or otherwise of the order for disposal of the property, and not with the findings of the trial court in the main case. In any event, the appellate Court's order for disposal of the property under section 517 or 519 cannot affect the finality of the order of acquittal or conviction passed in

the main case either by the trial Court or by the Court of appeal, confirmation or revision.

Where a first class Magistrate passes an order of acquittal and an order for disposal of property under section 517, appeal against the order of acquittal will be to the High Court, whereas the appeal against the latter order will be to the Court of Session. Again, where the Magistrate passes a non-appealable sentence, it may be challenged in revision in the High Court, whereas the order under section 517 will be challenged before the Court of Session. In such contingencies, it should be left to the discretion of the superior court concerned, (whether moved by the parties or not), to pass appropriate orders with a view to avoiding prejudice to any party till the final disposal of all matters in controversy. There are decided cases where principles have been laid down for meeting these contingencies, and it will be inadvisable and also impracticable to incorporate them in section 520.

Section 520 revised

43.20. We accordingly propose that the existing section 520 be replaced by the following :—

Appeal against orders under section 517 or 519.

"520. (1) Any person aggrieved by an order made by a Court under section 517 or section 519, may appeal against it to the Court to which appeals ordinarily lie from convictions by the former Court.

(2) On such appeal, the Appellate Court may direct the order to be stayed pending disposal of the appeal, modify, alter or annul the order and make any further orders that may be just.

(3) The powers referred to in sub-section (2) may also be exercised by a Court of appeal, confirmation or revision while dealing with the case in which the order referred to in sub-section (1) was made."

Section 521.

43.21. No changes are required in section 521.

Section 522 not to apply where dispossession is not by force.

43.22. Under section 522 the Criminal Court is empowered to restore possession of immoveable property to any person who has been dispossessed of it by force, show of force or criminal intimidation. A suggestion has been made to us that in many cases possession is taken without use of force in the absence of the original owner and consequently he cannot get the speedy remedy provided for in section 522. We, however, consider that the essential requirements laid down in the section before a Criminal Court could order restoration of possession of immoveable property ought not to be interfered with, because we feel that any whittling down of these requirements is likely to result in the misuse of the power.

Power to restore possession after evicting by force.

43.23. While section 522 enables the Criminal Court to order restoration of possession to the person who has been forcibly dispossessed of the property, it does not indicate how exactly this order is to be carried out. In the absence of an express power to evict by force, if necessary, the person in actual possession of the property, it appears that the order of the Court under this section may remain ineffective. We think this defect should be removed by a suitable amendment.

When Court of appeal may order under sub-section (3).

43.24. Sub-section (3) of section 522 provides that an order under sub-section (1) may be made by any Court of appeal, confirmation, reference or revision. This is to meet cases where the trial court has failed to make an order under sub-section (1) and it appears to the Court of appeal or revision that such an order ought to be made in the interests of justice. There is a conflict of decisions as to whether the period of one month from the date of the conviction which is mentioned in sub-section (1) also applies to the Court of appeal or revision.[1] This conflict should be set at rest by a slight re-wording of sub-section (3) indicating that the Court of appeal, confirmation, reference or revision may make such an order while disposing of the appeal, reference or revision, as the case may be.

Independent right of appeal desirable.

43.25. As in the case of orders for the disposal of property under section 517 and 519, it is desirable that an independent right of appeal should be conferred upon any person aggrieved by an order made under section 522(1); so also the Court of appeal, confirmation or revision dealing with the main case should have the power to modify, alter or annul an order made by the trial court under this section.

Section 522 revised.

43. 26. We accordingly propose that section 522 be revised as follows :—

Power to restore possession of immoveable property.

"522. (1) Whenever a person is convicted of an offence attended by criminal force or show of force or by criminal intimidation, and it appears to the Court that by such force or show of force or intimidation any person has been dispossessed of any immoveable property, the Court may, if it thinks fit, order that possession of the same be restored to that person after evicting by force, if necessary any other person who may be in possession of the property.

Provided that no such order shall be made by the Court more than one month after the date of the conviction.

(2) Where the Court trying the offence has not made an order under sub-section (1), the Court of appeal, confirmation or revision may, if it thinks fit, make such order while disposing of the appeal, reference or revision, as the case may be.

(3) Where an order has been made under sub-section (1), the provisions of section 520 shall apply in relation thereto as they apply in relation to an order made under section 519."

Section 523

43. 27. Section 523(1) deals with two different matters. First it lays down that seizure of property by a police-officer shall be forthwith reported to a Magistrate in certain circumstances, and then it goes on to provide for the disposal of such property by the Magistrate.

Seizure of property is to be reported by the police-officer when it is either under section 51 upon searching an arrested person, or under section 550 which empowers any police-officer to seize any property which may be alleged or suspected to have

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[1] (a) *Hari Sahu*, A.I.R. 1951 Orissa 30;

(b) *Krishnan* v. *Krishnakuthy*, A.I.R. 1960 Kerala 348 (Reviews cases).

been stolen or which may be found under circumstances which create suspicion of the commission of any offence. There are various other sections in the Code which also empower the police to seize property, e.g., during the investigation of an offence, and most of these provisions contain the requirement that the police-officer should report the seizure to a Magistrate. It would therefore be better if section 523(1) generally referred to all cases where the seizure of property by a police-officer is reported to a Magistrate and not only to seizure under sections 51 and 550. Where such property is produced before any Criminal Court during an inquiry or trial, it will be dealt with under sections 516A to 522. This class of property may be excluded from the scope of section 523(1). This sub-section may accordingly be revised as follows :—

> "(1) Whenever the seizure of property by any police-officer is reported to a Magistrate under the provisions of this Code, and such property is not produced before a Criminal Court during an inquiry or trial, the Magistrate may make such order as he thinks fit respecting the disposal of such property or the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained, respecting the custody and production of such property."

Section 524 amended.

43. 28. Sub-section (1) of section 524 provides that where no person is able to establish his claim to the property or where the person in whose possession the property was found is unable to show that it was legally acquired by him, the property shall be at the disposal of the State Government and may be sold under the orders of the Magistrate. Sub-section (2) further provides that every order passed under this section shall be appealable. From the wording of sub-section (2) it seems that it is the order of the Magistrate directing sale of the property that is made appealable; whereas it is really the implied and antecedent direction of the Magistrate placing the property at the disposal of the State Government that is, and has to be, appealable. After the Magistrate has made a lawful order that the property shall be at the disposal of the State Government, there is no need to provide expressly that it may be sold under the orders of a Magistrate. It is accordingly proposed that section 524 may be revised as follows :—

> "524. (1) If no person within such period establishes his claim to such property, and if the person in whose possession such property was found is unable to show that it was legally acquired by him, the Magistrate may by order direct that such property shall be at the disposal of the State Government.
>
> (2) An appeal shall lie against any such order to the Court to which appeals ordinarily lie from convictions by the Magistrate."

Section 525.

43.29. No changes are required in section 525.

CHAPTER XLIV

TRANSFER OF CRIMINAL CASES

Section 526-sub-sections (1) to (7) formally revised.

44.1. Sub-section (1) of section 526 sets out elaborately the circumstances in which a High Court may order transfer of a case or appeal from one subordinate Court to another or from any subordinate Court to itself. In contrast, the analogous provision made in section 527(1) empowering the Supreme Court to transfer criminal cases and appeals is very simple: it may direct transfer whenever it is "expedient for the ends of justice". Of the five clauses in section 526(1), clause (c)—"that a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same"—would seem to be a minor and unimportant matter, and in any event covered by the more general provision in clause (d). By way of simplification, clauses (c), (d) and (e) may be combined as follows :—

> "(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice".

With reference to clause (i) of sub-section (1), which enables the High Court to order that any offence be inquired into or tried *by* any Court not empowered under section 177 to 184, a controversy exists[1] as to whether the High Court can order transfer of a case *from* a Court which does not have jurisdiction under those sections. There, however, seems to be no need to alter wording of clause (i). In view of the abolition of commitment proceedings as such, clause (iv) may be formally amended to read—

> "(iv) that any particular case be committed for trial to a Court of Session."

While no changes of substance are required in sub-sections (1A) to (7) of section 526, a few drafting changes and a more logical re-arrangement of the provisions seem desirable. Sub-sections (1) to (7) may be revised as follows :—

Power of High Court to transfer cases and appeals.

"526. (1) Whenever it is made to appear to the High Court—

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that an order under this section is required by any provision of this Code, or will end to the general convenience of the parties or witnesses, or is expedient for the ends of justice,

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[1]Pokker, A.I.R. 1950 Kerala 53 (Reviews cases).

it may order—

(i) that any offence be inquired into or tried by any Court not qualified under sections 177 to 184 (both inclusive) but in other respects competent to inquire into or try such offences;

(ii) that any particular case or appeal, or class of cases or appeals be transferred from a Criminal Court subordinate to its authority to any such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case be committed for trial to a Court of Session; or

(iv) that any particular case or appeal be transferred to and tried before itself.

(2) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative :

Provided that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

(3) Every application for an order under sub-section (1) shall be made by motion, which shall, except when the applicant is the Advocate General, be supported by affidavit or affirmation.

(4) When such application is made by an accused person, the High Court may direct him to execute a bond, with or without sureties, for the payment of any compensation which the High Court may award under sub-section (7).

(5) Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which it is made; and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

(6) Where the application is for the transfer of a case or appeal from any subordinate Court, the High Court may order that, pending the disposal of the application, the proceedings in the subordinate Court shall be stayed, on such terms as the High Court may think fit to impose :

Provided that such stay shall not affect the subordinate Court's power of remand under section 344.

(7) Where an application for an order under sub-section (1) is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding *one thousand rupees* as it may consider proper in the circumstances of the circumstances of the case.

(8) When the High Court orders under sub-section (1) that a case be transferred from any Court for trial before itself, it shall observe in such trial the same procedure which that Court would have observed if the case had not been so transferred.

(9) Nothing in this section shall be deemed to affect any order Government under sub-section (2) of section 197."

Section 526 (8) compulsory adjournment on application for transfer.

44.2. Section 526(8) is a peculiar provision whereby a subordinate Court is obliged to stop all proceedings on the more intimation by an interested party that he intends to apply to the High Court for a transfer of the case. The principle that if an accused person has reasonable cause to believe that he may not receive a fair trial at the hands of a particular Judge, he should have the right to have his case transferred to another Court is unobjectionable, as also the corollary that the proceedings should not be continued while such an application for transfer is pending before a higher Court. However, the provision for a mandatory stay of the case on his mere intimation to the Court that he intends so to apply has been subject to gross abuse.

Lowndes Committee's criticism of the provision.

44.3. This provision has come in for scrutiny and criticism on several occasions. As far back as 1916, the Lowndes Committee which scrutinised the 1914 Bill to amend the Code observed :—

> "There is no doubt that some of the provisions of section 526 are subject to constant abuse, and that a party, against whom a criminal case is apparently going, will frequently apply for a transfer on manifestly insufficient grounds. We are also satisfied that advantage is frequently taken of the section to obtain an adjournment which would otherwise be refused, without the least intention of making any application to the High Court. It is reported to us, for instance, that in the Dacca Division during three years, adjournments were obtained in no less than 125 cases in which no attempt was made to move the High Court."

