

PREFACE.

THIS edition prepared on the same lines as the previous editions, has been thoroughly revised, enlarged and partly re-written. Great pains have been taken to simplify the subject as much as possible by a systematic arrangement of the commentaries, always keeping in view the exact wording of the sections. All the earlier decisions which did not find a place in this work before, for want of time and space, have now been incorporated in their appropriate places. Although the amendments and alterations in the Code since the general revision in 1923 are not many, the decisions of the various High Courts on the amended Code have been quite numerous and very often conflicting opinions have been expressed as to the scope, nature and extent of the changes in the law introduced by the amended Code of 1923. For example, the decisions on the interpretation of the amended S. 162 are many but there is a conflict of opinion as to the interpretation of the amended S. 162 with regard to the admissibility of oral evidence to prove statements made to the police during their investigation. All the amendments made since 1923 and the case-law, have been brought down to *1st January 1927*. To make the meaning of some of the sections clearer and the procedure to be followed easily understood, extracts are given in appropriate places from the Standard Works like *Archbold's Criminal Evidence, Practice and Procedure* and *Roscoe's Criminal Evidence and Practice* and *Forsyth's History of Trial by Jury*.

A bare perusal of the list of cases given will at once show that the number of cases cited in this edition has nearly doubled itself. The book has also grown somewhat bulky but to keep it less heavy and more handy, it is printed on antique paper specially manufactured for the purpose. All possible cross references to the cases cited are given to save time and labour of the busy practitioner. The general index has been revised and a number of new headings have been added to facilitate easy reference and also to add to the usefulness of the work. A tabular statement of the repeals and amendments up-to-date is added

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THIS edition prepared on the same lines as the previous editions, has been thoroughly revised, enlarged and partly re-written. Great pains have been taken to simplify the subject as much as possible by a systematic arrangement of the commentaries, always keeping in view the exact wording of the sections. All the earlier decisions which did not find a place in this work before, for want of time and space, have now been incorporated in their appropriate places. Although the amendments and alterations in the Code since the general revision in 1923 are not many, the decisions of the various High Courts on the amended Code have been quite numerous and very often conflicting opinions have been expressed as to the scope, nature and extent of the changes in the law introduced by the amended Code of 1923. For example, the decisions on the interpretation of the amended S. 162 are many but there is a conflict of opinion as to the interpretation of the amended S. 162 with regard to the admissibility of oral evidence to prove statements made to the police during their investigation. All the amendments made since 1923 and the case-law, have been brought down to *1st January 1927*. To make the meaning of some of the sections clearer and the procedure to be followed easily understood, extracts are given in appropriate places from the Standard Works like *Archbold's Criminal Evidence, Practice and Procedure* and *Roscoe's Criminal Evidence and Practice* and *Forsyth's History of Trial by Jury*.

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which will show at a mere glance which sections of the Code have been altered, amended or repealed.

Although the cost of production has increased considerably, in order to put this edition within the easy reach of all, especially junior members of the Bar, the Law students, and the Subordinate Magistracy and the Police, the price of the book has not been increased and has been kept down as low as possible.

The indulgence of the Bench and the Bar is specially craved for the errors and imperfections which must inevitably creep in, in a work of this magnitude dealing with thousands of decided cases, many of which are not easily reconcilable. It is hoped that the ready appreciation which this work has enjoyed before, in the hands of the Bench and the Bar and of the students, will be extended to the present edition as well.

My sincere thanks are due to Mr. W. T. Sundararajan, B.A., B.L., High Court Vakil, who has so kindly assisted me in the preparation of this edition.

"SWAMI VILAS,"
EGMORE,
1st January, 1927.)

S. RANGANADHAIYAR.

PREFACE (REPRINT SECOND EDITION).

THIS *reprint* has been necessitated, by the cordial reception accorded to the first edition of this work, which was almost exhausted in a few weeks after its publication in September last and also by the Government kindly placing a very large order for its supply to all the Courts and public offices in the Presidency. This is the first time the Government has thought fit to supply an edition of the Code *with Commentaries* to all the Courts and public offices, and it is hoped that this departure will be of real help to all those who have to administer the law.

The amended Code having been brought into force, rather suddenly, on the first September, 1923, the first edition had to be seen through the press hurriedly in two weeks and certain slips and errors in printing which had inadvertently crept in have all been corrected now.

"SWAMI VILAS,"
EGMORE,
30th November, 1923.

S. RANGANADHAIYAR.

PREFACE (FIRST EDITION).

THE object of this work is to present in a handy volume, a short, critical and explanatory commentary and not a mere collection of cases in the shape of disconnected notes, on the language of the sections of the Code as interpreted by the various High Courts, and it is hoped that it will not only be of some real help to the profession which has to familiarise itself with the amended Code, but also to the Law students and others who have occasion to make themselves acquainted with the provisions of the Code. Elaborate details and authority for every conceivable position which a practitioner may sometimes require and decisions of Courts other than the Chartered High Courts, including decisions of doubtful authority are generally avoided to save confusion to the busy practitioner and more especially to Law students and beginners. Great pains have been taken in the selection of cases; decisions which do not turn on the language of the sections of the Code,

PREFACE.

or, which merely repeat the wording of the section without any attempt to examine the same critically are ignored. As far as possible the very words used by the Learned Judges in their Judgments are extracted, and to save time and unnecessary labour and also disappointment which is more important, cases which are no longer Law on account of their being overruled by later cases, or, rendered obsolete by the new amendments, are prominently given in their appropriate places. Preference is given to the latest decisions and when a case is reported in the authorised series, reference to the authorised series alone is given and no cross-references to private publications are made. This mode of citation has the great advantage of reducing the size of the volume and making it very handy. The additions and alterations newly made in the Code, are printed in italics so that the change in the Law may readily be perceived. At the beginning of the commentary to each section, the change in the law is briefly summarised and the scope and object of the important sections are explained. All the reported decisions up to the end of August, 1923, which throw any light on the interpretation of the language of the sections of the Code have been incorporated. An exhaustive Index is given at the end of the volume for ready reference.

* * * * *

My thanks are due to Mr. W. T. Sundararajan, B.A., B.L., who has assisted me considerably in the preparation and publication of this work. * * * *

I am fully conscious of the many defects and shortcomings in this work and I shall consider my labour sufficiently rewarded if the work proves useful to those for whom it is intended.

“ SWAMI VILAS,”
EGMORE,
1st September, 1923.)

S. RANGANADHAIYAR.

**TABULAR STATEMENT OF REPEALS AND AMENDMENTS
UP-TO-DATE.**

Section.	How dealt with.	Section.	How dealt with.
1	Amended by Act XXXVIII of 1920, S. 5 and Sch. I.	123	Amended by Act XVIII of 1923, S. 21. Amended by Act X of 1926, S. 2.
2	Repealed by Act X of 1924, S. 3 and Sch. II.	124	Amended by Act XVIII of 1923, S. 22.
4	Amended by Act XVIII of 1919, S. 2 and Schs. I and II.	126	Amended by Act XVIII of 1923, S. 23.
	Amended by Act XVI of 1919 S. 3 and Sch. II.	126-A	Amended by Act XVIII of 1923, S. 23.
	Repealed in part by Act XX of 1923, S. 5 and Sch. II.	127	Amended by Act XXXVIII of 1920, S. 2 & Sch. I.
	Amended by Act XII of 1923, S. 2.	133	Substituted by Act XVIII of 1923, S. 24.
	Amended by Act XXXV of 1923, S. 2.	135	Amended by Act XVIII of 1923, S. 25.
7	Amended by Act XXXVIII of 1920, S. 2 and Sch. I.	139	Inserted by Act XVIII of 1923, S. 26.
10	Amended by Act XVIII of 1923, S. 2.	144	Amended by Act XVIII of 1923, S. 27.
14	Amended by Act XXXVIII of 1920, S. 2 and Sch. I.	145	Amended by Act XVIII of 1923, S. 28.
18	Amended by Act XVIII of 1923, S. 3.	146	Amended by Act XVIII of 1923, S. 29.
21	Amended by Act XVIII of 1923, S. 4.	147	Substituted by Act XVIII of 1923, S. 30.
22	Substituted by Act XXXVIII of 1920, S. 2 and Sch. I.	148	Amended by Act XVIII of 1923, S. 31.
	Amended by Act XII of 1923, S. 3.	157	Amended by Act XVIII of 1923, S. 32.
23 & 24	Repealed by Act XII of 1923, S. 4.	161	Amended by Act XVIII of 1923, S. 33.
27	Amended by Act XXXVIII of 1920, S. 2 and Sch. I.	162	Amended by Act XVIII of 1923, S. 34.
29	Amended by Act XII of 1923, S. 5.	164	Amended by Act XVIII of 1923, S. 35.
	Amended by Act XVIII of 1923, S. 5.	165	Amended by Act XVIII of 1923, S. 36.
29A	Inserted by Act XII of 1923, S. 6.	166	Amended by Act XVIII of 1923, S. 37.
29B	Inserted by Act XVIII of 1923, S. 6.	167	Amended by Act XVIII of 1923, S. 38.
34A	Inserted by Act XII of 1923, S. 7.	169	Amended by Act XVIII of 1923, S. 39.
35	Amended by Act XVIII of 1923, S. 7.	170	Repealed by Act II of 1926, S. 2.
40	Amended by Act XVIII of 1923, S. 8.	(4)	
45	Amended by Act XVIII of 1923, S. 9.	173	Amended by Act XVIII of 1923, S. 40.
54	Amended by Act XVIII of 1923, S. 10.	174	Amended by Act XVIII of 1923, S. 41.
55	Amended by Act XVIII of 1923, S. 11.	181	Amended by Act XVIII of 1923, S. 42.
59	Amended by Act XVIII of 1923, S. 12.	185	Substituted by Act XVIII of 1923, S. 43.
83	Amended by Act XVIII of 1923, S. 13.	188	Amended by Act XVIII of 1923, S. 44.
99A	Inserted by Act XI of V 1922, S. 5 and Sch. III.	190	Amended by Act XVIII of 1923, S. 45.
99A to G	Amended by Act XXXVI of 1926, Ss. 2 to 5.	193	Amended by Act XVIII of 1923, S. 46.
101	Amended by Act XIV of 1922, 5 and Sch. III.	195	Amended by Act XVIII of 1923, S. 47.
103	Amended by Act XVIII of 1923, S. 14.	196	Amended by Act XVIII of 1923, S. 48.
106	Amended by Act XVIII of 1923, S. 15.	196	Inserted by Act XVIII of 1923, S. 49.
107	Amended by Act XVIII of 1923, S. 16.	197	Amended by Act XVIII of 1923, S. 50.
108	Amended by Act XVIII of 1923, S. 17.	198	Amended by Act XVIII of 1923, S. 51.
110	Amended by Act XVIII of 1923, S. 18.	199	Amended by Act XVIII of 1923, S. 52.
111	Repealed by Act XII of 1923, S. 8.	199-A	Inserted by Act XVIII of 1923, S. 53.
117	Amended by Act XVIII of 1923, S. 19.	200	Amended by Act XVIII of 1923, S. 54.
122	Substituted by Act XVIII of 1923, S. 20.	202	Amended by Act II of 1926, S. 3.
		203	Amended by Act XVII of 1923, S. 55.
			Amended by Act II of 1926, S. 4.
			Amended by Act XVIII of 1923, S. 56.
			Amended by Act II of 1926, S. 5.