That Committee was of the opinion that "penalising an improper application" would put an end to the widespread abuse of the provision.

Select Committee's views.

44.4. This criticism by the Lowndes Committee was endorsed by the Select Committee on the 1921 Bill to amend the Code. It observed :—

> "We have found section 526 somewhat difficult to deal with. One class of opinions presses for greater safeguards against frivolous, vexatious or dilatory applications for transfer. Another class depreciates any measure which makes a transfer more difficult to obtain. We think it is unavoidable to retain in the Code some provision for the compulsory adjournment of a case when an intention to apply for a transfer has been notified. But we recognise that the provisions of the section, as they stand, have lent themselves to gross abuse, and, therefore, we feel that greater safeguards are necessary."

The section was amended in 1923 whereby a new sub-section (6A) was added giving the High Court power to order costs if the application for transfer was found to be frivolous or vexatious.

Further amendment in 1932.

44.5. However, the expected improvement did not take place, and a further amendment had to be resorted to in 1932. The Statement of Objects and Reasons for the 1932 Bill mentioned that "the practical working of this new procedure has been carefully observed by Government over a considerable period, and they have come to the conclusion that it lends itself to grave abuse and is calculated to defeat the ends of justice." In a judgment[1] of the Calcutta High Court, in was forcefully observed :—

> "The position created by section 526(8) is truly amazing, one effect being that no accused person can be convicted except with his own consent. No discretion is given to the Court by the section. If the accused notifies his intention to make an application to the High Court for transfer, the trial must be adjourned immediately. There is no limit to the number of such notifications which may be given during the course of any trial. × × × The abuse of process which sub-section (8) makes possible obviously may be aggravated to almost any extent, where there is a joint trial and each accused person is represented by a different pleader."

The provision was amended is 1932, whereby sub-section (8) was re-cast in more or less its present form and sub-section (6A) was amended providing for payment of compensation not exceeding Rs. 250/- to the opposite party if the application for transfer was found to be frivolous or vexatious.

Sub-sections (8), (9) and (10) to be omitted.

44.6. These changes also have failed to improve the situation. In fact, the amendment of 1955 giving the power of transferring cases to Sessions Judges has naturally led to an increase in the number of transfer applications and consequent delay in the disposal of a larger number of cases. Instances where after securing adjournment applications for transfer are either not made or not seriously pressed have not decreased in number. We are, therefore, of the opinion that sub-sections (8), (9) and (10) of section 526 which provide for a mandatory stay in trials and appeals should be deleted. In their place, power should be given to the Court hearing the application for transfer to stay the proceedings in the lower court pending the disposal of the application. This should not lead to any practical difficulties since, after the 1955 amendment, most applications for transfer are filed in the Sessions Courts and stay could be obtained without delay. We would also recommend that the maximum compensation that can be awarded by a High Court under sub-section (6) should be raised from Rs. 250/- to Rs. 1000/, and that a Sessions Court should be empowered to award compensation upto Rs. 250/-.

Section 526 A to be omitted as obsolete.

44.7. Section 526A requires the High Court to transfer the case for trial to itself, where any person subject to the Naval Discipline Act, the Army Act or the Air Force Act is accused of any such offence as is referred to in proviso (a) to section 41 of

[1] *Neamat Shah*, I.L.R. 59 Cal. 482.

the Army Act, and the Advocate-General applies for such transfer. The three Acts mentioned in this section are Acts of the British Parliament which governed the British personnel serving in India. The section has become obsolete after independence and should be omitted.

Section 527 sub-section (3) omitted.

44.8. Section 527 deals with the transfer of cases by the Supreme Court. Sub-section (3) provides that the court to which a case has been transferred under this section may act on the evidence already recorded by the former court unless the accused demands a re-trial. We do not think that any such special provision is required. Sub-section (3) may be omitted, so that the position as regards re-trial of the case after a transfer by order of the Supreme Court will be exectly the same as in a transfer under any other provision of the Code.

We considered the question whether a provision similar to section 25(2) of the Code of Civil Procedure (about the law applicable to the transferred proceedings) should be inserted in section 527. Since it is fairly clear that the substantive law originally applicable to the case will continue to apply, no express provision is necessary.

Section 528 (1).

44.9. Under sub-section (1) of section 528 any Sessions Judge may withdraw any case or appeal from, or recall any case or appeal which he has made over to, any Assistant Sessions Judge subordinate to him. Earlier in this Report[1] we have recommended that Assistant Sessions Judges need not exercise any appellate jurisdiction. The mention of "appeal" in this sub-section may, therefore, be omitted.

Section 5282(1c).

44.10. Sub-section (1C), inserted by the Amending Act of 1955, confers on Sessions Judges the power to transfer cases from one Criminal Court to another Criminal Court in the same sessions division whenever "expedient for the ends of justice." The Sessions Judge may, however, act only on an application made to him in this behalf by an interested party. The sub-section does not contain any details of procedure similar to those contained in section 526.

We consider it desirable that a Sessions Judge should be authorised to transfer cases, not only on the application of an interested party, but also on the report of the lower Court or on his own initiative. The procedural provisions contained in section 526 should be applicable *mutatis mutandis* to applications for transfer made to a Sessions Judge, should have the power to order payment of compensation when he finds that the application for transfer was frivolous or vexatious. The maximum amount of such compensation may, however, be Rs. 250 instead of Rs. 1,000.

We have in an earlier Chapter proposed[2] that appeals from convictions by Magistrates of the second class should lie to the Chief Judicial Magistrate. In view of this proposal, it is desirable that the Sessions Judge should have the power to transfer a parti-

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[1] *See* para. 31.7 above.

[2] *See* para. 31.5 above.

cular appeal from the Court of the Chief Judicial Magistrate to himself, and decide the appeal.

Section 528 (2).

44.11. Sub-section (2) of section 528 has to be read with section 192 which empowers a District Magistrate or a Sub-divisional Magistrate to transfer a case after taking cognizance of it to another Magistrate subordinate to him. In our discussion[1] of the earlier section, we have recommended that section 192 should be confined to making over of cases relating to offences and provision for transferring other kinds of cases should be placed elsewhere. The proper place for such a provision would appear to be in section 528.

Section 528 (5).

44.12. Sub-section (5) of section 528 provides that a Magistrate making an order under this section shall record his reasons in writing for making the same. We consider that this provision, which is sound in principle, should apply equally to orders of a Sessions Judge recalling, withdrawing or transferring a case or appeal under this section.

Section 528 (6).

44.13. Sub-section (6) of section 528 provides that the head of a village under the Madras Village-police Regulation, 1916, or the Madras Village-police Regulation, 1821, is a Magistrate for the purposes of this section. It appears that this provision is practically obsolete and can be omitted.

Section 528 revised and split into five sections.

44.14. Section 528, as it stands, is a composite provision dealing with different classes of Courts and with two or three different matters. It is desirable to split it up into five sections as follows :—

Power of Sessions Judge to transfer cases and appeals

"528. (1) Whenever it is made to appear to a Sessions Judge that an order under this sub-section is expedient for the ends of justice, he *may direct*—

(a) that any particular case be transferred from one Criminal Court to another Criminal Court in his sessions division;

(b) that any particular appeal be transferred from the court of a Chief Judicial Magistrate in his sessions division to his own court.

(2) The Sessions Judge may act either on the report of the lower Court, or on the application of a party interested, or on his own initiative.

(3) The provisions of sub-sections (3), (4), (5), (6), (7) and (9) of section 526 shall apply in relation to an application to the Sessions Judge for an order under sub-section (1) of this section as they apply in relation to an application to the High Court for an order under sub-section (1) of section 526, except that sub-section (7) of that section shall so apply after substituting for the words "one thousand rupees" occurring therein, the words "two hundred and fifty rupees".

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[1] *See* para. 15.83 above.

Withdrawal of cases and appeals by Sessions Judges.

528A (1) A Sessions Judge may withdraw any case from, or recall any case which he has made over to, any Assistant Sessions Judge subordinate to him.

(2) At any time before the trial of the case or the hearing of the appeal has commenced before the Additional Sessions Judge, a Sessions Judge may recall any case or appeal which he has made over to any Additional Sessions Judge.

(3) Where a Sessions Judge withdraws or recalls a case or appeal under sub-section (1) or sub-section (2), he may either try the case in his own Court or hear the appeal himself, of make it over in accordance with the provisions of this Code to another Court for trial or hearing, as the case may be.

Withdrawal of cases by Judicial Magistrates.

528B. (1) Any Chief Judicial Magistrate may withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him, and may inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same.

(2) Any Judicial Magistrate may recall any case made over by him under sub-section (2) of section 192, to any other Magistrate and may inquire into or try such case himself.

Making over or withdrawal of cases by Executive Magistrates.

528C. Any District Magistrate or Sub-divisional Magistrate may—

(a) make over any case, of which he has taken cognizance, for inquiry to any Magistrate subordinate to him;

(b) withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him, and inquire into such case himself or refer it for inquiry to any other such Magistrate.

Reasons to be recorded.

528D. A Sessions Judge or Magistrate making an order under section 528, 528A, 528B or 528C shall record his reasons for making it."

CHAPTER XLV

IRREGULAR PROCEEDINGS

Introductory.

45.1. Chapter 45 deals with the effect of irregularities in procedure on the validity of the proceedings in which they occur. The Code recognizes the principle that is not every deviation from, or neglect of, procedural formalities and technicalities that would vitiate the proceedings of a Court. Broadly speaking, only irregularities that have caused substantial prejudice to the accused will render the proceedings invalid, while minor or inconsequential errors or omissions are considered curable. The Chapter contains specific provisions saving irregularities on certain matters, as also a residuary provision saving irregularites in general. At the same time, there are certain provisions of the Code which are considered so vital that their disregard must vitiate a fair and proper trial and, therefore, destroy the validity of the proceedings.

Section 529.

45.2. Section 529 enumerates the irregularities committed by a Magistrate which do not vitiate the proceedings, where the Magistrate erroneously, but in good faith, takes a proceeding though not empowered to do so. No changes seem to be necessary in this section. Though the specific enumeration of certain proceedings naturally leaves out others, and may occasionally cause difficulties, it does not appear to be desirable to insert a blanket provision saving all irregularities where no injustice has, in fact beem caused.

Section 530.

45.3. Section 530 enumerates the irregularities which, when committed by a Magistrate not empowered by law to do a particular thing, vitiate the proceedings. The section seems to need no change.

Section 531.

45.4. Section 531 saves the validity of a proceeding held in a wrong place unless the error has in fact occasioned a failure of justice. No changes are necessary in the section.

Section 532 omitted.

45.5. Section 532 validates irregular commitments in certain circumstances. In view of the proposed abolition of commitment proceedings, this section will be rendered unnecessary and may be omitted.