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206	Amended by Act XII of 1923, S. 9.	356	Amended by Act XVIII of 1923, S. 96.
	Amended by Act XVIII of 1923, S. 57.	362	Amended by Act XVIII of 1923, S. 97.
210	Amended by Act XVIII of 1923, S. 58.	364	Repealed in part by Act XI of 1923, S. 3
214	Repealed by Act XII of 1923, S. 10.		and Sch. II.
215	Amended by Act XII of 1923, S. 11.		Amended by Act XXXVII of 1923, S. 2,
	Amended by Act XVIII of 1923, S. 59.	365	Repealed in part by Act XI of 1923 S. 3
219	Amended by Act XVIII of 1923, S. 60.		and Sch. II.
221	Amended by Act XVIII of 1923, S. 61.		Amended by Act XVIII of 1923, S. 99.
234	Amended by Act XVIII of 1923, S. 62.	367	Amended by Act XVIII of 1923, S. 100.
237	Repealed by Act XVIII of 1923, S. 63.	369	Amended by Act XVIII of 1923, S. 101.
(2)		386	Substituted by Act XVIII of 1923, S. 102.
238	Amended by Act XVIII of 1923, S. 64.	387	Amended by Act XVIII of 1923, S. 103.
239	Substituted by Act XVII of 1923, S. 65.	388	Substituted by Act XXXVII of 1923, S. 3.
243	Amended by Act XVIII of 1923, S. 66.	390	Amended by Act XII of 1923, S. 21.
244	Amended by Act XVIII of 1923, S. 67.	391	Amended by Act, XII of 1923, S. 22.
245	Amended by Act XVIII of 1923, S. 68.	395	Amended by Act XVIII of 1923, S. 105.
250	Amended and repealed in part by Act XVIII of 1923, S. 69.	397	Amended by Act XVIII of 1923, S. 106.
252	Amended by Act XVIII of 1923, S. 70.	401	Amended by Act XVIII of 1923, S. 107.
255	Inserted by Act XVIII of 1923, S. 71.	402	Amended by Act XVIII of 1923, S. 108.
A		406	Substituted by Act XVIII of 1923, S. 109.
256	Amended by Act XVIII of 1923, S. 72.	406-	Inserted by Act XVIII of 1923, S. 110.
258	Amended by Act XVIII of 1923, S. 73.	A	
259	Amended by Act XVIII of 1923, S. 74.	407	Amended by Act XVIII of 1923, S. 111.
261	Amended by Act XVIII of 1923, S. 75.	408	Repealed in part by Act XII of 1923, S. 23.
266	Repealed in part by Act XI of 1923, S. 2		Amended by Act XVIII of 1923, S. 112.
	and Sch. II.	409	Amended by Act XVIII of 1923, S. 113.
	Amended by Act XII of 1923, S. 12.	413	Amended by Act XII of 1923, S. 24.
	Amended by Act XVIII of 1923, S. 76.	414	Amended by Act XII of 1923, S. 25.
269	Amended by Act XXXVIII of 1920 S. 2	415	Inserted by Act XVIII of 1923, S. 114.
	and Sch. I.	A	
274	Amended by Act XII of 1923, S. 13.	416	Repealed by Act XII of 1923, S. 26.
275	Substituted by Act XII of 1923, S. 14.	418	Amended by Act XVIII of 1923, S. 115.
276	Amended by Act XVIII of 1923, S. 77.	435	Amended by Act XVIII of 1923, S. 116.
284	Amended by Act XII of 1923, S. 15.	435	Repealed by Act XVIII of 1923, S. 116.
284-	Amended by Act XII of 1923, S. 16.	(9)	
A		436	Renumbered by Act XVIII of 1923,
285-	Heading Inserted by Act XII of 1923,		S. 117.
A	S. 17.	437	Renumbered and Amended by Act XVIII
288	Amended by Act XVII of 1923, S. 78.		of 1923, S. 117.
292	Substituted by Act XVIII of 1923, S. 79.	438	Amended by Act XVIII of 1923, S. 118.
305	Amended by Act XVIII of 1923, S. 80.	439	Amended by Act XVIII of 1923, S. 119.
307	Amended by Act XVIII of 1923, S. 81.	443	(Oh, XXXIII) Substituted by Act XII of
309	Amended by Act XVIII of 1923, S. 82.	463	1923.
310	Substituted by Act XVIII 1923, S. 83.	464	Amended by Act XVIII of 1923, S. 120.
312	Substituted by Act XII of 1923, S. 18.	465	Amended by Act XVIII of 1923, S. 121.
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316	Amended by Act XVII of 1923, S. 85.	473	Amended by Act XVIII of 1923, S. 125.
326	Amended by Act XII of 1923, S. 19.	474	Amended by Act XVIII of 1923, S. 126.
336	Repealed by Act XII of 1923, S. 20.	475	Substituted by Act XVIII of 1923, S. 127.
337	Amended by Act XVIII of 1923, S. 86.	476	Substituted by Act XVIII of 1923, S. 128.
339	Amended by Act XVIII of 1923, S. 87.		Amended by Act II of 1926, S. 6.
339-	Inserted by Act XVIII of 1923, S. 88.	476-	Inserted by Act XVIII of 1923, S. 128.
A		A	
340	Substituted by Act XVIII of 1923, S. 89.	476-	Inserted by Act XVIII of 1923, S. 128.
345	Amended by Act XVIII of 1923 S. 90.	B	
347	Amended by Act XVIII of 1923, S. 91.	477	Repealed by Act XVIII of 1923, S. 129.
348	Amended by Act XVIII of 1923, S. 92.	478	Amended by Act XII of 1923, S. 28.
349	Amended by Act XVIII of 1923, S. 93.	480	Amended by Act XII of 1923, S. 29.
350	Amended by Act XVIII of 1923, S. 94.	487	Amended by Act XVIII of 1923, S. 130.
350-	Inserted by Act XVIII of 1923, S. 95.	488	Amended by Act XVIII of 1923, S. 131.
A		489	Amended by Act XVIII of 1923, S. 132.

TABULAR STATEMENT OF REPEALS AND AMENDMENTS.

IX

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491	Amended by Act XII of 1923, S. 30.	540-	Inserted by Act XVIII of 1923, S. 151.
491-	Inserted by Act XII of 1923, S. 31,	A	
A		544	Amended by Act XXXVIII of 1920, S. 2 and Sch. I.
492	Amended by Act XVIII of 1923, S. 133.	545	Amended by Act XVIII of 1923, S. 152.
494	Amended by Act XVIII of 1923, S. 134.	546-	Inserted by Act XVIII of 1923, S. 153.
495	Amended by Act XXXVIII of 1920 S. 2 and Sch. I.	A	
496	Amended by Act XVIII of 1923, S. 135.	547	Amended by Act XVIII of 1923, S. 154.
497	Amended by Act XVIII of 1923, S. 136.	552	Amended by Act XVIII of 1924.
504	Amended by Act XVIII of 1923, S. 137.	555	Amended by Act XVIII of 1916, S. 2.
505	Amended by Act XVIII of 1923, S. 138.	559	Substituted by Act XVIII of 1923, S. 155.
514	Amended by Act XVIII of 1923, S. 139.	561-	Inserted by Act XVIII of 1923, S. 156.
514-	Inserted by Act XVIII of 1923, S. 140.	A	
A &		562	Substituted by Act XVIII of 1923, S. 157.
B			Amended by Act XXXVII of 1923, S. 34.
516-	Inserted by Act XVIII of 1923, S. 141.	565	Substituted by Act XVIII of 1923, S. 158.
A			Schedule I Repealed by Act X of 1914, S. 3 and Sch. II.
517	Amended by Act XVIII of 1923, S. 142.		(Amended by Act XXXIX of 1920, S. 3.
522	Amended by Act XVIII of 1923, S. 143.	Schedule II	Amended by Act XVIII of 1923, S. 159.
525	Amended by Act XVIII of 1923, S. 144.		
526	Amended by Act XVIII of 1923, S. 145.	Schedule III	Amended by Act XVIII of 1923, S. 160.
526-	Inserted by Act XII of 1923, S. 32.	Schedule IV	Amended by Act XVIII of 1923, S. 163.
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527	Amended by Act XVIII of 1923, S. 146.	Schedule V	Amended by Act XXXVII of 1923, S. 5.
528	Amended by Act XVIII of 1923, S. 147.		
528-	(Ch. XLIV A) Inserted by Act XII of 1923, S. 33.		
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534	Substituted by Act XII of 1923, S. 34.		
537	Amended by Act XVIII of 1923, S. 148.		
538	Amended by Act XVIII of 1923, S. 149.		
539	Inserted by Act XVIII of 1923, S. 150.		
A &			
B			

ABBREVIATIONS OF REPORTS AND TEXT BOOKS CITED.

- | | |
|--|---|
| <p>A. Indian Law Reports, Allahabad Series.
 A.C. Law Reports, Appeal Cases,
 A.L.J. Allahabad Law Journal.
 A.W.N. Allahabad Weekly Notes.
 B. Indian Law Reports, Bombay Series.
 B.L.R. Bombay Law Reports.
 B.L.R. Appx. Bengal Law Reports, Appendix.
 B.H.C.R. Bombay High Court Reports.
 B.H.C.R. (Ap. Cr.) Bombay High Court Reports, Appellate Criminal.
 B.H.C.R. (Cr. Ca.) Bombay High Court Reports, Crown Cases.
 Bom. L.R. Bombay Law Reporter.
 C. Indian Law Reports, Calcutta Series.
 C.L.J. Calcutta Law Journal.
 C.L.R. Calcutta Law Reports.
 C.W.N. Calcutta Weekly Notes.
 Cr. L.J. Criminal Law Journal.
 Cr. L. Rev. Criminal Law Review.
 Ind. App. Law Reports, Indian Appeals.
 Ind. Cas. Indian Cases.
 L.W. Law Weekly.
 Lah. Indian Law Reports, Lahore Series.
 M. Indian Law Reports, Madras Series.
 Mad. Jur. (N. S.) Madras Jurist New Series.
 M.H.C.R. Madras High Court Reports.
 M.H.C.R. Appx. Madras High Court Reports Appendix.</p> | <p>M.I.A. Moore's Indian Appeals.
 M.L.J. Madras Law Journal,
 M.L.T. Madras Law Times.
 M.W.N. Madras Weekly Notes.
 N.W.P.H.C.R. North-West Provinces High Court Reports.
 P.R. The Punjab Record.
 Pat. Indian Law Reports, Patna Series.
 [Pat] Patna High Court Cases (C.W.N. Supplement) and All India Reporter (Pat. H.C.)
 Pat. L.J. Patna Law Journal.
 Pat. L.T. Patna Law Times.
 Rang. Indian Law Reports, Rangoon Series.
 Ratanlal. Ratanlal's Unreported Criminal Cases of the Bombay High Court.
 W.R. (Cr.) Sutherland's Weekly Reporter, Criminal Rulings.
 W.R. (F.B.) Sutherland's Weekly Reporter, Full Bench Rulings.
 Weir I & II. Weir's Criminal Rulings of the Madras High Court.
 Arch. Cr. Pl. & Pro. Archbold's Criminal Pleading, Evidence and Procedure.
 Ros. Cr. Ev. & Pro. Roscoe's Criminal Evidence and Procedure,
 Forsyth, His. Tr. by Jury. Forsyth's History of Trial by Jury.</p> |
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THE
CODE OF CRIMINAL PROCEDURE
ACT V OF 1898

*An Act to consolidate and amend the law relating to
Criminal Procedure.*

[AS AMENDED UP TO DATE.]