Section 533 nature of evidence that may be taken.

45.6. Section 533 provides that if the Court before which a statement or confession of the accused person purporting to be recorded under section 164 and section 364 is tendered in evidence, finds that any of the provisions of such sections have not been complied with by the Magistrate recording the statement, it shall "take evidence that such person duly made the statement recorded". This expression seems to have created some difficulty in interpretation, as is evidenced by the conflicting decisions of the various Courts.

One has to distinguish between two questions, (1) whether the confession or other statement was "duly made", that is to say, made after giving the necessary warning and after putting the re-

quired questions under section 164, and (ii) whether the confession or other statement, duly made, was properly recorded.

In the first case, section 533 should not apply, because, to apply the section in such cases would defeat the very object of sections 164 and 364, thereby depriving the accused of a beneficial provision on a matter on which the law has always shown its anxious concern. It is only the second kind of defect—defect in recording—that should be curable. The Magistrate should have complied with the substantial provisions of section 164, and there can be no saving for a non-compliance on that account. If such compliance is not apparent from the record, it can be proved otherwise. That is all that section 533 is intended to provide for.

As observed by the Supreme Court[1]—

> "Now a statement would not have been 'duly made' unless the procedure for making it laid down in section 164 had been followed. What section 533 therefore does is to permit oral evidence to be given to prove that the procedure laid down in section 164 had in fact been followed when the Court finds that the record produced before it does not show that that was so. If the oral evidence establishes that the procedure had been followed, then only can the record be admitted. Therefore, far from showing that the procedure laid down in section 164 is not intended to be obligatory, section 533 really emphasises that that procedure has to be followed. The section only permits oral evidence to prove that the procedure had actually been followed in certain cases where the record which ought to show that does not on the face of it do so."

Sub-section (1) amended to clarify the position.

45.7. We would, therefore, recommend that sub-section (1) of section 533 be amended as follows to clarify that the evidence given should relate to the apparent non-compliance with the statutory provisions :—

> "(1) If any Court before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or section 364 is rendered or has been received in evidence finds that any of the provisions of either of such sections has not been complied with by the Magistrate recording the statement, *it may notwithstanding anything contained in section* 91 *of the Indian Evidence Act,* 1872, *take evidence in regard to such non-compliance, and may, if satisfied that such non-compliance has not injured the accused in his defence on the merits and that he duly made the statement recorded, admit such statement.*"

Section 533 of the Code and section 29 of the Evidence Act.

45.8. It may be noted in this connection that the effect of irregularities in the recording of a confession on its admissibility in evidence is also dealt with in section 29 of the Evidence Act. This section which saves *inter alia* the omission to warn the accused as provided for in section 164 of the Code seems to run counter to the principle underlying section 533 as explained above.

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[1] *State of U.P.* v. *Singhara Singh,* **(1964) 4 S.C.R. 385; A.I.R. 1964** S. C. 358 at page 362.

This has given rise to some difficulty in deciding the admissibility of such confessions, resulting in a number of conflicting decisions[1]. The cause of the trouble may be traced to the omission to amend section 29 of the Evidence Act when section 164(3) of the Criminal Procedure Code was amended in 1923. The matter will have to be considered when the Evidence Act comes up for revision.

Section 535 expanded and revised.

45.9. Section 535 deals with the effect of omission to frame a charge while clause (b) of section 537 deals with the effect of "any error, omission or irregularity in the charge, including any misjoinder of charges". The same matter is also dealt with in section 232 which provides that if any appellate Court or the High Court in the exercise of its powers of revision or confirmation is of the opinion that the absence of a charge or an error in the charge has misled the accused in his defence, it shall order a re-trial. The section also provides that if the facts proved in the case are such that no valid charge can be proved against the accused, the Court shall quash the conviction. We recommend that sections 232, 535 and 537(b) which deal with the same subject, should be combined into one. We are also of the opinion that a re-trial should not be mandatory as at present. In several reported cases, Courts have in the interests of justice refrained from ordering a re-trial, as for instance, when the accused had already undergone sufficient punishment[2] or when the evidence was considered insufficient to support a conviction.[3] It would be better to make the provision for ordering retrial discretionary so that a Court could pass an order appropriate in the particular circumstances of a case.

Section 535 may accordingly be amplified and revised as follows :—

Effect of omission to frame, or absence of, or error in, charge.

"535. (1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) It the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may,—

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit;

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[1] *Rangappa* v. *State*, A. I. R. 1956 Bombay 285; *Bala Majhi* v. *State*, A. I. R. 1951 Orissa 168; *Karuthambi*, A. I. R. 1951 Madras 579; *Vella, Mauji*, A. I. R. 1932 Madras 431.

[2] *See Hosseni Sardar* v. *Kalu Sardar* (1902), I. L. R. 29 Cal. 481, 482

[3] *Nemain Adak* v. *State*, A.I.R. 1966 Calcutta 89.

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction."

Section 536. omitted.

45.10. Section 536 which relates to jury trials may be deleted.

Section 537

45.11. Section 537 is a general provision regarding irregularities in complaints, summons, warrants, orders, judgments and other proceedings. Clauses (c) and (d) which relate to jury trials may be deleted. Clause (b) has been incorporated in the revised section 535(1). The rest of section 537 may be revised as follows :—

Finding or sentence when reversible by reason of error, omission or irregularity.

"537. (1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

Section 538.

45.12. Section 538 provides that no attachment shall be illegal on account of any defect in the proceedings. No change is necessary here.

CHAPTER XLVI

MISCELLANOUS

Introductory.

46.1. The last Chapter of the Code is a real hotch-potch and deserves the title 'Miscellaneous'. A number of provisions relegated to this Chapter could more appropriately and quite easily have been put in earlier Chapters along with connected or analogous sections.

Sections 539 and 539 AA(1).

46.2. Section 539 lists the persons before whom affidavits and affirmations to be used before any High Court or any officer of a High Court may be sworn or affirmed. Then section 539AA(1) provides that an affidavit to be used before any Court, other than a High Court, under section 510A (evidence of a formal character) or under section 539A (evidence regarding conduct of public servants), may be sworn or affirmed in the manner prescribed in section 539 or before any Magistrate.

According to one view,[1] section 539A(1) does not cover affidavits under section 145 since they are not of a formal character so as to fall under section 510A. A Magistrate also does not seem to possess a general power to administer oath to any person who wishes to swear an affidavit before him. The provisions of section 4 of the Indian Oaths Act, 1873, do not confer such a power.[2] In an earlier Report,[3] the Law Commission has suggested an amendment of this Act for this purpose. We see no good reason why section 539AA(1) should be limited in its scope, nor why there should be two separate and slightly different provisions for the High Court and other Courts on this subject.

As regards the authorities referred to in section 539, the Clerk of the State, Commissioners to administer oaths in England or Ireland and Magistrates authorised to take affidavits or affirmations in Scotland should obviously be omitted. On the other hand, it is desirable to add notaries as they have been expressly authorised by law to administer oaths.[4] We note that a suggestion to add notaries in the Code of Civil Procedure was rejected by the Law Commission in its earlier Report[5] on that Code on the ground that the matter should be left to be dealt with by the High Court under section 139 of that Code. We would, however, prefer to mention notaries expressly in the Code of Criminal Procedure.

Section 539A and section 539AA(2)

46.3. While no change is required in sub-section (1)of section 539A (regarding affidavits in proof of the conduct of public servants), there is no reason why the provisions in sub-section

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[1] *Hemdan* v. *State,* A.I.R. 1966 Raj. 5.

[2] *Wahid* v. *State* A.I.R. 1963, All. 256; *Nandlal Ghose* v. *Emperor* 354. A.I.R. 1944 Cal. 283.

[3] 28th Report on the Oaths Act, page 25.

[4] Section 8(1)(a), Notaries Act, 1952 (53 of 1952).

[5] 27th Report, page 125.

(2) prescribing the essential requirements of an affidavit should be limited to this class of affidavits. Similarly, the provision in section 539AA(2) that the Court may order any scandalous and irrelevant matter to be struck out or amended should be applicable in relation to all affidavits and all Courts. These two general provisions relating to affidavits may be put together in the same section.

46.4. We propose accordingly that sections 539, 539A and 539AA be combined and revised as follows :—

"539. (1) Affidavits to be used before any Court under this Code may be sworn or affirmed before— Authorities before whom affidavits may be sworn.

(a) any Judge or Magistrate;

(b) any Commissioner of Oaths appointed by a High Court; or

(c) any notary appointed under the Notaries Act, 1952.

(2) Affidavits shall be confined to, and shall state separately, such facts as the deponent is able to prove from his own knowledge and such facts as he has reasonable ground to believe to be true, and in the latter case, the deponent shall clearly state the grounds of such belief.

(3) The Court may order any scandalous and irrelevant matter in the affidavit to be struck out or amended.

539A. When any application is made to any Court in the course of any inquiry, trial or other proceeding under this Code, and allegations are made therein respecting any public servant, the applicant may give evidence of the facts alleged in the application by affidavit, and the Court may, if it thinks fit, order that evidence relating to such facts be so given." Affidavits in proof of conduct of public servants.

These two sections should be put in the Chapter relating to the taking of evidence.

46.5. Sub-section (1) of section 539B empowers any Judge or Magistrate to visit and inspect any place "for the purpose of properly appreciating the evidence given at the inquiry or trial". Whenever he does so, he is required to record without delay "a memorandum of any relevant facts observed at such inspection". While it may not always be possible to draw a sharp distinction between "relevant facts" and impressions or opinion formed by a Judge at a local inspection, the requirements of the section are fairly clear. The purpose of the inspection, as indicated in the sub-section, is neither unduly restrictive nor unduly lax. No change is required in the sub-section. Section 539B(1).

46.6. The proviso to section 539B(2) relating to jury trial will have to be omitted. Section 539B(2).

46.7. With reference to section 540A, it was suggested during our discussion that there should be a provision for continuing the proceedings in the absence of the accused in cases where he persistently disturbs the proceedings and has therefore to be kept out. If such an accused is represented by counsel, it is possible Section 540A.

for the Court, even under the present section, to proceed with the inquiry or trial in the absence of the accused person. Cases of extreme contumacious behaviour on the part of accused persons are extremely rare and we do not therefore think it necessary to make a special provision for those cases.

This section and the two preceding sections could well be included in the Chapter on general provisions as to inquiries and trials.

Section 541(3). 46.8. In section 541(3), the references to sections 341 and 342 of the former Code of Civil Procedure should be replaced by "section 58 of the Code of Civil Procedure, 1908, or section 23 of the Provincial Insolvency Act, 1920, as the case may be."

Section 542. 46.9. We have earlier in this Report recommended[1] that this section may be omitted.

Section 543. 46.10. Section 543 which lays a duty on every interpreter to interpret truthfully is a general provision relating to the taking and recording of evidence and should be included in the appropriate Chapter.

Section 544. 46.11. No change is required in section 544 which provides for payment by Government of the reasonable expenses of complainants and witnesses. As a general provision relating to inquiries and trials, this section could be put in Chapter 24.

Section 545. 46.12. Under clause (b) of sub-section (1) of section 545, the Court may direct "payment to any person of compensation for any loss or injury caused by the offence when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court". The significance of the requirement that compensation should be recoverable in a Civil Court is that the act which constitutes the offence in question should also be a tort. The word "substantial" appears to have been used to exclude cases where only nominal damages would be recoverable. We think it is hardly necessary to emphasise this aspect, since in any event it is purely within the discretion of the Criminal Courts to order or not to order payment of compensation, and in practice they are not particularly liberal in utilising this provision. We propose to omit the word "substantial" from the clause.

Section 546 A 46.12a. Section 546A applies only to complaint cases where the accused is convicted of a non-cognizable offence. In such cases, the Court may, in addition to the penalty imposed on the accused, order him to pay to the complainant the fee paid on the petition of complaint and the process fee for summoning witnesses and the accused. These fees are small amounts compared to the total expenses properly incurred by the complainant in prosecuting the offender. We consider that the Court should have the power to award full costs. Sub-section (1) of section 546A may be revised to read as follows :—

"(1) Whenever any complaint of a non-cognizable offence is made to a Court, the Court, if it convicts the accused,

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[1] *See* paragraph 37.4 above.

may in addition to the penalty imposed upon him, order him to pay to the complaint in whole or in part the cost incurred by him in the prosecution, and may further order that in default of payment, the accused shall suffer simple imprisonment for a period not exceeding thirty days. Such costs may include any expenses incurred in respect of process fees, witnesses and pleader's fees which the Court may consider reasonable."[1]

Section 549 (1) amended.

46.13. Section 549(1) refers to "the Army Act, the Naval Discipline Act, the Indian Navy (Discipline) Act, 1934, and the Air Force Act", all of which are no longer in force. This may be substituted by "the Army Act, 1950, the Navy Act, 1957 and in the Air Force Act, 1950" which are relevant Acts now in force.

The sub-section refers to "commanding officer of the regiment, corps. ship or detchment, to which he (the accused) belongs". As suggested by the Ministry of Defence, it is proposed that after the word "ship" the word "unit" should be added in order to include the basic organisation of the Air Force.

The Ministry of Defence have also suggested that an explanation be added to the effect that Court-martial includes a disciplinary Court constituted under section 95 of the Navy Act, 1957 and also a summary trial by the commanding officer of the ship under section 93(2) of that Act. This suggestion appears to proceed on a misconception of the object of section 549. Every offence triable under the Navy Act may, according to section 93(1), be tried and punished by Court-martiall; and under section 549(1) of the Code the Central Government has the power to make such rules as may be appropriate for the Navy consistent with the provisions of the Navy Act. No change appears to be necessary in section 549 on this point.

Provision for securing attendance of a prisoner before a Court-martial.

46.14. In our Report[2] on the law relating to attendance of prisoners in Courts we had recommended that clause (d) of section 491(1) be omitted and the provision incorporated in a modified form in section 549. The following sub-section may accordingly be added to this section—

"(3) A High Court may direct that a person detained in any jail within the State be brought before a Court-martial for trial or to be examined touching any matter pending before the Court-martial."

Sections 550 and 552.

46.15. We have in an earlier Chapter[3] recommended that sections 550 and 552 should be put in Chapter VII of the Code as sections 104A and 100A respectively.

Section 553.

46.16. Section 553 provides for compensation to "persons groundlessly given in charge in presidency-towns". Where any person causes a police-officer in a presidency-town to arrest another person and it appears to the Magistrate by whom the case is heard that there was no sufficient ground for causing the arrest,

[1] *Cf.* section 148(3).

[2] Fortieth Report, para. 29.

[3] *See* paras. 7.9 and 7.10 above.

the Magistrate can order payment of compensation as provided in the section. The section is at present confined to arrests in presidency-towns but we think that it is a salutary provision and should be extended to all places. Accordingly sub-section (1) of section 553 may be amended by omitting the words "in a presidency-town".

Section 554 omitted in view of Article 227.

46.17. The subject-matter of section 554 is fully covered by clauses (2) and (3) of Article 227 of the Constitution under which every High Court has power to call for returns, make and issue general rules and prescribe forms for regulating the practice and proceedings of courts etc. This Article applies also to Courts of Judicial Commissioners.[1] Section 554 is therefore redundant and may be omitted.

Section 555 amended.

46.18. Consequentially, in section 555, the reference to section 554 may be omitted.

Section 557.

46.19. Section 557 prohibits a pleader practising in a criminal court from "sitting as a Magistrate" in that court or in any court subordinate to that court. Practically this prohibition is in relation to pleaders appointed as honorary Magistrates. The section enables a pleader practising in the civil courts to accept such an appointment and function as a Magistrate. The words "in a presidency-town or district" are superfluous and may be omitted from the section.

Section 558.

46.20. Under section 558, the State Government may determine what shall be the language of each Criminal Court in the State other than a High Court (not being the Court of a Judicial Commissioner). The analogous provision of Civil Courts is contained in section 137 of the Civil Procedure Code. Some States have issued notifications under section 558 determining the language of subordinate Criminal Courts. Although article 345 of the Constitution specially empowers the legislature of a State to determine by law what language shall be used for all or any of the official purposes of the State, there does not appear to be any real conflict between that article and section 558 of the Code. As a pre-existing law, this section has been continued in force by article 372 of the Constitution "until repealed, altered or amended by a competent legislature". No change of substance is necessary in the section, but as a formal amendment, for the words "territories administered by such Government", the word "State" may be substituted.

Section 559(2).

46.21. Sub-section (2) of section 559 requires to be formally revised as follows :—

> "(2) When there is any doubt as to who is the successor in office of any Metropolitan Magistrate, Judicial Magistrate or Executive Magistrate, the Chief Metropolitan Magistrate, the Chief Judicial Magistrate or the District Magistrate, as the case may be, shall determine by order in writing the Magistrate who shall, for the purpose of this Code or of any proceedings or order thereunder, be deemed to be the successor in office of such Magistrate."

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1 *See* the Judicial Commissioners (Declaration as High Courts) Act, 1950.

Section 561.

46.22. Section 561 contains two special provisions with respect to the offence of rape where it is committed by a man on his wife. Under sub-section (1) only a Chief Presidency Magistrate or District Magistrate is competent to take cognizance of the offence and to commit the man for trial, if necessary, to the Court of Session. Under sub-section (2), when a police investigation is ordered, no police-officer of a rank below that of a police-inspector may take part in the investigation. The object of these special provisions appears to have been to prevent harassment by unfriendly neighbours, but considering that prosecutions for this offence have been extremely rare, these special provisions appear to be practically unnecessary. We propose that the section may be omitted.

Section 561A.

46.23. Section 561A recognises the inherent power of the High Court to do real and substantial justice between parties. Assuming its existence, the section provides that nothing in the Code shall be deemed to limit or affect the inherent power of the High Court to give effect to any order under the Code (whether made by itself or by a subordinate Court) or to prevent abuse of the process of any Court (including subordinate Courts) or otherwise to secure the ends of justice.

In an earlier Report,[1] the Law Commission observed :—

> "This statutory recognition, however, extends only to the inherent powers of the High Court. One may compare it with the recognition of the inherent powers of all civil courts by section 151, Civil Prfocedure Code.
>
> In a number of decisions before and after the enactment of section 561A, various High Courts have also recognised the existence of such power in subordinate Courts.[2] We would, therefore, recommend a statutory recognition of such inherent power which has been recognised as vesting in all subordinate criminal courts.
>
> However, the general principle of law is that the inherent power of a court can be exercised only to give effect to orders made by it or to prevent abuse of its own processes."

We agree with this recommendation. We do not, however, consider it necessary or desirable to go further and recognise an "inherent power" in Courts of Session and other Courts of Appeal to pass appropriate orders to prevent the abuse of the process of any subordinate Court.

We propose that the section may be expanded as follows :—

Saving of inherent powers of Criminal Courts.

> "561A. Nothing in this Code shall be deemed to limit or affect the inherent power—
>
> (a) of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice, or

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[1] Fourteenth Report, Vol. II, page 829.

[2] *Achambit Mondal* v. *Mahatab Singh and others*, A. I. R. 1915 Cal. 119; *Nagen Kundu* v. *Emperor*, 61 Cal. 498; *Krushna Mohan* v. *Sudhakur Dass*, A. I. R. 1953 Orissa, 281.

(b) of any other Criminal Court to make such orders as may be necessary to prevent abuse of its process or otherwise to secure the ends of justice."

Section 562 (1), proviso, and section 380 combined.

46.24. With reference to the proviso to section 562(1) we have in an earlier Chapter[1] recommended that section 380 may be added to this proviso with which it is immediately connected. The reference to Magistrates of the third class in the proviso will have to be omitted since this class of Magistrates is to be abolished. The proviso may be revised to read as follows:—

"Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court in this behalf, and the Magistrate is of opinion that the powers conferred by this section should be exercised,—

(a) he shall record his opinion to that effect and submit the proceedings to a Magistrate of the first class, forwarding the accused to, or taking bail for his appearance before, such Magistrate; and

(b) such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken."

Section 562 (1A) amended.

46.25. Under sub-section (1A) of section 562, it is permissible to release a first offender after admonition only in the case of certain offences punishable under the Indian Penal Code. It has been stated[2] that Courts very often release first offenders after admonition in petty cases under various laws other than the Indian Penal Code, although this is not strictly covered by section 562. In principle, however, there is no reason why section 562 should not apply also to other laws. We accordingly propose that the words "under the Indian Penal Code" may be omitted from sub-section (1A).

Occasionally doubts have been raised whether an offence punishable only with fine is covered by the expression "any offence punishable with not more than two years' imprisonment". Although the Courts[3] have answered this question in the affirmative, it seems desirable to make the position clear by adding the words "or with fine only" after the words "not more than two years' imprisonment".

Section 565.

46.26. Section 565 empowers the Courts to order previously convicted offenders to notify their place of residence and any change of, or absence from, such residence after their release. As the section is at present worded, it has been held[4] that it does not apply to persons convicted of attempts, abetments and conspiracies to commit any of the offences listed in clause (a) of

[1] *See* para. 27.11 above.

[2] F.3(2)/55-L.C. Pt. II, S. No. 17 (Shri N. C. Chatterjee, Ghose Lane, Calcutta).

[3] *See Emperor* v. *Manchershaw*, A.I.R. 1935 Bom. 156.

[4] *Doraiswamy*, A. I. R. 1942 Mad. 521.

section 565(1). It is obviously desirable that the section should apply also to such persons. Clause (b) of the section is practically obsolete because of lapse of time and may be omitted. Sub-section (1) of section 565 may accordingly be revised as follows :—

"(1) When any person having been convicted by a Court in India of an offence to which this section applies is again convicted of any such offence by any Court other than that of a Magistrate of the second class, that Court may, if it thinks fit, at the time of passing sentence of imprisonment on such person, also order that his residence and any change of, or absence from, such residence after release be notified as hereinafter provided for a term not exceeding five years from the date of the expiration of such tence.