THE AMENDMENTS NEWLY MADE ARE PRINTED IN ITALICS.

WHEREAS it is expedient to consolidate and amend the law relating
to Criminal Procedure; it is hereby enacted as
follows :—

Preamble.

PREAMBLE :—The preamble of an Act has been called a key to its understanding, and may properly be consulted in order to fix the scope or limit of a statute. 9 B. 333 at 343 ; 12 A. 409 at 417-18. There can be no doubt that the preambles to statutes do not always cover in the wide and general terms in which they are necessarily couched, all the specific offences, which are to be found provided for within the enacting portions of the statute itself. It is an undoubted rule of construction that where the language of the enacting sections of a statute is clear, the terms of a preamble cannot be called in aid to restrict their operation or to cut them down. The purpose for which a preamble is framed to a statute is to indicate what in general terms was the object of the Legislature in passing the Act but it may well happen that the general terms will not indicate or cover all the mischief which in the enacting portions of the Act itself are found to be provided for. 11 A. 262 at 266 ; 22 B. 321 at 330-31.

CONSOLIDATE AND AMEND :—The term 'consolidation' as applied to statute law means the combination in a single measure of enactments relating to the same subject-matter, but scattered over different Acts. The result of consolidation is to substitute a single code for many Acts and regulations dealing with procedure.

PART I.

PRELIMINARY.

CHAPTER I.

1. (1) This Act may be called the CODE OF CRIMINAL PROCEDURE, 1898 ; and it shall come into force on the first day of July, 1898.

Short title, Com-
mencement,

(2) It extends to the whole of British India ; 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, or shall apply to—

Extent.

- (a) the Commissioners of Police in the towns of Calcutta Madras and Bombay, or the police in the towns of Calcutta and Bombay ;
- (b) heads of villages in the Presidency of Fort St. George ; or
- (c) village police-officers in the Presidency of Bombay ;

Provided that the Local Government may, if it thinks fit, by notification in the official Gazette, extend any of the provisions of this Code, with any necessary modifications, to such excepted persons.

BRITISH INDIA.—General Clauses Act X of 1897, S. 3 (7) defines British India. It means " all territories and places within Her Majesty's dominions which are for the time being governed by Her Majesty through the Governor-General of India or through any Governor or other Officer subordinate to the Governor-General of India." S. 15, I.P.C. defines British India thus " British India denote the territories which are or may become vested in Her Majesty by Statute 21 & 22 Victoria, Chapter 106, entitled an Act for the better Government of India." It includes the Island of *Perim*, 10 B. 258, but does not include the Civil Station of Rajkot, 10 B. 186, or the Civil and Military Station of Bangalore, 12 M. 39. As the Code extends to the whole of British India, it applies to the Scheduled Districts, unless by notification under S. 3 of Act XIV of 1874 it has been specially excluded. The Code is in force in the Scheduled Districts of Ganjam and Vizagapatam, in the *Laccadive Islands*, 13 M. 353, in the *Andaman and Nicobar Islands*, in the *Sonthal Parganas*, in British Baluchistan, and in Upper Burma including Shan States, but is no longer in force in the *Garo*, the *Khasas*, *Jaintia*, the *Naga* and *Lusat Hills*.

The Code regulates all proceedings of Criminal Courts in British India, unless otherwise expressly provided. The trial of a British seaman for an offence committed on board a British ship on the high seas must be conducted under the Code, 21 C. 782, see also 1 B.L.R. (Or. Cr.) 1 ; 7 B.H.C.R. 89 ; 15 C. 238. The Code is also in force in places outside British India. It applies to the Hyderabad Assigned Districts, the Civil and Military Station of Bangalore, 12 M. 39, the Cantonments of Secunderabad and Quetta, and the lands occupied by certain railways passing through Native States, 25 C. 20 (P.O.) ; it also applies to the *Persian Gulf*, *Zansidar* (now treated as a District in Bombay) and *Muscat* (original criminal jurisdiction alone vests in the Bombay High Court), 24 B. 471. Transfer of territory which formed part of British India to a native state will not deprive British Courts of jurisdiction to hear pending cases, 183 A. 578 ; 34 A. 118.

IT EXTENDS TO THE WHOLE OF BRITISH INDIA.—The Code applies to all trials held in British India subject to a saving of special or local law or any special form of procedure prescribed. For example the procedure for the trial of an offence committed on the high seas must be in accordance with the local law even though the offence charged and punishable is one under English law, 1 B.L.R. (Or. Cr.) 1 ; 7 B.H.C.R. 89 ; 25 B. 636, similarly the trial of a seaman for an offence committed on board a British Ship on the high seas must be conducted under the Code, 21 C. 782.

IN THE ABSENCE OF ANY SPECIFIC PROVISION TO THE CONTRARY NOTHING HEREIN CONTAINED SHALL AFFECT SPECIAL OR LOCAL LAW.—The Code is in force in the Southal Pergunnahs, S. 2 of Act XXXVII of 1855 vests the administration of criminal justice in that territory in an officer appointed by the Lieutenant-Governor of Bengal and all sentences in Criminal Cases passed by him under S. 4 (1) of the above Act shall be final. On a revision to the High Court against the sentence passed under the Act, the High Court held that it had no revisional jurisdiction under the Code, 12 C. 538.

SPECIAL OR LOCAL LAW.—A 'Special law' is a law applicable to a particular subject S. 41, I.P.C., a 'Local law' is a law applicable to a particular part of British India S. 42, I.P.C. The expression "special law" has reference to statutory enactments and not to a local or family law. The Coroners Act IV of 1871, which is a special enactment, as this section provides remains unaffected, 31 C. 1 at 6. The phrase covers laws such as the Opium Act or the Gambling Act and not a vast system like the English common law. 4 Bur. L.J. 147. The law for suppression of outrages in Malabar Act XX of 1859 is a local law.

SPECIAL JURISDICTION.—Under Madras Act XXIV of 1889, S. 3, the Agents to the Governor in Vizagapatam and Ganjam have, special jurisdiction within the limits of the Agency tracts in respect of the administration of criminal justice and in the exercise of this jurisdiction they are to be guided by such rules as the Government of Madras may prescribe. This enactment created a special jurisdiction and a special procedure, 14 M. 121 at 122, See 23 M.L.J. 670=12 M.L.T. 601. See Act I of 1878 (Cattle-trespass), Ss. 20 to 23, 23 C. 300; 33 C. 926 and Indian Army Act VIII of 1911.

SPECIAL POWER.—For example (1) the power of the High Courts in India as Courts of Record to punish for contempts, 10 C. 109 (P.C.); 33 C. 927; 33 B. 240; 8 B. 380; 26 M. 494; 24 M. 523 at 548; (2) the power of the Governor-General to make rules regulating Indian Marine Courts in the exercise of their ordinary original jurisdiction under Act XIV of 1887, S. 70; (3) the power of High Court to transfer criminal cases under S. 29 of the Letters Patent, 8 M. 32; (4) power of superintendence under S. 107 of the Government of India Act.

SPECIAL FORM OF PROCEDURE.—See for example the procedure prescribed by the Indian Articles of War, Act V of 1869, for trial of military offences or by the Criminal Law Amendment Act XIV of 1908 for the speedy trial of certain classes of offences under the Indian Penal Code and under the Explosive Substances Act.

POLICE AND COMMISSIONERS OF POLICE.—The Code does not apply unless it has been specially extended to the police or to the Commissioners of police in the towns of Calcutta and Bombay. See Ss. 83, 85 and 86, *infra* as to Commissioners of Police. But by various Acts, the Code has been extended to the Calcutta and Bombay police, 31 C. 557; the Code applies to the police in Madras but not to the Commissioner of police in the town of Madras. This section bars the application of the Code to the police in the Presidency towns, 5 Pat. 171.

Sections 43, 44, 54, 56, 68, 83 to 86, 127, 202 and Column 3 of Sch. II relating to arrests by the police with or without warrant under the Penal Code and other Laws, are made applicable to the police of Calcutta and Bombay, 15 C. 695; 21 B. 495.

HEADS OF VILLAGES IN MADRAS.—This section says *inter alia* that nothing contained in the Code shall apply to Heads of villages in the Presidency of Fort St. George which means that in their official capacity as Village Headmen in proceedings as Village Magistrates, they are not governed by the Code. This has nothing to do with their coming forward in any Criminal cases as complainants. 19 L.W. 30=(1923) M.W.N. 145=25 Cr. L.J. 221=76 Ind. Cas. 633. Under Regulation XI of 1816, Ss. 10 to 14 and Regulation IV of 1821, S. 6, Heads of villages are empowered to try cases of trivial nature, such as abusive language and inconsiderate assaults or affrays and petty thefts not attended with aggravating circumstances, and not committed by persons of notoriously bad character where the value of the property stolen does not exceed one rupee. The Code does not govern the village headman, Weir II 1. But

under S. 6 of Regulation XI of 1816, he has authority on a verbal examination either to dismiss the parties or if the offence is proved and deserves to be punished, to confine the accused in the village choultry for a period not exceeding 12 hours or if the accused belongs to any of the lower castes on whom it may not be degrading to be put in stocks, then that punishment for a period not exceeding 6 hours may be inflicted. The provisions of Ss. 480 and 482 *infra* do not apply to village headman, 15 M. 131 and the provisions of S. 528 are applicable to proceedings under the Regulations above referred to.

VILLAGE POLICE OFFICERS IN BOMBAY :—The Code does not apply to these officers, 19 B 612. They are governed by Bombay Village Police Act, VIII of 1867 and Bombay Regulation XII of 1827.

2. *Repealed by Act X of 1914.*

3. (1) In every enactment passed before this Code comes into force, in which reference is made to, or to any chapter or section of, the Code of Criminal Procedure, Act XXV of 1861 or Act X of 1872, or Act X of 1882, or to any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding chapter or section.

References to Code of Criminal Procedure and other repealed enactments.

(2) In every enactment passed before this Code comes into force the expressions "Officer exercising (or 'having') the powers (or 'the full powers') of a Magistrate," "Subordinate Magistrate, first class," and "Subordinate Magistrate, second class," shall respectively be deemed to mean "Magistrate of the first class," "Magistrate of the second class" and "Magistrate of the third class," the expression "Magistrate of a division of a district" shall be deemed to mean "Sub-divisional Magistrate," the expression "Magistrate of the district" shall be deemed to mean "District Magistrate," the expression "Magistrate of Police" shall be deemed to mean "Presidency Magistrate," and the expression "Joint Sessions Judge" shall mean "Additional Sessions Judge."

Expressions in former Acts.

The effect of an interpretation clause is to give the meaning assigned by it to a word in all places in the Act in which the word occurs and to prevent a different meaning attached to it by any other Act of the Legislature being read into it, 12 C. 430 ; 30 C. 910 ; 32 C. 379 ; 40 C. 860 ; when the terms of an enactment admit of but one meaning, a Court is not at liberty to speculate on the intention of the Legislature and to construe them in accordance with its own notion of the subject of such enactment, 7 C. 127.