(1A) This section applies to any of the following offences, namely :—

(i) any offence punishable under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards;

(ii) any offence punishable under section 215, 489A, 489B, 489C or 489D of the same Code;

(iii) an abetment of, or attempt to commit, of conspiracy to commit, any of the aforesaid offences."

CHAPTER XLVII

CLASSIFICATION OF OFFENCES IN THE SECOND SCHEDULE

Five-fold classifiction under the Second Schedule.

47.1. The Second Schedule to the Code classifies offences under the Indian Penal Code and also offences against other laws from five stand-points. The Schedule has to be referred to for ascertaining—

(i) whether an offence is cognizable or non-cognizable (column 3);

(ii) whether a summons or a warrant shall ordinarily issue in the first instance (column 4);

(iii) whether an offence is bailable or not (column 5);

(iv) whether an offence is compoundable or not (column 6); and

(v) by what Court an offence is triable (column 8).

Omission of columns 4 and 6 recommended.

47.2. We have recommended[1] in Chapter 17, while discussing section 204, that column 4 of the Second Schedule may be dispensed with by providing in section 204 itself that in all summons-cases, a summons should ordinarily issue in the first instance and in a warrant-case, a warrant. We consider that since the correct position regarding the compoundability of an offence can be readily ascertained by looking up section 345, there is no need for repeating this information in a tabular form in column 6 of the Second Schedule. The ommission of these two columns will simplify the Schedule to some extent.

Cognizability of offences under coluna 3.

47.3. Column 3 of the Schdeule indicates the offences for which the police may arrest without warrant and the offences for which a warrant of arrest must be obtained by them. On a detailed scrutiny of the Schedule we find the present classification to be generally sound in principle, and have few changes to propose.

Offences against State to be cognizable.

47.4. One such change is in regard to offences against the State specified in Chapter VI of the Indian Penal Code. It is curious that, in spite of the fact that all of them are grave offences punishable with heavy sentences and, except in two cases, triable exclusively by the Court of Session, they are made non-cognizable under the Schedule. We are unable to see any real justification for this and recommend that, with these two exceptions (*viz.*, sedition punishable under section 124A and the minor offence punishable under section 129), offences under this Chapter should be cognizable.

Offence under section 324 should be cognizable.

47.5. It has been suggested that the offence of voluntary causing hurt by dangerous weapons or means punishable under section 324 of the Code need not be a cognizable offence since it is compoundable with the permission of the Court and the

[1] *See* para 17.3. above.

maximum punishment for it is only three years' imprisonment. The actual injury caused might not be serious, but having regard to its potentialities, it is clearly an offence for which the police should have the power to act promptly to prevent serious consequences. In our opinion, the offence is rightly made cognizable.

Fraudulent disposition of property, forgery and counterfeiting trade and property marks to remain non-cognizable.

47.6. We have considered a suggestion from a mercantile Association of Calcutta that the fraudulent disposals of property punishable under sections 421 and 422 of the Indian Penal Code should be made cognizable. It is said that these offences are steadily increasing and persons purchasing goods on credit are taking undue advantage of the system of sale on credit and defrauding their creditors. While there may be a case for increasing the punishment provided in the Penal Code (now two years punishment or fine or both), we do not think business morality is likely to be improved merely by making the offence cognizable. The offences are in the nature of things difficult to investigate by the ordinary police and the result of making them cognizable may well be a spate of false or exaggerated complaints and undue harassment by the police at the instance of jealous business rivals. For similar reasons, we consider that the offences of forgery and counterfeiting trade and property marks described in sections 465 to 477A of the Code should remain non-cognizable.

Offence under section 498 should be non-cognizable

47.7. The offence of enticing away a married woman for illicit purposes punishable under section 498 of the Indian Penal Code is, in our view, quite rightly a non-cognizable offence. It stands on a different footing from kidnapping or abduction which are cognizable offences.

Offence under section 509 to be cognizable.

47.8. A State Government has suggested that the offence of intentionally insulting the modesty of a woman by word or gesture punishable under section 509 of the Penal Code, should be made cognizable so that in the changed social circumstances of the day, when women are coming out in larger numbers and taking greater part in various professional and business activities, they may have a sense of security. The States of Madhya Pradesh, Maharashtra and Mysore have already amended this item in the Second Schedule making the offence cognizable. We agree that the amendment should be made in the Code so as to be of all-India application.

No change in column 5.

47.9. The classification in column 5 of the Second Schedule is of bailable and non-bailable offences. We do not think that any changes are required in this column.

Nature of changes proposed in column 8.

47.10. The last column of the Schedule shows the Court by which an offence is triable. It will be noticed that against a number of offences, the entry in column 8 reads, "Court of Session, Presidency Magistrate or Magistrate of the first class", and even "Court of Session, Presidency Magistrate or Magistrate of the first or second class". Since it is clear from section 28 that any offence under the Indian Penal Code may be tried by the Court of Sessions, whether it is expressly mentioned in column 8 or not, it is sufficient to mention the Court of Session

in that column against those offences which are triable exclusively by that Court. After a careful scrutiny of the Schedule we have considerably reduced the number of entries in which the Court of Session figures in the last column. This will have the effect of transferring some of the work which now goes up to the Sessions Court on commitment to the Courts of Magistrate which, under our proposals, will have enhanced powers of punishment. We have also deleted all references to Presidency Magistrates, since in metropolitan areas, the Metropolitan Magistrates will be competent to try all offences triable by any Judicial Magistrate, whether of the first class or of the second, in a district.

47.11. The changes proposed by us are indicated below :

Section 120*B*—The first entry in column 8 should read, "Court by which abetment of the offence which is the object of conspiracy is triable"; and the second entry should read "Magistrate of the first class".

Section 124*A*—Since the offence of sedition is not only serious but also likely to involve complicated questions of law and fact, we propose that it should be triable exclusively by the Court of Session.

Sections 161 *to* 169—All these offences may be triable by a Magistrate of the first class. It is not necessary to bring the Court of Session for offences under sections 161 to 164. A second class Magistrate should not be authorised to try offences under sections 165 and 166.

Section 193—First part triable by Magistrate of the first class and second part by any Judicial Magistrate.

Sections 196 *to* 200—Triable by "the Court by which the offence of giving or fabricating the false evidence is triable".

Section 201, 3*rd paragraph*—Triable by the Court by which the offence is triable. "Presidency Magistrate or Magistrate of the first class" to be omitted.

Sections 212 *to* 216—May be triable by a Magistrate of the first class in all cases. Even where a capital offence is involved, since the maximum punishment for the offence is 7 years, it need not be triable exclusively by the Court of Session.

Sections 246 *to* 263—Court of Session may be omitted for offences in this group where the maximum punishment is 7 years. The offence under section 251 which is punishable with 10 years' imprisonment may be triable exclusively by the Court of Session.

Section 263*A*—May be triable by any Magistrate since the offence is punishable with fine of Rs. 200.

Section 292—Any Magistrate should have jurisdiction to try this offence. No doubt, it is sometimes difficult to decide whether a publication is obscene; but in the bulk of cases

instituted there is no doubt about the nature of the publication.[1]

Section 295—Any Magistrate should have jurisdiction to try this offence which is punishable with 2 years' imprisonment.

Section 295*A*—At present, triable by "Court of Session or Presidency Magistrate". Should be triable by "Magistrate of the first class."

Sections 317 *and* 318—These may be triable by Magistrate of the first class. Reference to the Court of Session will be omitted.

Sections 335, 345 *and* 346—Considering the nature these offences and the punishment provided for them triable by Magistrate of the first class only.

Section 363*A*, *first part*—Court of Session may be omitted, and the offence may be triable by Magistrate of the first class.

Section 366—Court of Session or Magistrate of the first class according as the offence of kidnapping or abduction is triable, should have jurisdiction.

Section 372 *and* 373—These two grave offences should be triable exclusively by the Court of Session.

Section 376, *first part*—The offence should be made triable exclusively by the Court of Session (like the offence under the second and third parts of the section), even though the maximum punishment is 2 years only.

Section 377—Court of Session may be omitted. Though the maximum punishment is 10 years, only a light punishment is awarded in practice.

Sections 386 *to* 389—These are non-cognizable offences, and although the punishment is 7 years or 10 years and in two instances may be imprisonment for life, we propose that they may be tried by Magistrate of the first class (ordinarily the Chief Judicial Magistrate) instead of the Court of Session.

Sections 406 *and* 408—Should be triable by Magistrate of the first class only.

Sections 429 *and* 432—Should be triable by Magistrate of the first class only, second class Magistrates may be omitted.

Section 454—First part should be triable by any Magistrate and second part, for which the punishment may go up to 10 years, by Magistrate of the first class.

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[1] The Dwarka Dhamija Lal's Bill, as reported by the Select Committee (Rajya Sabha) and Select Committee, Lok Sabha (1st May, 1969) punishment under section 292 is proposed to be raised to 2 years for the first conviction and 5 years for a subsequent conviction. The offence will be exclusively triable by the High Court or Court of Session. The Bill is pending.

Section 457, *second part*—Second class Magistrate may be omitted, in view of the gravity of the offence.

Sections 465 *to* 477*A*—Most of the offences are triable exclusively by the Court of Session, but they are non-cognizable. In order to reduce the pressure on the Court of Session, we propose that all offences under this Chapter may be triable by Magistrate of the first class. Serious or complicated cases will be tried by the Chief Judicial Magistrate.

Section 505—May be triable by any Magistrate, since the punishment is only 2 years.

Section 509—As the maximum punishment is one year, any Magistrate should be competent to try it.

Offences under other laws

47.12. The latter part of the Schedule dealing with offences under other laws puts them in four groups according to the severity of the punishment prescribed for the offence. Since the third class of Magistrates is to be abolished, the last two groups will have to be combined. In the third group, offences punishable with more than one year's but less than three years' imprisonment, the Court of Session is mentioned as one of the Courts competent to try the offence. We propose to omit the mention of Court of Session here. Under section 28, the Court of Session does not get automatic jurisdiction so far as offences under other laws are concerned, but this would not be material in practice.

In the first group, we propose, to exclude offences punishable with imprisonment which may extend to seven years. These would go into the next group, so that they might be triable either by a Court of Session or a Magistrate of the first class. The last group of offences—those punishable with imprisonment for less than 3 years or with fine only—would be triable by any Magistrate.

In the second group of offences under column 5 (whether bailable or not), we propose to omit the exception which reads "except in cases not relating to fire arms under the Indian Arms Act, 1878, section 19, which shall be bailable". The proper place for this exception is in the Arms Act, 1959, which has replaced the Arms Act of 1878.

CHAPTER XLVIII

CONCLUSION

Objective of revision.

48.1. We have come to the end of our detailed study of the Code, in the course of which we have made numerous recommendations for its improvement, ranging from verbal changes designed to remove ambiguities and clarifying underlying ideas, to substantial changes in procedure with a view to its simplication and the avoidance of delay. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice. It may be said that by laying down detailed rules of procedure for meeting every possible contingency, the Code makes one lose sight of the main objective, but it is obviously not so. As observed by Justice Vivian Bose in the Supreme Court,[1]

> "The Code is emphatic that whatever the irregularity, it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice, and *justice includes the punishment of guilt just as much as the protection of innocence*. Neither can be done if the shadow is mistaken for the substance and the goal is lost in a labyrinth of unsubstantial technicalities. Broad vision is required, *a nice balancing of the rights of the State and protection of society in general against protection from harassment to the individual and the risks of unjust conviction*."

We have kept these objectives in view while revising the Code.

Summary of main changes proposed.

48.2. We do not consider it necessary to give a complete summary of all the recommendations made in the foregoing pages. We have indicated in each Chapter of this Report, corresponding to a Chapter of the Code, the provisions which should be made in lieu of, or in addition to, the existing provisions, and also the amendments, both major and minor, to be made in them. The main changes proposed by us are set out below in broad outline :—

(1) The extent clause should state the factual position, *viz.*, that the Code extends to the whole of India except the State of Jammu & Kashmir, the State of Nagaland and the Tribal Areas in the State of Assam.

(2) Steps should be taken to have the same Penal Code and Criminal Procedure Code operating in Jammu & Kashmir as in the rest of India.

(3) The jurisdiction of Criminal Courts in relation to territorial waters should be clarified.

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[1] *Willie (William) Slaney* v. *The State of Madhya Pradesh*, (1955) 2 S.C.R. 1140, 1168.

(4) The revised Code should, while giving effect to the separation of the executive from the judiciary in the administration of criminal justice, provide for uniformity in the set-up of Criminal Courts, the distinction between Executive and Judicial Magistrates and their respective functions under the Code.

(5) All Judicial Magistrates should be under the control of the High Court and organised in two classes-Magistrates of the third class being abolished-under a Chief Judicial Magistrate for each district. In districts with large sub-divisions and a concentration of Judicial Magistrates at sub-divisional headquarters, Additional Chief Judicial Magistrates should be appointed to do the work of co-ordination and supervision now done by Sub-divisional Magistrates.

(6) Executive Magistrates in a district should be under the control of the State Government and organised, as at present, under a District Magistrate, Additional District Magistrates (where necessary) and Sub-divisional Magistrates. There is no need for putting Executive Magistrates in two or three different classes according to the powers exercisable by them.

(7) The institution of Presidency Magistrates should be maintained. Since "Presidencies" disappeared from the political map of India long ago, these Magistrates should be designated Metropolitan Magistrates and the areas in which they exercise jurisdiction, viz., the "presidency-towns" of Bombay, Calcutta and Madras and the city of Ahmedabad, should be called metropolitan areas. The institution should be capable of being extended to other cities with population exceeding one million.

(8) Ordinary original criminal jurisdiction of High Courts, which is now exercised only by the Calcutta High Court in a very small category of cases, should be abolished.

(9) Section 30 need not be retained in any form, but every Chief Metropolitan Magistrate and Chief Judicial Magistrate, and any Additional Chief Metropolitan Magistrate or Additional Chief Judicial Magistrate empowered by the High Court, should have the power to pass sentences of imprisonment upto seven years. The sentencing power of first class Magistrates should be enhanced to three year's imprisonment and Rs. 5,000 fine, and that of second class Magistrates should be enhanced to one year's imprisonment and Rs. 1,000 fine.

(10) The powers of Judges of the High Court should be defined in the Code.

(11) When a person is arrested by the police without warrant, he should be informed immediately of the grounds of his arrest and, if the arrest be for a bailable offence, of his right to be released on bail.

(12) Provision should be made for service by post of summonses addressed to witnesses.

(13) In Chapter 8, security proceedings under section 107 only should be the concern of Executive Magistrates, and those under section 108, 109 and 110 should be handled by Judicial Magistrates.

(14) In regard to abatement of public nuisances under Chapter 10, power should be with the Executive Magistrates. Assistance by jury provided for in section 138 should be dispensed with.

(15) Executive Magistrates alone should have the power to take action under sections 144, 145 and 147.

(16) In regard to proceedings under sections 145 and 147 (disputes as to immoveable property), the position existing prior to the amendments made in 1955 should be restored.

(17) In section 161 relating to the examination of witnesses by the police, two changes should be made : first, persons shall be bound to answer *truly* questions put to them, and secondly when the statement of a literate person is reduced to writing, he should be allowed to read and sign the statement so recorded.

(18) Section 167(2) should be amended to provide for remands in custody during an investigation for a period not exceeding 15 days at a time and 60 days in the whole.

(19) The duty of furnishing copies of police report, statements of witnesses and documents to the accused under section 173(4) should be assigned to the Magistrate taking cognizance of the offence.

(20) In regard to petty offences adequately punishable by a small fine, provision should be made for the offender to send a plea of guilty and the proposed fine instead of appearing before the Court.

(21) Commitment proceedings in sessions cases should be abolished. When the case is instituted on police report, the Magistrate taking cognizance will only do the preliminary work of supplying the accused with copies of the police report, statements of witnesses, documents etc., and then send the case to the Court of Session. When the case is instituted otherwise than on a police report, the Magistrate should make a preliminary inquiry as provided in section 202, and then commit the case to the Court of Session.

(22) All provisions relating to trial by jury should be ommitted.

(23) Provision should be made that when the accused is convicted in a sessions case or a warrant-case he should be heard on the question of sentence before it is passed.

(24) Section 250 should be liberalised so that the Magistrate may award compensation up to the maximum amount of fine he is empowered to impose, when he is satisfied that there was no reasonable ground for making the accusation.

(25) The procedure to be followed in a case where an incorporated company or other body corporate or a society registered under the Societies Registration Act, 1860, is an accused, should be laid down in detail.

(26) The right of an indigent accused person to assignment of counsel at State expense should be recognised in the Code, at least in all sessions cases in the first instance, with provision for extending it to other serious cases tried by Magistrates.

(27) In order to avoid unnecessary commitment of cases to the Court of Session, provision should be made for subordinate Magistrates to submit cases to the Chief Judicial Magistrate for imposing adequate punishment.

(28) The provisions relating to the mode of recording evidence and the language of the record in different classes of cases should be systematised.

(29) In regard to judgments in capital cases, the Judge should be required to state his reasons for awarding the particular sentence whether it be a sentence of death or one of imprisonment for life.

(30) Provision should be made for postponement of execution of a death sentence in case of appeal to the Supreme Court.

(31) Section 386(1) should be amended to authorise the recovery of fine by the Collector as an arrear of land revenue.

(32) In cases where the Central Government is immediately concerned, the State Government should exercise its power to remit or commute the sentences only in consultation with the Central Government.

(33) The right of appeal to the Supreme Court conferred by article 134(1)(a) of the Constitution should be extended to cases where a High Court has on appeal reversed an order of acquittal and sentenced the accused to imprisonment for life. There should also be a right of appeal when a person is convicted

on a trial held by a High Court and sentenced to imprisonment for more than six months or to fine exceeding Rs. 1,000.

(34) Provision should be made for appeal by the Government against sentence on the ground of its inadequacy.

(35) In order to combat perjury of a blatant kind, a summary procedure is recommended for punishing a person who gives contradictory statements on oath in the same case.

(36) Provisions for securing the attendance in Criminal Courts of persons confined or detained in prisons, whether for answering to a charge or for giving evidence, should be included in the Code.

(37) The Public Prosecutor of the district should be given a greater authority, a higher status and a wider range of functions than he has at present, approximating to those of a Director of Public Prosecutions. He should be an advocate of not less than seven years' standing and should have been recommended by the High Court for appointment.

(38) The Code should provide the frame work for organising the prosecuting agencies in the district in a systematic way.

(39) In order to prevent any conflict of interests between the Centre and the State in the matter of withdrawal from prosecutions, the State Public Prosecutor in charge of a case of substantial concern to the Central Government should obtain its previous permission before withdrawing from the prosecution.

(40) Provision should be made enabling a person to obtain "anticipatory bail order" from the High Court or Court of Session in certain circumstances.

(41) The provision in section 526(8) which obliges a subordinate Court to stop all proceedings on the mere intimation by a party that he intends to move the High Court for transfer has lent itself to gross abuse and should be repealed.

(42) Section 561A which recognises the "inherent power" of the High Court should be expanded to cover the inherent power of other Criminal Courts to prevent abuse of their process or to secure the ends of justice.

(43) The Second Schedule which classifies offences from five stand-points should be simplified. The number of offences triable exclusively by the Court of Session should be reduced.

Enactment of new Code Recommended.

48.3. It was observed by Sir James Stephen in 1872 when the Code was being first revised that constant revision and re-enactment was "as necessary as repairs are necessary to a railway. I do not think any Act of importance ought to last for more than ten or twelve years. At the end of that time it should be carefully examined from end to end, and whilst as much as possible of its general frame-work and arrangement are retained, it should be improved and corrected at every point at which experience has shown that it required improvement and correction"[1] Seventy years have elapsed since the Code was last revised and re-enacted, and during this period it has been subjected to extensive amendments on several occasions. The changes recommended by us are both so substantial and numerous that "an Act further to amend the Code of Criminal Procedure, 1898", as the draftsman will crisply call the patchwork legislation, will not be satisfactory We recommend that the Code should be replaced by a new Criminal Procedure Code, and annex a draft for the purpose.

Chairman

1. K. V. K. SUNDARAM.

Members

2. S. S. DULAT.
3. MRS. ANNA CHANDI,
4. R. L. NARASIMHAM,*
5. S. BALAKRISHNAN,*

Secretary

P. M. BAKSHI.

New Delhi,

The 24th September, 1969.

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[1] Gazette of India Supplement, May 4, 1872, page 534. Quoted in the 14th Report, Vol. 2, page 700.

*Shri R. L. Narasimham and Shri S. Balakrishnan have signed the Report, subject to the note appended.

Note of Dissent regarding the proposed Amendments to sections 161(3) and 162 Criminal Procedure Code by Members Shri R. L. Narasimham and Shri Balakrishnan.

The existing provisions of section 162 Criminal Procedure Code have been universally condemned by the Police, the Bar, the Courts and the litigant public. The need for making substantial changes in the law is accepted by all of us in the Commission but we two regret our inability to agree with the recommendations of the majority regarding the proposed amendments in section 161(3) and 162. In our opinion, the proposed amendments do not solve any of the well-known difficulties and anomalies that exist at present. Nor do they deal with the root of the problem. On the contrary the proposed amendments may create further difficulties and anomalies.

2. The fundamental anomaly in the existing provisions of section 162 is that though the statute prohibits the use of the statements made to the police during investigation for the purpose of corroboration (on the basic assumption that the police cannot be trusted in this regard and that being self-serving statements they cannot be relied upon), nevertheless permits their use for contradicting prosecution witnesses. Obviously, the earlier statement to the police should have been correctly recorded even for contradicting witnesses. If such statements can be considered to be correctly recorded for the limited purpose of contradicting the witness when he deposes in court, it seems to be wholly illogical to say that they cannot be relied upon as accurate for the purpose of corroboration. A record cannot at the same time be correct and incorrect.