SO FAR AS MAY BE PRACTICABLE.—These words appear to limit the repeal to cases in which the provision is necessarily inconsistent with the provisions of another Act, 12 M. 95 at 97 ; see 25 C. 333.

MAGISTRATE OF POLICE.—This expression in S. 1 of Act XIII of 1859 (Workmen's Breach of Contract) means Presidency Magistrate, see 25 C. 837.

4. (1) In this Code the following words and expressions have the following meanings, unless a different intention appears from the subject or context :—

Definitions.

(a) " Advocate General " includes also a Government Advocate, or, where there is no Advocate General or Government Advocate, such officer as the Local Government may, from time to time, appoint in this behalf :

DEFINITIONS :—Too much importance and force should not be attached to interpretation clause in Acts of the Legislature as is sometimes claimed for them, holding that they should not be read merely by themselves, but they may be controlled and limited by other express provisions of the same law, and as a consequence, that if inconsistent with and repugnant to such other provisions they may be disregarded. They are frequently very useful, 2 A. 205 at 208. Illustrations to sections do not strictly form part of the Act, 1 A. 34 (F.B.) at 38. They are not to be construed as limiting the right given by the section, 28 M. 57. They furnish some indication as to intention of legislature, 13 B. 491 at 496 ; 48 C. 380, In 21 Bom. L.R. 558 (P.C.) it was held that illustrations are to be taken as part of the statute.

UNLESS A DIFFERENT INTENTION APPEARS FROM THE SUBJECT OR CONTEXT.—The concluding paragraph of this section says that all words and expressions used in the Code and defined in the I.P.C., but not in the previous part of this section should be deemed to have the meaning attributed to them by the I.P.C., notwithstanding that the concluding paragraph of this section is separated by a full stop from the part of the section which contains these qualifying words, it is difficult to believe that the framers of the Code intended that paragraph was not to be taken subject to these qualifying words in the beginning, 20 M. 470 (F.B.) at 474.

INCLUDES :—The word is intended to be enumerative and not exhaustive. When it is intended to exhaust the signification of the word interpreted, the word ' mean ' is used, 2 M. 5 at 7. The use of the word ' includes ' suggests that persons included in the expression are persons over and above those to whom the word in its ordinary significance applied and who might but for the explanation have escaped out of the category. 1901 A.W.N. 10 ; 22 B. 235 ; 5 C. 483 (F.B.) at 493 ; 23 A.L.J. 845 at 852.

ADVOCATE GENERAL.—The Advocate General is the chief law officer of Government whose duty it is to exhibit informations S. 194 ; to enter *nolle prosequi* S. 393. See 23 Cr. L.J. 317. It is undesirable that he should appear at the Criminal Sessions of the High Court either for the crown or for the complainant. The Advocate General is by law empowered to enter a *nolle prosequi* under S. 393 of the Code in any case if he thinks fit to do so. This is a function to be performed by him *qua* Advocate General without being induced thereto by the complainant or by the accused. He cannot be expected to discharge it in an impartial manner if he gets himself enlisted on one side beforehand. Again, having regard to the judicial function which the law assigns him when appealed to, to certify that the Judge at the Sessions has gone wrong on certain points of law he should be prohibited altogether from taking part in the trial as counsel for the prosecution. 10 M.L.J. 311 (Jour).

(b) " bailable offence " means an offence shown as bailable in the second schedule, or which is made bailable by any other law for the time being in force ; and " non-bailable offence " means any other offence ;

" Bailable offence,"
" Non-bailable offence,"

Bail literally means either to carry or take away, deliver or give. In modern legal sense it means to deliver on trust on certain conditions. When it is said a man is let on bail, we mean he is released from the custody of the officers of law to the custody of private persons

who as sureties are bound to produce him whenever called upon. The Code divides offences into two classes bailable and non-bailable. See 14 A. 45 at 47 as to the necessity for granting bail. See chapter XXXIX *infra* Ss. 496 to 502 dealing with bail.

"Charge." (c) "charge" includes any head of charge when the charge contains more heads than one.

The word 'charge' is used in the Code both as indicating the whole series of counts or heads of charge and also as indicating a specific offence. In S. 237 *infra*, it is used in the former sense, 8 B. 200. A charge is a precise formulation of the specific accusation made against a person who is entitled to know its nature at the earliest stage, 28 C. 434 at 437; 28 C. 786; 3 B.H.C.R. (Cr. Ca.) 100.

(d) *Repealed by Act XI of 1923, S. 3 and Sch. II.*

"Clerk of the Crown." (e) "Clerk of the Crown" includes any officer specially appointed by the Chief Justice to discharge the functions given by this Code to the Clerk of the Crown:

CLERK OF THE CROWN.—For functions of the Clerk of the Crown, See Ss. 211, 216, 218, 226, 313, 314 and 539 *infra*.

(f) cognizable offence " means an offence for, and " cognizable case " means a case in, which a police-officer, within or without the presidency-towns, may, in accordance with the second schedule, or under any law, for the time being in force, arrest without warrant:

The Code divides offences into cognizable and non-cognizable but when it deals with procedure it speaks not of offences but of warrant cases and summons cases, 31 M. 727 at 730. The words 'a police officer may arrest' do not mean every or any police-officer, and whenever the law provides that in a particular offence a police officer of a particular rank may arrest without a warrant then the offence is a cognizable one, 27 Cr. L.J. 503—93 Ind. Cas. 967 following 27 C. 144 at 150.

"Commissioner of Police." (g) "Commissioner of Police" includes a Deputy Commissioner of Police:

"Complaint." (h) "complaint" means the allegations made orally or in writing to a Magistrate, with a view to his taking action, under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police-officer.

COMPLAINT.—Ordinarily a complaint implies at least three persons, a person complaining, a person against whom a complaint is made and a third person to whom the complaint is made. The implication is contained in the definition in the Code. 27 Cr. L.J. 385—93 Ind. Cas. 33. A complaint ought to contain particulars of the offence with which a man is charged. Though in the Indian Procedure, there is no such thing as a regular indictment as in the English Procedure, yet a complaint ought to contain sufficient particulars as to the offence with which a man is charged. A complaint should always contain sufficient materials to enable the trying court to proceed to trial without going through a lot of records for the purpose of finding whether certain statements made by the person charged are true or false, (1923) M.W.N. 470. As a general rule any person whatever can institute a complaint of an offence other than certain offences clearly specified in the Code, such as defamation, etc., 35 M. 88; 13 B. 800; 18 A. 465; 11 C.W.N. 170; 15 Cr. L.J. 369—23 Ind. Cas. 737; 31 C. 1013; 23 Cr.L.J. 117. Complaint is something anterior to and distinct from the

examination on oath of a complainant by a Magistrate under S. 200 *infra*, and such examination of the complainant cannot be regarded as part of the complaint for the purposes of S. 199 *infra*, (1924) M.W.N. 514-13 L.W. 698. But for the purpose of ascertaining the real nature of the complaint in any particular case the sworn statement may be read with the complaint, 45 M.L.J. 848-(1923) M.W.N. 876-23 Cr. L.J. 837-73 Ind. Cas. 959. There is nothing in the Code to suggest that a complainant must have personal knowledge of the offence complained of, 25 C.W.N. 357-22 Cr. L.J. 455-61 Ind. Cas. 839; 21 Cr. L.J. 356-55 Ind. Cas. 682. The definition does not contain any limitation such as that the person lodging the complaint must have personal knowledge of the facts. If a complainant is not speaking from personal knowledge a Magistrate taking cognizance would exercise a wise discretion in making an inquiry under S. 202 *infra* but he is not compelled to do so. The object of the examination under S. 200 *infra* is that the facts constituting the offence may be well ascertained when in a written complaint they are not given, 25 C.W.N. 357-22 Cr. L.J. 455-61 Ind. Cas. 839. A letter from a Union Chairman to a Magistrate requesting him to take action against a person who, while drunk had used insulting language to him, was held to be a complaint, 17 C.W.N. 448. So also (1) a *Yadast* sent by a Revenue Officer to a Magistrate charging a person with disobedience of a summons issued by him, 11 M. 443; (2) a petition to a Magistrate in the course of a police inquiry questioning its propriety and praying for action being taken against persons who were alleged to have committed an offence, 33 C. 1; (3) the sending of records by an officer trying a rent suit to the Collector who was also a District Magistrate, for starting proceedings under S. 193, I.P.C., against the plaintiff in the rent suit, 26 A. 314; (4) report by a District Judge against certain insolvents asking the Magistrate to take action for an offence under S. 421, I.P.C., 18 A.L.J. 50; but the following are held to be *no complaints*:—(1) a letter from a Civil Court Amin to the police containing allegations charging one of having committed an offence, 1904 A.W.N. 265-1 Cr. L.J. 1016; (2) a report from a paon who was obstructed in the execution of a warrant under the Cess Act stating what took place but contained no express or implied request to the Magistrate to take action, 17 C.W.N. 980; (3) a petition to the Collector as Agent of the Court of Wards against one of his subordinates praying for redress of grievances, 30 C. 115; (4) a petition presented to a Magistrate alleging that an offence had been committed but the petitioner did not desire to prosecute the offender, 6 C.W.N. 926; 28 M. 640; (5) a petition containing allegations against a person with a request for an order on the police to warn the wrong-doer, 15 C.W.N. 1081; (6) an order under S. 196 *infra* sanctioning a prosecution, 35 C. 141 at 160; (7) a letter by an Assistant Collector to the District Magistrate in which the former did not ask any action to be taken according to law but only solicited orders, 40 A. 641. An application under S. 107 *infra* does not fall within the definition and so a Magistrate has no power to dismiss it under S. 203, *infra* 25 Cr. L.J. 89-76 Ind. Cas. 28; 25 Cr. L.J. 1129. A Criminal Court is not bound by all the statements in a complaint. Its duty is to find out the truth in the midst of conflicting evidence and for a conviction it is not necessary to find that the complainant's case exactly as is stated by him was proved, 14 Bom. L.R. 135-13 Cr. L.J. 300-14 Ind. Cas. 764.

ORAL COMPLAINT.—A complaint need not be in writing but may be oral, 1 Rang, 349, and it need not quote any section of the I.P.C., but only must contain a statement of the facts relied on as constituting the offence and it is for the Magistrate to determine on the facts what offence has been *prima facie* made out, 6 Lah. 375. Where the name of a person against whom sanction was accorded under S. 196 *infra* appeared in the sanction order but did not find a place in the written complaint filed, it was held that a subsequent application to the trying Magistrate for the issue of process against the person named in the sanction order does not amount to an oral complaint, because such an application for issue of process presupposes a valid complaint, 18 C.W.N. 98. See also 20 C. 481 and 10 C.W.N. 1029; 30 C. 910 (F.B.).

WITH A VIEW TO HIS TAKING ACTION UNDER THE CODE.—One of the tests to decide whether an allegation amounts to a complaint is, whether it was made to the Magistrate with a view to his taking action, 27 M. 127; 19 B. 81 at 62. A complaint is not intended to give information to the accused. A summons or warrant issued to secure the

attendance of the accused need not set out all the facts on which he is to be charged and if not in them, why in the complaint? 32 M. 3 at 11. The Magistrate must be empowered under S. 190 (1) (a) *infra* to take cognizance of offences; the definition of offence has now been extended by Cl. (c) of this section to cover acts on which proceedings under S. 90 of the Cattle-trespass Act I of 1871 may be taken. The rulings in, 9 M. 102 and 374 are no longer law; the examination of a complainant by a Magistrate after taking cognizance of the offence under S. 200 *infra* has been held not to form part of the complaint, 13 L.W. 695 = (1921) M.W.N. 514. But for the purpose of ascertaining the real nature of the complaint in any particular case, the sworn statement may be read with the complaint, 45 M. L.J. 543 = (1923) M.W.N. 876. But various petitions to Magistrates such as applications to start security proceedings under Chapter VIII, petitions to initiate proceedings under Chapter XII, petition under S. 488 claiming maintenance, do not fall within the definition. See 16 M. 224; 6 M. L.T. 261; 11 M. 199; 6 C.W.N. 163; 27 C. 662. The mere filing of a complaint invoking jurisdiction of a Magistrate does not invest him with jurisdiction if he is otherwise incompetent to try the offence and it is open to a complainant to object to the jurisdiction even in revision stage, 24 Cr. L.J. 110 = 71 Ind. Cas. 238. It is not necessary that in a complaint the names of all the accused persons should be mentioned to make it a valid complaint, 13 Cr.L.J. 588 = 15 Ind. Cas. 1004.

DOES NOT INCLUDE THE REPORT OF A POLICE OFFICER.—The report referred to here does not refer to reports made under Chapter XIV only, but also includes any report by a police-officer or any written or verbal information by him as such, 1 Cr. L.J. 193; written information under S. 154 received with a police report cannot be treated as a complaint given by informant, 43 C. 1152, unless informant impugns the propriety of the police-report sent to the Magistrate referring the case and claims a Magisterial inquiry, 20 Cr. L.J. 389. The report herein referred to, not to be a *complaint*, must be some statement made by the police-officer in connection with or at least under the colour of the duty of the maker as a police-officer, 32 M. 3 at 10. Thus the complaint of a Prosecuting Inspector in a non-cognizable offence, say, under S. 124-A, I.P.O., cannot be regarded as a report of a police-officer, as it is no part of the duty of a Prosecuting Inspector to make reports of such an offence, 32 M. 3 at 10. It was held in 35 C. 141, that the application of a police-officer for warrants in respect of an offence under S. 124-A, I.P.O. coupled with his oral allegations not made on oath or reduced to writing amounted to a complaint. A complaint is none the less a complaint because it was filed by a police-officer, 32 M. 3 at 10; 28 B. 150 and 22 B. 112. The Code does not prohibit a police-officer from presenting a complaint in a non-cognizable case, 25 Cr. L.J. 1351 = 82 Ind. Cas. 753: See 49 M. 525 (F.B.) where it was held that a Magistrate may take cognizance of an offence upon a report in writing of facts which constitute such offence, made by any police-officer in non-cognizable offences. Such report can be treated as a complaint by a public servant acting or purporting to act in the discharge of his official duties and S. 200 (aa) provides that he need not be examined on oath by the Magistrate before taking cognizance of the offence. A person cannot delegate to another the right to file a complaint. A District Magistrate cannot authorise the Public Prosecutor to file a complaint on his behalf, 16 Cr. L.J. 251; 38 B. 642 at 644. It is a principle of general application that criminal proceedings instituted by a private complainant abate on such person's death, 45 M. 88.

(v) "European British subject" means—

- (i) any subject of His Majesty of European descent in the male line born, naturalised or domiciled in the British Islands or any Colony, or
- (ii) any subject of His Majesty who is the child or grandchild of any such person by legitimate descent :

The definition, which is entirely new, was added by Act XII of 1929, *Racial Distinctions*. It is restricted to persons of European descent, and Colonials are also included in the definition. But persons of Indian descent have no longer any privilege by reason of their

being born or domiciled in the British Islands. A person who claims the special privilege must prove (1) that he is a subject of His Majesty, (2) that he is of European descent answering the description herein given, (3) that he is a legitimate child or grandchild of such person.

As to the special provisions relating to trial of European British subjects, see the new Chapters XXXIII and XLIVA and Ss. 29A and 34A *infra*.

(j) "High Court" means, in reference to proceedings against European British subjects or persons jointly charged with European British subjects, the High Courts of Judicature at Fort William, Madras, Bombay, Allahabad, Patna, Lahore and Rangoon and the Courts of the Judicial Commissioners of the Central Provinces, Oudh and Sind:

In other cases "High Court" means the highest court of criminal appeal or revision for any local area; or, where no such Court is established under any law, for the time being in force, such officer as the Governor-General in Council may appoint in this behalf.

HIGH COURT.—The definition in the first paragraph refers to "Special Proceedings" against European and Indian British subjects under Chapter XXXIII and does not refer to proceedings generally against Europeans including proceedings in which they waive their right under the Chapter. When in any particular case the special rules contained in Chapter XXXIII do not apply, the definition in the first paragraph has no application and the definition in the second paragraph prevails. See the decision 12 B. 561 where it was held that an appeal from a conviction, by an European British subject who had waived his right and was convicted by the City Magistrate of Karachi, lay to the Sind Sadar Court and not to the Bombay High Court. See the definition in S. 266 *infra*. The 'Judicial Commissioners' Courts of the Central Provinces, Oudh and Sind are High Courts for both the subjects. But when an European British subject waives his special privilege, the High Court competent to deal with him would be the one indicated for "other cases", namely, the highest Court of Criminal Appeal. It is only when an European British subject claims to be dealt with as such that the High Court for him will be the one indicated in the definition. The view taken in 12 B. 561 was followed in 43 M.L.J. 800—18 L.W. 895—(1924) M. W. N. 60—33 M.L.T. 195, and the contrary view of Walsb, J., in 21 Cr. L.J. 767 was not followed. The High Court when exercising Original Criminal Jurisdiction is not a Court of Session within the meaning of the Code, 51 G. 280.

IN OTHER CASES.—This includes the case of an European British subject who waives his rights to be dealt with under Chapter XXXIII. See 12 B. 561; 12 Cr.L.J. 436; 25 Cr. L. J. 231.

WHERE NO SUCH COURT IS ESTABLISHED.—The Governor-General in Council may appoint an officer to perform the functions of a High Court under this clause. For Upper Burma, the Judicial Commissioner is a High Court, *Reg. V of 1892, Sch. Art 1*. For Coorg, the Chief Commissioner is a High Court, *Reg. I of 1901, S. 26* for Baluchistan the Chief Commissioner and agent to the Governor-General is a High Court, *Reg. VIII of 1901 S. 6 (I) (a)*.

(k) "inquiry" includes every inquiry other than a trial conducted under this Code by a Magistrate or Court:

"Inquiry."

INQUIRY.—The term includes not only inquiries into offences but also extends to inquiries into matters which are not offences, such as proceedings under S. 145 *infra*, 37 C. 812 ; 22 C. 398 ; 28 C. 709. So also proceedings under Ss. 99, 117 and 133 *infra*. The definition is not exhaustive so as to include an inquiry under the Workmen's Breach of Contract Act, 45 A. 700. The term inquiry in Ss. 436 and 437 refers to proceedings *up to charge* and the word trial refers to proceedings *after charge*, 15 C 808 (F.B.) ; 9 A. 52. The distinction between an inquiry and a trial becomes very important as the benefit of S. 403 *infra* is available only in case the proceedings have terminated after a *trial* and not after an *inquiry*. The object of the inquiry is to take evidence in the case and to determine *prima facie* the truth or falsity of certain facts in order to take further action thereon. For example a Magistrate holds an inquiry as to possession under Chapter XII of the Code for passing a final order as to possession upon the result of this inquiry ; an inquiry under Chapter XVIII of the Code is held by a Magistrate for passing a final order of Committal under S. 213 *infra* or for cancelling the charge if no *prima facie* case is made out. 5 Pat. L. J. 47 at 53.

OTHER THAN A TRIAL.—There is no definition of the word ' *Trial*' in the Code, 27 M. 510. See the observations of *Maclean, C. J.*, in 28 C, 863 at 865. " Now what is a trial. To my mind it means the proceedings which commence when the case is called on with the Magistrate on the Bench, the accused in the dock and the representatives of the prosecution, and for the defence if the accused be defended, are present in Court for the hearing of the case. That is I consider the proceeding which is intended by the term ' trial '," See also the observations of *Subramania Iyer, Offg. C.J.*, in 27 M. 510 at 514, as to the meaning of trial. See also 38 M.L.J. 370 (F.B.)=11 L.W. 435. Trial includes security proceedings under S.107 *infra*, 27 M. 510 but in 50 C. 955 it was held that proceedings under Chapter VIII of the Code do not constitute a trial nor is the person proceeded against an accused person who has committed any offence. As to when a trial begins, See 32 M. 220 at 234 (F.B.)

(l) " investigation " includes all the proceedings under this Code for the collection of evidence conducted by a police-officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf :

The definition herein given is not exhaustive. It would be placing an undue limitation on the simple meaning of the words to hold that a police-officer who obtains a warrant of arrest under the Gaming Act and arrested and seized their account books has not taken part in the investigation, 25 B. 333. Investigation and inquiry are two different things under the Code. The object of the investigation is confined to the collection of evidence. This is evident from the definition herein given. A local investigation is merely collection of evidence on the spot. 5. Pat L.J. 47 at 82-83

(m) " judicial proceeding " includes any proceeding in the course of which evidence is or may be legally taken on oath :

SCOPE OF THE DEFINITION.—We have added the words "on oath" in this definition because the power to take evidence on oath (*oath* under S. 3 (36) of the General Clauses Act includes affirmation and declaration)—is the characteristic test of judicial proceedings. We have omitted the new words " and it also includes every other proceeding consequential thereon", providing for consequent proceedings which the Bill as introduced proposed to add to the definition as they appear too wide. On the otherhand we have altered the word ' *means* ' at the commencement of the definition into ' *includes* ' and have thus given to the Courts a certain latitude of construction.—*Report of the Select Committee.*

JUDICIAL PROCEEDING.—See 12 B. 36 for the distinction between judicial and administrative proceeding. The definition herein given is clearly not exhaustive, 37 C. 842

(F.B.). See in this connection Explanation II to S. 193, I.P.C. The following have been held to be judicial proceedings:—(1) proceedings before a Magistrate to whom a complaint was referred for inquiry and report under S. 903 *infra*, 38 C. 72 and 2 Cr. L.J., 118; (2) inquiry held by a Magistrate before issuing an order under S. 144 *infra*, 19 M. 18; (3) a preliminary inquiry under S. 476 *infra* with a view to take action under that section, 37 C. 82; (4) inquiry conducted by a Magistrate into the truth of an allegation against a subordinate official in a petition presented to a Deputy Commissioner, 23 A. 89; (5) execution proceedings subsequent to the determination of the civil suit, 37 C. 642 (F.B.); 19 Cr. L.J., 183; (6) proceedings under the Reformatory Schools Act, S. 8, 13 B. 381; (7) proceedings under Ch. XIV of the Code, 29 M. 89; 16 M. 421. But the following are *not* judicial proceedings:—(1) preliminary inquiry held by a Subordinate Magistrate at the direction of the District Magistrate in regard to a complaint against the police with a view to ascertain whether the District Magistrate should grant sanction under S. 197 *infra* or not, 23 M. 223; (2) proceedings of a Magistrate purporting to act under S. 86 *infra* taking bonds from an appellant in an appeal to appear (a) before the Sub-Magistrate who was directed to take further evidence by the appellate Court; (b) before the appellate Magistrate to give evidence in connection with a departmental inquiry as to the charge of corruption against a Sub-Magistrate, 29 M. 100; (3) proceedings before a District Magistrate under S. 125 *infra* with a view to have a bond under S. 107 *infra* cancelled, 37 C. 72; (4) an order of a District Magistrate directing the prosecution of a *Mukhtar* on a perusal of the records submitted to him by a Sub-Divisional Officer relating to the conduct of the *Mukhtar* in a case tried before that officer, 15 C.W.N., 269; (5) proceedings with regard to a complaint to District Magistrate as head of the District Police to prevent police-officers acting high-handedly, 35 A. 102; (6) calling for records under S. 435 of the Code, 15 M.L.J. 489; (7) inquiries by District Magistrate secretly on information that a grave crime was being or about to be committed, 4 C.L.J. 181.