3. The second anomaly is that the use of these statements for contradiction is permitted only for prosecution witnesses and not for defence witnesses. There is no basis for this differentiation. During police investigation no one can say whether a person examined by the police will eventually figure as a prosecution witness or a defence witness. If the statements made before the police by a person, who becomes a witness for the defence during the trial, cannot be relied upon to contradict him, it is difficult to understand how the same statement can be relied upon if the person is examined as a prosecution witness. The majority opinion appears to be that it is not desirable to allow a witness to be contradicted by a record prepared by the opposite party. With great respect there appears to be an erroneous assumption that a witness questioned by the police could *at that stage* be categorised either as a witness for the prosecution or as a witness for the defence. Under section 161(1) the police may generally question all persons, who are supposed to be acquainted with the facts and circumstances of the case. It will not be proper to assume that when a witness makes a statement to the police which is not favourable to the prosecution story as given in the F.I.R., the police, *at the time of recording his statement* would anticipate that he may become a defence witness during subsequent trial, and deliberately make an incorrect record with a view to discredit him when he becomes a defence witness. If the investigating

police Officer's record cannot be trusted so far as this class of witnesses is concerned, how can it be trusted as regards the statements of the other class of witnesses?

4. Again there is considerable difference of opinion as to what is meant by "contradiction". The Supreme Court has no doubt settled that a "material omission" may amount to a contradiction, but there will always be controversy as to whether a particular omission is "material" or not. In our opinion, the occasion for the revision of the Code should be taken to remove all doubts on the matter. The recommendations of the majority would necessitate the continuance of the existing provisions and would, therefore, perpetuate the difficulties.

5. According to the recommendations of the majority section 161(3) is proposed to be amended so as to permit a literate witness to sign his statement as recorded by the police. The existing prohibition in section 162 against the police taking the signature of any person examined by them is proposed to be deleted. In our opinion, this would make matters much worse than at present. With the removal of the statutory ban on the police to get the signatures of witnesses, there is nothing to prevent the police from compelling a witness, either literate or illiterate, to sign or to give his thumb impression on what purports to be the statement of the witness. A signed statement will certainly discourage even a truthful witness from departing from it even if he wishes to tell the truth before the court. At present he can at least say that what is recorded by the police is not what he stated. But if he were to sign the statement, this stand would be very difficult for him to take and he has to sacrifice truth at the alter of consistency :

6. We are, therefore, of opinion that the recommendations of the majority would not improve matters and we, therefore, have an alternative suggestion in this regard, which is explained fully in the succeeding paragraphs.

7. At the outset it is desirable to refer to some sections of the Indian Evidence Act which have a bearing on police investigation. Section 157 of that Act enables a party to corroborate the testimony of its witness by proof of a former statement made by him before an officer authorised to investigate a fact. Section 145 read with section 155(3) of that Act enables the adverse party to discredit that witness by proof of previous statements inconsistent with his deposition in court. These provisions have been made with a view to ensure fair trial—fair both for the party producing that witness and for the adverse party. In a criminal case the prosecution is, therefore, entitled to show that the version as put forward by a witness before the court is not a belated version but that it was put forward at the earliest opportunity during investigation. Similarly, the defence is entitled to bring out contradictions between the deposition of that witness in Court and his earlier statements for the purpose of discrediting him. These two rights of the rival parties should be carefully borne in mind by the authorities engaged in revising Chapter XIV of the Criminal Procedure Code. It is true that the Legislature can take away or abridge these rights conferred by the Evidence Act;

but as the primary objective of a Criminal Procedure Code in any country (where the rule of law prevails) is to ensure fair trial of an accused, it is clear that nothing in the Criminal Procedure Code should substantially take away or abridge these rights. For the proper exercise of these rights it is essential that the earlier statement of a witness should be recorded accurately. The agency employed for the purpose and the mode of recording the same should be such as to ensure the accuracy of record.

8. A word of caution is necessary at this stage. Merely by providing for an accurate record of the earlier statement of a witness the framers of the Code cannot obviously guarantee its truth. A witness may consistently prejure on oath whereas a truthful witness may make inconsistent statements on two occasions, but when an opportunity is given, he may be able to explain the inconsistency to the satisfaction of the Court. The truth or otherwise of the statement of a witness will have to be judged by the Court concerned not only on the basis of his consistency, or contradictions, but also on other considerations such as the inherent improbabality of the story, the divergent versions put forward by different witnesses, the interestedness or enmity of the deponent and such other factors. It is not the function of the framers of the Code to deal with these in the Code. They must be left to be decided by the Court in each case.

9. For the same reason, it is not the function of the framers of the Code to provide for complete elimination of all influences when a witness makes his statement on oath. It may be that his earlier statement during police investigation is made under police influence, or else it may be given voluntarily or under the influence of the informant's party. Similarly, his subsequent deposition in Court may be made when the influence mentioned in the proceeding sentence continues to persist, or else it may be made under the influence of the accused who has gained him over to his side. These again are matters for the Court to consider while judging about the credibility of the witness. The revision of the Criminal Procedure Code should not be mixed up with these irrelevant considerations which tend to confuse the real issues.

10. It is true that confessions made under police influence are held to be inadmissible in law but the Criminal Procedure Code while providing for the record of a confession in section 164 has made adequate provisions for removal of such influence. The Evidence Act nowhere says that the statement of a witness is inadmissible *in law* merely because it is made either under the influence of the police or of the informant or of the accused and hence these matters should be ignored while revising the Code for this purpose.

11. Police investigation under Chapter XIV may be broadly divided into the following two aspects :

(a) tracing out of the culprit and the collection of materials to be used against him during trial; and

(b) preparation of a record during investigation which will be of aid or assistance during trial.

12. Under the first will come the F.I.R., the tracing out and questioning of the witnesses whose statements would lead to the detection of the criminal, the search and recovery of incriminatory articles and the preparation of the search list etc. Under the second will come the facts observed by the police officer at the spot during investigation, the work done by him every day including the dates on which the various witnesses were examined by him and a summary of their statements made to him. The F.I.R. is admissible as corroborative evidence under section 157 of the Evidence Act when the informant comes to Court and repeats the version given in the F.I.R. It may also be used by the adverse party to contradict him if there is a material discrepancy. Similarly, the search list is admissible in Court as corroborative evidence if the officer conducting the search comes forward as a witness and proves the search and recovery of the incriminating articles. These two documents, namely, the F.I.R. and the search list, are prepared by the investigating police officer but the Code contains adequate safeguards to ensure their accuracy. Thus section 154 requires the F.I.R. to be recorded verbatim in the very language of the informant (as far as possible), to be read over and explained to him and to be signed by him. In some States the Police Manual further requires the Investigating Officer to get the F.I.R. attested by some respectable witnesses who may be present at the time of the lodging of the F.I.R. Section 157(1) further requires the I.O. to send the F.I.R. at once to the Magistrate taking cognizance on police report. Hence, though subsequent interpolations in the F.I.R. are not unknown, nevertheless the aforesaid provisions, to a large extent, ensure their accuracy. Similarly, the search list is required to be prepared in the presence of two respectable witnesses who are required to attest the same. A copy of it must be sent forthwith to the nearest Magistrate taking cognizance on police report and the occupier of the house searched is required to be given a copy of the same [section 165(4) read with sub-section (3) and (4) of section 103].

13. The most unsatisfactory section in Chapter XIV is section 162. The I.O. is authorised to record the statement of a witness without even disclosing to the witness what he has written. The witness is not required to sign the same nor is a copy required to be sent to the nearest Magistrate with a view to prevent interpolation. In consequence, there is no guarantee of the accuracy of the record of the statement of a witness as made by the I.O. It is a notorious fact (which has been admitted by almost all the persons examined by us) that the statement of a witness recorded under sections 161 and 162 is not necessarily what the witness actually said but is a record of what the I.O. wants the witness to say. Indeed, cases were brought to our notice in which so called statements were recorded without examining the witness at all. The I.O. is enabled to do so by the language of the section. Moreover, while such statement is considered unreliable for the purposes of corroboration, it suddenly becomes and is treated as reliable for the purpose of contradiction ! Even if a witness speaks the truth before the court, his evidence becomes unworthy of credence if what he says in court contradicts what the police officer chose to record as a so-called statement.

14. There is a well recognised charge that the non-gazetted police staff is generally corrupt. To quote the Report of the Delhi Police Commission, 1966-68, Vol. I, at page 490 :—

> "Corruption to a large extent is to be found among the non-gazetted staff of the Delhi Police. Among the higher staff there is lack of proper supervision, control and discipline. To this must be added the distressing fact, that though the improbity of the subordinate police and the misdemeanours committed by the lower ranks are fully within the knowledge of the senior officers of the department, no really effective or determined effort to eradicate this evil is being made."

The Police Commissions of other States also have observed on similar lines. But strangely enough the definition of an "officer incharge" of the police station in the Criminal Procedure Code refers to the Sub-Inspector of Police and his subordinates who are all non-gazetted police officers. Thus, under the existing provisions of the Code, the preparation of the earliest record of the statement of a witness is left in the hands of an agency whose integrity is highly doubtful and the mode of recording as provided in section 162 does not ensure the accuracy of the record. It is well known that many good cases are spoilt by the insidious incorrect entries made in the diary by the I.O. at the instance of the accused and it is also well known that many innocent persons are sent up along with the guilty of the I.O. is gained over by the informant's party.

15. In Western Europe it is generally considered an essential guarantee of the impartiality of the preliminary investigation that it be conducted independently of the prosecuting arm and subject to the control of the courts. This means that the French *judge d' instruction of* the German *Untersuchungsrichter* is (theoretically, at least) not subject to the influence of the prosecuting arm in determining whether or not to indict; it also means that any abuses of the rights of the accused by the judge d' instruction or Untersuchungarichter may be appealed to the courts. (See Soviet Criminal Law and Procedure by Harold J. Berman, p. 75). In Russia, however, investigation is controlled not by the judiciary but by a quasi-judicial independent body under the control of the Procurator-General and his subordinate staff who are also independent of the executive. In India, at present, it may not be practicable to adopt wholly either the French or the German system or the Russian system of controlling investigation. Nevertheless, an important step towards effective control of investigation may be made if the preparation of the record of the statement of witnesses during investigation is taken out of the police and entrusted with the Magistracy.