(n) "non-cognizable offence" means an offence for, and "non-cognizable case" means a case in, which a police-officer, within or without a presidency-town, may not arrest without warrant:

The expression police-officer is not defined in the Code or in the General Clauses Act, but only an officer in charge of a police station is defined in cl. (p) *infra*. See Sch. II, Col. 3 as to the offences under the I.P.C., which a police-officer could arrest without warrant and the last portion of Sub. II as to his powers of arrest under other laws. A police-officer cannot arrest a person for an offence under S. 9 of the Opium Act I of 1878 as the offence is a non-cognizable one, 24 C. 691. See Ss. 155 and 155 as to his powers to investigate and search in non-cognizable cases.

(o) "offence" means any act or omission made punishable by any law for the time being in force;

it also includes any act in respect of which a complaint may be made under section 20 of the Cattle-Trespass Act, 1871:

See the definition in S. 3 (37), General Clauses Act X. of 1897 and S. 40, I.P.C. See also S. 4, I.P.C. explanation which says 'offence' includes every act committed outside British India which if committed in British India, would be punishable under this Code.

The last portion of this clause supersedes the rulings in 9 M. 102 and 373.

(p) "Officer in charge of a police-station" includes, when the officer in charge of a police-station is absent from the station-house or unable from illness or other cause to perform his duties, the police-officer present at the

"Officer in charge of a police-station."

station-house who is next in rank to such officer and is above the rank of constable or, when the Local Government so directs, any other police-officer so present :

See 42 M. 446 and (1911) 1 M.W.N. 231-9 M.L.T. 414-12 Cr. L.J. 190-10 Ind. Cas. 867, as to the meaning of the term. The aim of S. 4 (p) is to bring in more men, so that the duties of the officer may be performed without delay and not to include persons who are either permanent incumbents or who have been appointed to act for permanent incumbents. As to the powers of an officer in charge of a police-station, see Ss. 55, 56, 92, 94, 127, 128, 153, 154, 156, 157, 169, 173 to 175 *infra*. As to his duties see Ss. 55, 62, 154, 169, 173, 174 and 175 *infra*. This clause is not applicable to the police in Calcutta and Bombay.

See S. 551 *infra*, which empowers superior police-officers to exercise all the powers of a station-house officer.

"Place." (q) "place" includes also a house, building, tent and vessel :

See the explanation to S. 133 *infra* as to the meaning of 'public place.' See 17 A. 166 as to what is a 'public place.'

"Pleader." (r) "pleader" used with reference to any proceeding in any Court, means a pleader or a *mukhtar* authorized under any law, for the time being in force, to practise in such Court, and includes (1) an advocate, a *vakil* and an attorney of a High Court so authorized, and (2) any other person appointed with the permission of the Court to act in such proceeding :

UNDER ANY LAW.—See the Legal Practitioners Act XVII of 1879 as amended by Act IX of 1884, VI of 1900, I of 1908, XXIII of 1923 and XXXV of 1923.

PRACTICE.—A mere petition-writer cannot be said to practise, 18 W.R. (Cr.) 27 ; only those who are entitled to appear, plead or act in Court can be said to practise, 14 C. 556 at 568. The term "practitioner" in S. 32 of the Legal Practitioners Act does not connote the doing of acts habitually or often but signifies the performance of an act by a person as a professional man which could not be done by a private individual, 26 A. 380. It is the duty of a pleader accepting an engagement in a Court where he is not authorised to practise to inform the client that his appearance will be contingent on the Magistrate's permission to appear in the case and the better course is not to accept fee or engagement until the Magistrate's permission is obtained, 15 Cr. L.J. 388-23 Ind. Cas. 780. See also 9 Ind. Cas. 717 ; 38 Ind. Cas. 729.

MUKHTAR.—This class of legal practitioners is recognized by the Legal Practitioners Act XVII of 1879 and S. 9 of the Act specially reserved the provisions of this Code in respect of *mukhtars*. They are licensed under the Act, 25 C. 733. By the new amendment (Act XXXV of 1923) they are entitled to practise in criminal Courts without special permission in each case. See 30 A. 86 and 38 C. 433 as to their rights and *status*. In Madras, the position of private *vakils* is recognized in 7 M.H.C.R. Appx. 37 and 6 M. 100 but in each case the Magistrate is to exercise a discretion before giving audience to the *vakil* and in deciding whether permission is to be granted or not. The Magistrate is to consider the private character of the *vakil*. A general circular prohibiting a private *vakil* from appearing in all cases was declared illegal in 4 M.L.T. 91. See also the Full Bench ruling in 12 M.L.J. 385, which refers to the previous circulars of the Madras High Court and recognized the right of private *vakils* to appear. Form No. 1 of Sch. V also contemplates an accused person appearing not necessarily in person but by a pleader, 50 B. 250.

OTHER PERSONS APPOINTED.—Parties to criminal proceedings are to have the fullest opportunity to employ whomsoever they please without reference to the mode or circumstance by which they may be influenced to do so, 1 B.H.C.R. (Cr. Ca.) 16. It is open to an accused person to appoint his own estate manager to appear in his stead and plead for him and it is equally open to the Court to permit him to appear but in such a case the record must clearly show the person who represents the accused has been duly appointed and the Court gave its permission for the same, 30 B. 280. See S. 340 *infra* which recognizes the right of every accused person to be defended by a pleader as defined herein. See also S. 255 *infra* which gives a Magistrate discretion whenever he issues a summons to dispense with the personal attendance of the accused and permit him to appear by his pleader. A Magistrate has no power to appoint a *Mukhtar* to represent an accused when he was absent and did not ask for such permission, (1923) Pat. 239.

WITH THE PERMISSION OF THE COURT.—The permission required is not a general one but a permission in each particular case. A private *vakil* would require such permission in each particular case and such permission should not be refused in an arbitrary manner, 7 C.W.N. 524; 28 C. 483; 30 A 66; 4 M.L.T. 91.

(s) "police-station" means any post or place declared, generally or specially, by the Local Government to be a police station, and includes any local area specified by the Local Government in this behalf:

"Police-station."

(t) "Public Prosecutor" means any person appointed under section 492, and includes any person acting under the directions of a Public Prosecutor and any person conducting a prosecution on behalf of Her Majesty in any High Court in the exercise of its original criminal jurisdiction.

"Public Prosecutor."

PUBLIC PROSECUTOR.—See Ss. 492, 495 and 270 *infra* as to the appointment, duties and powers of a Public Prosecutor. See also 32 C. 422. A private complainant may retain a pleader and the Public Prosecutor may avail himself of his services, but in doing so the Public Prosecutor does not deprive himself of the management of the case, 11 B.H.C.R. 102.

"Sub-division."

(u) "sub-division" means a sub-division of a district;

See section 8 *infra* as to the power to divide district, outside Presidency Towns into sub-divisions.

"Summons case."

(v) "summons-case" means a case relating to an offence, and not being a warrant-case; and

"Warrant case."

(w) "warrant-case" means a case relating to an offence punishable with death, transportation or imprisonment for a term exceeding six months.

Words referring to acts.

(2) Words which refer to acts done, extend also to illegal omissions; and.

all words and expressions used herein and defined in the Indian Penal Code, and not hereinbefore defined, shall be deemed to have the meanings respectively attributed to them by that Code.

Words to have same meaning as in Indian Penal Code.

In 20 M. 470 (F.B.) it was held that the word 'adultery' occurring in S. 488 *infra* should not be construed with regard to the definition in the Penal Code which may not justify a conviction under S. 497 but may be sufficient for the purpose of S. 488 *infra*. The concluding words of the section enact that any word used but not defined in that Code shall be deemed to have the meaning attributed to it in the I.P.C., but the provision is subject to the opening words of the section which say 'unless a different intention appears from the subject or context.' This limitation seems to have been overlooked by the learned Judges in 17 M. 260—*per* Benson, J. in 20 M. 470 at 475.

5. (1) All offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained.

Trial of offence under Penal Code.

(2) All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

Trial of offences against other laws.

SCOPE OF THE SECTION.—Sub-Sec. (1) provides for the trial under the Code of offences under the Penal Code, and sub-sec. (2) goes on to say that all offences under any other law, *i.e.*, any law other than the Penal Code, shall be investigated, and inquired into according to the same provisions, that is, the provisions of the Criminal Procedure Code. That states the general principle that the appropriate procedure for the trial of offences is to be found in the Criminal Procedure Code and a saving clause however follows to the effect that it must be subject to any enactment for the time being in force, regulating the manner or place of investigation, inquiry or trial of such offences. Then follows the next section which recognizes other Courts having jurisdiction to try criminal offences besides the High Court and the five classes of criminal Courts mentioned therein. If any rule framed under any enactment is covered by the saving clause in sub-S. (2), then there is no inconsistency between that rule and the Code, but the rule will not be an "enactment" within the meaning of sub-S. (2), 48 C. 955. Under various English Statutes like 12 and 13 Vict. C. 96, S. 1, 23 and 24 Vict. C. 98, S. 1, 33 Vict. C. 27, S. 3, the Merchant Shipping Act of 1883, S. 6 and Act X of 1889, S. 55, a Magistrate in India is empowered to try an accused for an offence committed on board a British ship on the high seas. The trial shall be conducted according to the provisions of this Code and the offence charged should be one under the Indian Penal Code and conviction and the punishment should be under the Penal Code, 25 B. 636. See also notes to S. 1 *supra*, but a conviction both under the Penal Code and under a special law in respect of the same offence is illegal, 5 N.W.P.H.C.R. 49; 6 M. 249. See S. 26 of the General Clauses Act X of 1897.

ALL OFFENCES UNDER THE INDIAN PENAL CODE.—A contempt of the High Court by a libel published out of Court when the Court is not sitting is not included in these words, although the contempt may include defamation. Such an offence is something more than mere defamation and is of different character. It is an offence which by the Common Law of England is punishable by the High Court in a summary manner by fine or

imprisonment or both. That part of the Common Law of England was introduced into the Presidency Towns when the late Supreme Courts were established by the Charters of Justice and the offences of contempt of the powers of the High Court for punishing it are the same as in this country, not by virtue of the Penal Code and the Criminal Procedure Code in British India but by virtue of the Common Law of England, 10 C. 109 (P.C.) at 131; 21 M.L.J. 832 at 838. The High Court has similarly Common Law jurisdiction to deal with contempts committed before an inferior Court but not under the Charter Act.

SUB-SECTION (2).—This sub-section controls Chap. XIV of the Code. The police are not entitled to file a charge sheet for an offence under S. 55 of the Madras Abkari Act and on such a charge sheet a Magistrate cannot take cognizance of the case and proceed with it as by the filing of the charge sheet no valid proceedings are instituted before the Magistrate, 43 M.L.J. 231—17 L.W. 308—24 Cr. L.J. 335. The summary process for contempt is not under any special or local law within the meaning of this section nor is it under any enactment regulating the manner or place of investigating inquiring into or trying such offence. The Code is therefore applicable to this offence not being excluded by its own provisions, 10 C. 109 (P.C.) at 127.

ALL OFFENCES UNDER ANY OTHER LAW ;—These words cannot be intended to include a contempt of Court by libel published out of Court for which no provision is made by the Code and it is therefore unnecessary to consider what is the true construction of the words any special jurisdiction or power conferred by any other law now in force in S. 1 *supra*, 10 C. 109 (P.C.) at 132.

SUBJECT TO ANY ENACTMENT.—The Criminal Procedure Code cannot be invoked to justify any departure where a special procedure is prescribed for in a Special Act like the Bombay Gambling Act IV of 1987, S. 6. Where the Special Act is silent, the provisions of the Code would be applicable. 31 B. 438. Where a violation of a Special law is not an offence the rule in S. 5 (2) will not apply, 37 C. 287. An Ordinance is law and any infringement of its provisions is an offence. In the absence of special rules made under the powers conferred by the Ordinance, an inquiry into such an offence should be conducted in accordance with the provisions of the Code, 17 Cr. L.J. 228.

SHALL BE OTHERWISE DEALT WITH.—See S. 549 *infra* as to trial of military offences by a Court martial; sub-S. (2) controls Chap. XIV of the Code, 43 M.L.J. 231—17 L.W. 308—24 Cr. L.J. 335.

PART II.

CONSTITUTION AND POWERS OF CRIMINAL COURTS AND OFFICERS.

CHAPTER II.

OF THE CONSTITUTION OF CRIMINAL COURTS AND OFFICERS.

A.—Classes of Criminal Courts.

6. Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force,

Classes of Criminal Courts,

there shall be five classes of Criminal Courts in British India, namely :—

- I. Courts of Session :
- II. Presidency Magistrates :
- III. Magistrates of the first class :
- IV. Magistrates of the second class :
- V. Magistrates of the third class.

The classes of Courts here given refer to col. 8 of Sch. II and the Code does not recognize any Courts other than the classes of Courts provided by this section. Thus District Magistrate's Court will, for purpose of an ordinary criminal trial, be a Court of the Magistrate of the first class. The titles 'Deputy Magistrate' and 'General Deputy Magistrates' are titles unknown to the Code, 23 M.L.J. 670 at 675—13 Cr. L.J. 880—17 Ind. Cas. 786.

HIGH COURT.—See S. 4 (j) *supra* and notes thereunder.

COURTS OF SESSION.—This expression includes the Court of an Additional Sessions Judge and an Assistant Sessions Judge. See S. 9 (3) *infra*; under this section Courts of Session belong to a different class of Courts from the High Court. The High Court when exercising original criminal jurisdiction is not a Court of Session within the meaning of the Code. The original criminal jurisdiction of the High Court is regulated by the Letters Patent and a distinction is maintained throughout the Code between the High Court and Court of Session 51 C. 980.

MAGISTRATE.—There is no definition of the term Magistrate given in the Code. The terms 'Magistrate' and 'Court' are generally, if not always, convertible, 39 C. 953 (P.C.) at 965; S. 3 (31) of Act X of 1897 (General Clauses) defines a Magistrate 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. See S. 10 *infra* for the definition of 'District Magistrate.' The Code does not recognize any particular Court as being the Court of a District Magistrate. This section and S. 32 *infra* show that the Magistrate's Court other than those in the Presidency Towns consist (1) Courts of Magistrate of the first class; (2) Courts of Magistrate of the second class; (3) Courts of Magistrate of the third class, 3 A.L.J. 826 at 827. A Sub-Divisional Magistrate is not mentioned as one of the Courts. He may either be a second or first class Magistrate S. 13 *infra*. See 32 A 649 at 654. There is no definition of a first class Magistrate but it is used to mean a Magistrate exercising within a particular jurisdiction the highest Magisterial powers conferred ordinarily on Magistrates, 31 B. 611.

PRESIDENCY MAGISTRATE.—This section differentiates Presidency Magistrates from Magistrates of the first class, 24 C. 551 and Ss. 10 and 12 show that District Magistrates and Magistrates of the first class are appointed only in districts outside the presidency towns, 32 M. 303. A Presidency Magistrate belongs to what is generally speaking the highest class of Magistrates, 31 B. 611 at 623. See also 32 B. 10.

COURTS CONSTITUTED UNDER ANY LAW OTHER THAN THIS CODE.—For example, Forest Courts under S. 71 of Act VII of 1878, Indian Marine Courts under Act XIV of 1887, Court Martial under Act V of 1869 as amended by Act XII of 1894, Courts of Cantonment Magistrates under S. 7 of Act XIII of 1889, Courts of heads of villages in Madras under Reg. XI of 1816 and IV of 1821. This section appears to recognise, that besides the High Court and the five classes of Criminal Courts constituted by the Code there may be other Courts constituted under other laws meaning presumably other Courts having jurisdiction to try criminal offences. 48 C. 955. A Municipal Magistrate appointed to deal with offences against Municipal Act is a Court constituted under a law other than the Code for the time being in force and comes within this section and consequently the provisions of Ss. 435 and 439 *infra* apply to those proceedings, 52 C. 962 at 968.

B.—Territorial Divisions.

7. (1) Every province (excluding the presidency-towns) 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.

Sessions divisions and districts.

Power to alter divisions and districts.

(2) The Local Governments may alter the limits or the number of such divisions and districts.

(3) The sessions divisions and districts existing when this Code comes into force shall be sessions divisions and districts respectively, unless and until they are so altered.

Existing divisions and districts maintained till altered.

Presidency-towns to be deemed districts.

(4) Every presidency-town shall, for the purposes of this Code, be deemed to be a district.

PROVINCE.—S. 3 (43) of the General Clauses Act defines a Province as meaning the territories for the time being administered by any Local Government.

LOCAL GOVERNMENT.—S. 3 (39) of the General Clauses Act defines the term as meaning the person authorized by law to administer Executive Government in the part of British India in which the Act or Regulation containing the expression operates and shall include a Chief Commissioner.

PRESIDENCY-TOWN.—S. 3 (41) of the General Clauses Act defines the term as meaning the local limits for the time being of the ordinary original jurisdiction of the High Court of Judicature at Fort William, Madras or Bombay, as the case may be. The Presidency-Town of Madras is divided into two divisions and a Presidency Magistrate's Court established for each division. Fort. St. George Gazette Pt. I, p. 2877, dated 1-5-1877.

LOCAL GOVERNMENT MAY ALTER THE LIMITS OR NUMBER OF SUCH DIVISIONS.—Section 7 of the Code assumes the existence of a sessions division in every part of British India where the Code is in force outside the presidency-towns. It does not contemplate the constitution of sessions divisions by the Local Governments which can alter the limits of divisions or the number of divisions. Every Province is, by operation of law, a sessions division or consists of sessions divisions. There is no place, therefore, which escapes the pervading force of the section, 10 B. 274 at 282-83.

SUB-SECTION (2).—Under this section as amended by the Devolution of Powers Act, 1920, the Local Government with effect from and *after* 16th October 1923 has notified that the Agency Sessions division be abolished and in lieu thereof the old Agency Sessions division of Ganjam, Vizagapatam and Godavery be re-established. The Local Government has further notified establishing from the same date a Court of Session for each of the sessions divisions and direct that the said Courts do hold their sitting in the Towns of Chatrapur, Waltair and Oconada or in any such place within the respective Sessions Divisions and further that the Agents to the Governor in Ganjam and Vizagapatam and Government Agent Godavery are appointed Sessions Judges of the respective Courts of Sessions.

DISTRICTS EXISTING WHEN THIS CODE COMES INTO FORCE.—"The existence of two Sessions Divisions in the same District cannot be treated as unwarranted, for the same was the case when the Code of Criminal Procedure was passed and paragraph 3 of S. 7 recognizes the legality of the existing Sessions Divisions and Districts, unless and until altered", 30 M. 135 at 137, See 23 M.L.J. 870 where it was held that the Sessions Court of Ganjam Division was not competent to hear an appeal from a Magistrate who had jurisdiction over the Agency and non-Agency tracts when the case arose in the Agency tracts but the appeal lay to the Agency Sessions Division, *i.e.*, the District Magistrate of Ganjam.

8. (1) The Local Government may divide any district outside the presidency-towns into sub-divisions, or make any portion of any such district a sub-division and may alter the limits of any sub-division.

Power to divide districts into sub-divisions.

(2) All existing sub-divisions which are now usually put under the charge of a Magistrate shall be deemed to have been made under this Code.

Existing sub-divisions maintained. A Cantonment Magistrate under S. 7 of Act XIII of 1889 is to be deemed a Magistrate in charge of a division of a District, i.e., a Sub-division when appointed under S. 12 *infra*. Cantonment Magistrate shall be subordinate to the District Magistrate.

C.—Courts and Offices outside the Presidency-towns.

9. (1) The Local Government shall establish a Court of Session for every sessions division, and appoint a Judge of such Court.

(2) The Local Government may, by general or special order in the official Gazette, direct at what place or places the Court of Session shall hold its sitting; but, until such order is made, the Courts of Session shall hold their sittings as heretofore.

(3) The Local Government may also appoint Additional Sessions Judges, and Assistant Sessions Judges to exercise jurisdiction in one or more such Courts.

(4) A Sessions Judge of one sessions division may be appointed by the Local Government 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 Local Government may direct.

(5) All Courts of Session existing when this Code comes into force shall be deemed to have been established under this Act.

SESSIONS JUDGE.—Jurisdiction is restricted to his Sessions division, 23 M. 137, but he may be appointed by the Local Government to be an Additional Sessions Judge of another division. He may pass any sentence authorized by law S. 31 (2), but any sentence of death shall be subject to the confirmation of the High Court.

ADDITIONAL SESSIONS JUDGE.—The appointment of an Additional Sessions Judge does not thereby constitute an Additional Sessions Court, 1 M.L.J. 397 at 400. An Additional Sessions Judge exercises powers co-ordinate with those of a Sessions Judge, but he can exercise the powers of a Sessions Judge as a Court of revision under Ch. XXXII only in cases which may be transferred to him, S. 433 (2). A Sessions Judge under S. 17 (4) may delegate his powers to an Additional Sessions Judge. When a Sessions Judge had made over a particular appeal to be heard by an Additional Sessions Judge, but before it was dealt with by him the Sessions Judge called up the appeal to his own file and disposed of it himself, it was held that the Sessions Judge acted within his jurisdiction, 41 A. 137. He may pass any sentence authorized by law but a sentence of death is subject to the confirmation of the High Court. As to his powers to try original cases see S. 193 (2), and as to appeals to him and from his conviction, See Ss. 409 and 410 *infra*.