16. In our opinion the most satisfactory solution for the present difficulties and anamolies would be to amend section 164 so as to make it mandatory for the I.O. to send to the nearest Magistrate all material witnesses questioned by him during the course of investigation and have their statements recorded on oath by that magistrate. If the Magistrate is the Magistrate taking cognizance on police report he will keep the depositions along with

the F.I.R. [which must have been received by him under section 157(1)] and await further report from the I.O. such as charge-sheet or final report under section 173. He should also be required to grant copies of the depositions to the I.O. (so that his papers may be complete) and also to deponents and other parties who may ask for the same. If, however, he is not the Magistrate taking cognizance on police report but some other Magistrate, he should be required to send the depositions after record to the former Magistrate for further action. The necessity for making this provision arises because some of the places of the commission of crime though somewhat distant from the place where the Magistrate taking cognizance on police report is stationed, may be more proximate to another Magistrate stationed close by. The witness should not be harrassed by being required to proceed to a longer distance than is absolutely necessary. With quick means of transport available nowadays, it will be practicable to produce the witness before the Magistrate within a day or two after their questioning by the police so that the record of the statement under section 164 may be made at the earliest opportunity. It will be a statement made on oath in open court recorded by the Magistrate in his own hand, read over and explained to the witness and after having been admitted as correct, signed by him. Its accuracy therefore will be beyond question.

17. There can really be no objection to this suggestion on principle because section 164 even now enables the recording of statements of witnesses by a Magistrate during investigation. All that we suggest is that the provisions of this section should be resorted to in respect of all material witnesses instead of leaving it to the sweet will of the police to choose the witnesses who should be examined under section 164.

18. It may, however, be urged that instead of sending the witnesses to the nearest Magistrate if section 162 is amended and the language of section 154 is adopted, accuracy of the record may be ensured. But, the number of witnesses examined during investigation of a case is sufficiently large and if in respect of every such witness the I.O. is required to record his statement in his own language, read it over and explain it to him and obtain his signature and if possible to get the same attested by two witnesses, considerable time will be taken by the I.O. for this purpose and to some extent investigation will be hampered. Moreover, the record by the I.O. is not made in public as is done by a Magistrate and there will always be reasonable grounds to suspect that the record as prepared by him is not a true record especially where the witnesses are illiterate. An alternative suggestion has been made that a gazetted police officer may be required to record the statements of witnesses during investigation. It is true that the gazetted police officers' reputation for integrity is much higher than that of the non-gazetted staff but we consider that it is much better to have the statements recorded by Magistrates as this will ensure greater confidence in the public. The statements before the Magistrates are made on oath and they are recorded in open court whereas even before gazetted police officers these salutary checks will be lacking.

19. One of the distinct advantages of our recommendation is that a person accusing another person of the commission of a

cognisable offence is required to make his statement on oath in public. It is on his statement along with other materials collected by the police during investigation that the latter person is placed on trial. Under modern conditions the mere placing on trial of a person on a criminal charge causes great harrasment, mental agony, loss of reputation and heavy expenditure to that person. His subsequent acquittal after trial is not sufficient consolation or adequate compensation for the trouble and expenditure to which he is put in defending himself. It is, we think very unfair that a person should be put in jeopardy of his liberty by having to face a trial unless his accuser is prepared to incriminate him on oath in public. At present enemies of an innocent person may give his name along with the names of the guilty to the police during investigation and their statements will be recorded confidentally by the police under section 162. If they can induce the police to believe their statements, that innocent person also will have to face trial. Thus the existing provisions of the Code encourage the placing on trial of a person on mere confidential information given to the police by persons who *at that stage* are not required to make their accusation on oath. This type of harrasment of a person on the basis of confidential information is in the nature of a stab in the back and should be avoided.

20. It is true that the investigation and the tracing out of a culprit should be facilitated and the sources of information given to the police should not be disclosed as otherwise many crimes can not be detected. But it is also necessary that until the culprit is traced out and accused of the commission of an offence his accuser must be prepared to say so before a Magistrate prior to his being placed on trial to prevent irresponsible statements to the Police.

21. This principle has been recognised in the Code in respect of a non-cognisable offence. On a mere complaint of an non-cognisable offence, the Magistrate will not summon the accused. Under section 200 the complainant is required to substantiate his statement on oath. The witnesses, if any, brought by him to the Magistrate are required to be examined on oath. Even thereafter if the Magistrate entertains some doubt, a judicial enquiry is made under section 202 where other witnesses of the complainant are examined on oath. It is only then that the accused is summoned to face a trial. Thus, when for a minor non-cognisable offence the Code requires the accuser to make his statement on oath before the accused is placed on trial, it seems grossly unfair that for serious cognisable offences a person should be asked to face a trial on the basis of confidential information given to the police during investigation. This inconsistency will be removed if our suggestion is accepted.

22. We may now refer to possible criticism against the suggestion and meet them. Firstly, it may be urged that during investigation it will be very difficult to know who are the material witnesses and the I.O. will have to be given wide discretion in picking out and choosing those persons who should be sent to the Magistrate under section 164. By "material witnesses" is meant those witnesses who either by direct evidence or circumstantial evidence incriminate an accused. They need not necessarily be

eye witnesses to the actual commission of the crime. We agree that some discretion would necessarily remain with the I.O., but, with a view to prevent the I.O. from deliberately withholding those witnesses who may not support his view of the prosecution case, provision may be made in section 164 to enable anyone, other than those sent up by the I.O., to appear, of his own accord, before the Magistrate and state on oath what he knows about the crime and the offender. Secondly, if may be urged that by requiring the witness to make his statement on oath at the time when he is under police influence his mouth is, as it were, sealed and if the earlier statement is an untrue statement made under police influence, he will find it difficult to speak out the truth during the trial because of the threat of prosecution for perjury. This argument assumes that a statement on oath made while under police influence is untrue and that the subsequent deposition of the witness in Court is true. Such an assumption is not wholly justified. In a large number of instances the earliest statement of a witness whether under police influence or otherwise is true and his subsequent deposition in Court is untrue having been brought about by the influence of the accused. In any case, the question whether the first or the second statement is the correct one, should be decided by the Court. If in some of the cases the trying court finds that the earlier statement is an untrue statement made under police influence it will refuse to prosecute him for perjury. These questions must be left for the consideration of the trying court and should not weigh with the framers of the Code. Thirdly, it may be urged that the witnesses who are taken to a Magistrate for recording their statements would be overawed by the police and compelled to say that the police want them to say. Our attention was also drawn to the observations of the Supreme Court on the need to exercise utmost caution in using statements under section 164. We are quite alive to all these but would point out that even now section 164 is there on the statute book and no one has suggested its deletion on the grounds stated above. Further, we are not for a moment suggesting that the statement under section 164 would have any more probative value than what it has today.

23. Fourthly, it may be urged that investigation will be very much hampered if the Investigating Police Officer is required to take the material witness every time to the nearest Magistrate for recording his statement under section 164. This objection seems to have weighed to some extent with the majority of our colleagues. With great respect, however, we would point out that it is not always necessary for the Investigating Police Officer to personally escort the material witnesses to the nearest Magistrate and thereby interrupt his investigation. It is sufficient if he either directs them to appear before the Magistrate or gives them assistance such as Police escort and reasonable expenses so that they may arrive at the Court of the Magistrate as soon as possible. He may send a confidential note to the Assistant Public Prosecutor or Police Prosecuting Agency who are nowadays stationed in all courts so that during examination of these witnesses under section 164 they may be questioned by such an agency while their statement is being recorded by the Magistrate. With a view to compel these witnesses to appear before the Magistrate under section 164 provision may be made in that section on lines similar to

section 160 requiring their appearance before the Magistrate if so intimated by the I.O. Provision may be made for the payment of his reasonable expenses including transport charges.

24. The other objections against the aforesaid suggestion are all of an administrative nature. Difficulties of transport, cost of bringing the witnesses to the Magistrate's Court, the extra labour that will have to be put in by the Magistrate, are all referred to. But, in our opinion, these difficulties are not insurmountable and they should not stand in the way of the Code fulfilling one of the essential requirements of a fair trial, namely, the preparation of an accurate record of the earliest statement of a witness. It is true that in one sense the record of the statement made under section 164 is not the earliest statement of a witness, that statement having been made earlier before the Investigating Police Officer. But the interval between the two statements will not exceed a day or two in a large number of instances as pointed out in paragraph 16. The statement recorded by the police should be made wholly inadmissible for any purposes of the Code and hence the earliest statement *for the purposes of the Code* may be held to be the statement recorded under section 164.

25. To sum up, the main advantages of our recommendations are :—

i. An accurate record of the earliest statement of a witness is made available for both the prosecution and the defence.

ii. A person who makes a statement accusing anybody of the commission of a cognisable offence is required to make his accusation on oath in public. This prevents stabbing people in the dark as is now possible.

iii. By making a statement on oath at the earliest opportunity the witness is put under some check with a view to discourage him from making a different statement on oath during trial under the influence of the accused. It is true that there are some hardened perjurers whom no threat of perjury would deter a larger number of witnesses having made statements on oath would not agree to go back on those statements at the instance of the accused. It is not unlikely that the police may welcome such a suggestion. Allegations that diaries are manipulated, that the police officer writes what he wants to write in the diary etc. will no longer be made and the police will be free to complete the investigation and decide on submitting final report or chargesheet on the basis of the statements on oath made by witnesses and other facts and circumstances such as recovery of incriminating articles, facts observed during local inspection, presence of injury on the accused and other corroborative pieces of evidence.

26. We shall now briefly mention the various sections of Chapter XIV which will have to be amended for implementing the suggestion :

(1) In section 161, sub-section (3) should be omitted.

(2) Section 162 should be recast by omitting the proviso to sub-section (1). Sub-section (2) should be retained.

NOTE:—This exception in favour of dying declarations and section 27 of the Evidence Act is by way of necessity.

(3) Section 164 should be recast so as to make it obligatory for the Investigating Police Officer to send up to the Magistrate all material witnesses examined by him during investigation. Provision should also be made requiring those witnesses if summoned by the I.O. to appear before the Magistrate mentioned in the Notice. There will also be a further provision to the effect that apart from witnesses either sent up or summoned to appear before the Magistrate, any person will be entitled to appear before the Magistrate, and make his own statement as regards the offence under investigation and the identity of the culprit.

(4) If the Magistrate is the Magistrate taking cognisance on police report of the offence under investigation, he should after recording the statements of the witnesses on oath send copies of the same to the investigating police Officer and also grant copies to the deponent and other persons who may ask for the same. He should keep the original depositions along with the original F.I.R. sent to him under section 157(1). If, however, he is not the Magistrate taking cognisance on police report in respect of the offence under investigation, he should, after recording the statements, forward the same to that Magistrate.

(5) In section 172 it should be expressly provided that the statements of witnesses if recorded by the police during investigation shall not form part of the diary mentioned in this section and no court or any party will be entitled to call for the same. That record must remain a confidential paper accessible only to the superior police officers who may supervise the investigation made by the I.O. and also to the Police Prosecutors and the A.P.Ps and P.Ps., if they so desire.

(6) Consequential amendment should be made to sub-section (4) of section 173. As all material papers will be with the Magistrate taking cognizance on police report, the duty of granting copies must be left with him and not with the I.O.

27. Many other sections of the Code may have to be amended as a consequential step but it is not necessary to refer to them in this Note.

R. L. NARASIMHAM

Member

S. BALAKRISHNAN

Member