ASSISTANT SESSIONS JUDGE.—All Assistant Sessions Judges are subordinate to the Sessions Judges in whose Court they exercise jurisdiction, and the Sessions Judge may make rules as to distribution of business among Assistant Sessions Judges, S. 17 (3). The Sessions

Judge under cl. (4) of S. 17 may delegate his powers when he is unavoidably absent to an Assistant Sessions Judge. S. 31 (3) *infra* speaks of the sentence which may be passed by an Assistant Sessions Judge and S. 199 (2) speaks of his powers to try original cases. Appeals from the conviction of an Assistant Sessions Judge ordinarily lie to the Sessions Court, but when he is specially empowered under S. 30 and passes a sentence exceeding four years an appeal lies to the High Court. When an Assistant Sessions Judge sentences one of several accused to more than four years, and the others to lesser terms the appeal of all lie to the High Court even though the accused who had been sentenced to more than four years does not appeal, 37 A. 371. See S. 415A, *infra*. See S. 528 (1) which empowers a Sessions Judge to withdraw cases which he had made over to an Assistant Sessions Judge.

10. (1) In every district outside the presidency-towns the Local Government shall appoint a Magistrate of the first class, who shall be called the District Magistrate.

(2) The Local Government may appoint any Magistrate of the first class 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 Local Government may direct.

(3) For the purposes of sections 192, sub-section (1), 407, sub-section (2), and 528, sub-sections (2) and (3), such Additional District Magistrate shall be deemed to be subordinate to the District Magistrate.

AMENDMENT.—In Sub-Section (3) "for a period not exceeding six months" is omitted and the words "under any other law for the time being in force" are added. "At present an Additional District Magistrate can only be appointed for a period not exceeding six months and it is doubtful whether such a Magistrate can exercise the powers of a District Magistrate under any law except the Code. Experience has shown that the assistance of an Additional District Magistrate is not infrequently required for a longer time and the limit of six months is therefore removed."—*Statement of Objects and Reasons*. Sub-section (3) is new and renders obsolete, 34 C. 918, where it was held that a District Magistrate has no power to transfer a case under S. 528 *infra* from the file of the Additional District Magistrate to any other Magistrate. "The powers of such an officer are extended and his position vis a vis of the District Magistrate in respect of Se. 192, 407 and 528 of the Code is defined".—*Statement of Objects and Reasons*.

EVERY DISTRICT OUTSIDE THE PRESIDENCY-TOWNS.—S. 7 (4) *supra* says that every Presidency town shall be deemed to be a district but this section applies only to districts outside the Presidency town. So a Presidency Magistrate can never be a District Magistrate as was contended for in 24 C. 551 at 553.

DISTRICT MAGISTRATE.—The ordinary powers of a District Magistrate are enumerated in Sch. III and he is empowered to invest Magistrates subordinate to him with certain powers specified in Sch. IV. A District Magistrate may also make rules or give special orders consistent with this Code as to distribution of business among Magistrates and Benches in his district. S. 17 (1) *infra*. An Additional District Magistrate though he may have all the powers of a District Magistrate is a Magistrate other than the District Magistrate within S. 406 *infra*, 48 C. 874. The powers of a District Magistrate in respect of sentences are the ordinary powers of a District Magistrate. S. 32 *infra*, but he may be invested with special powers under S. 30 *infra*, by which he may pass any sentence authorized by law except a

sentences of death or transportation for a term exceeding seven years or imprisonment for a term exceeding seven years, S. 30 *infra*. Ordinarily the terms "District Magistrate" or "First class Magistrate" would not include a Presidency Magistrate, 22 M. 303; 24 C. 531. For purposes of S. 476 *infra* a Presidency Magistrate is deemed to be a first class Magistrate. See Act II of 1926, S. 6 (b) which omits the word 'Chief'.

SUB SECTION (2):—The scope of the powers conferred under this sub-section is not limited to the ordinary powers of a District Magistrate set out in Sch. III (v) but extends to all the powers which the District Magistrate is empowered to exercise at the date of a particular notification appointing an Additional District Magistrate and conferring on him all the powers of a District Magistrate, e.g., power to grant sanction under S. 197 *infra*, 17 L.W. 226—24 Cr. L.J. 116—71 Ind. Cas. 244.

SUB-SECTION (3):—All Magistrates of whatever class within the District are subordinate to the District Magistrate, 9 B. 100; 12 C. 473 (F.B.) and the ruling in 34 C. 318 is no longer law. It is now made clear that an Additional District Magistrate is subordinate to the District Magistrate for the purposes of Ss. 192 (1), 407 (2) and 528 (2) and (3), *infra*.

11. Whenever, in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the chief executive administration of the district, such officer shall, pending the orders of the Local Government, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate.

Officers temporarily succeeding to vacancies in office of District Magistrate.

A Magistrate of the first class while officiating for the District Magistrate commenced to try a case and continued the trial after he reverted as joint Magistrate in the same District, it was held that he had jurisdiction to do so and the trial was good, 3 A.L.J. 826—4 Cr. L.J. 140. See also 10 C.W.N. 1095.

12. (1) The Local Government may appoint as many persons as it thinks fit, besides the District Magistrate, to be Magistrates of the first, second or third class in any district outside the presidency-towns; and the Local Government or the District Magistrate, subject to the control of the Local Government, may, from time to time, define local areas within which such persons may exercise all or any of the powers with which they may respectively be invested under this Code.

Subordinate Magistrates.

Local limits of their jurisdiction.

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

LOCAL AREAS.—The expression "Local area" includes sessions division, district or sub-division and cannot be restricted to mean the scene of an alleged occurrence only, 25 C. 358. "It is sufficiently clear from the language of the section that in the absence of any express enactment to the contrary the Code does not contemplate an exercise of jurisdiction outside the limits of the area called a district," 9 B. 40.

SUB-SECTION (2).—This sub-section declares that except as otherwise provided by such definition, that is, without an order restricting the power of any Magistrate appointed by the Local Government, the jurisdiction and powers of such persons shall extend throughout such

district. Consequently unless the powers of the Magistrate had been restricted to a certain local area he had jurisdiction over the entire district, 29 C. 389; 10 C.W.N. 1098. A sub-divisional Magistrate whose jurisdiction is defined by order of the District Magistrate under this section cannot take cognizance of matter outside such local area, 19 A.L.J. 77—22 Cr.L.J. 122—59 Ind. Cas. 554, but if the jurisdiction is not so defined under the section his jurisdiction and power would extend under sub-section (2) of this section throughout the district, 68 Ind. Cas. 873. Where a sub-divisional Magistrate in a district initiated security proceedings under S. 107 *infra* against one in his division, the District Magistrate transferred the case to a Deputy Magistrate of the first class at the headquarters, that Deputy Magistrate had jurisdiction to try the case or institute fresh proceedings, 29 C. 389. See also 10 C.W.N. 1098; Ratanlal 838. Where a Subordinate Magistrate tried an offence committed beyond the local limits of what was regarded as his jurisdiction, it was held that as a Magistrate in the division in which the offence occurred and as a Magistrate whose powers had not been formally limited to any particular portion of the division he had jurisdiction to try the case, Weir II, 13. A Magistrate of the first class while acting as District Magistrate commenced a trial and during the pendency of the trial, he reverted as Joint Magistrate but continued the trial without any objection and concluded the case, *held* that he had jurisdiction to conclude the trial and his decision is valid, 3 A.L.J. 828—4 Cr. L. J. 140; 22 M. 47; 10 C.W.N. 1098; 21 Cr.L.J. 321. Cases on the file of one Magistrate do not pass automatically to his successor in the local area merely because the former has been transferred to another local area in the same district; there is nothing in this section which supports such a procedure, 9 A.L.J. 448—13 Cr. L.J. 203—14 Ind. Cas. 203. A Magistrate has no jurisdiction to try a case after having made over charge of his duties to his successor, 14 Cr. L.J. 239; 19 A. 114; 3 A. 588 (F.B.); 80 C. 864. A Magistrate appointed for a whole district but put in charge of particular *Taluk* only, is not without jurisdiction if he inquires into and tries a case in another *Taluk* of the same district, Ratanlal 177; 21 Cr.L.J. 321—56 Ind. Cas. 593. See also Weir II, 13. The transfer of a Magistrate to another station in the same district does not take away his jurisdiction, 22 M. 47.

13. (1) The Local Government may place any Magistrate of the first or second class in charge of a sub-division, and relieve him of the charge as occasion requires.

Power to put Magistrate in charge of sub-division.

(2) Such Magistrates shall be called Sub-divisional Magistrates.

Delegation of powers to District Magistrate.

(3) The Local Government may delegate its powers under this section to the District Magistrate.

SUB-DIVISION.—See the definition in S. 4 (1) (u), *supra*.

SUB-DIVISIONAL MAGISTRATE.—For ordinary power see Sch. III iv and for additional powers see S. 87, *infra*.

THE LOCAL GOVERNMENT MAY DELEGATE ITS POWERS.—In Bengal, Madras, Bombay and the Punjab, the Local Government has delegated its powers. See *Cal. Gas.*, 1873, Pt. I, p. 236; *Et. St. George Gas.*, 1873, p. 717; *Punjab G.O.* 907, dated 8-6-1874 *Bom. Gas.*, 1873, p. 473.

14. (1) The Local Government may confer upon any person all or any of the powers conferred or conferrable by or under this Code on a Magistrate of the first, second or third class in respect to particular cases or to a particular

Special Magistrates,

class or particular classes of cases, or in regard to cases generally in any local area outside the presidency-towns.

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

(3) The Local Government may delegate, with such limitations as it thinks fit, to any officer under its control the powers conferred by subsection (1).

(4) No powers shall be conferred under this section on any police-officer below the grade of Assistant District Superintendent, and no powers shall be conferred on a police-officer except so far as may be necessary for preserving the peace, preventing crime and detecting, apprehending and detaining offenders in order to their being brought before a Magistrate, and for the performance by the officer of any other duties imposed upon him by any law for the time being in force.

LOCAL AREA.—The term "local area" is intended to include a sessions division, district or sub-division, 23 C. 858 at 862; see S. 531, *infra*. The term is not restricted to a local area within a specified district or sessions division but extends even to a whole Province, 19 Cr. L.J. 310—44 Ind. Cas. 326.

SUB SECTION (2).—This sub-section enables special Magistrates to be appointed for a only. The appointment may be on probation and may be for meeting temporary emergencies.

POWERS TO BE CONFERRED ON POLICE OFFICERS.—(1) The Inspector-General of Police in Madras has been empowered under S. 7 of Act XXIV of 1859 (Madras Police) with full powers of a Magistrate throughout the Madras Presidency except the Scheduled Districts, but exercises these powers subject to the orders of the Governor-in-Council; (2) under Bombay District Police Act, VII of 1867, every Commissioner is a Magistrate of the first class throughout the district under his control and exercises his powers subject to the limitations imposed by the Governor.

15. (1) The Local Government may direct any two or more Magistrates in any place outside the presidency-towns to sit together as a Bench, and may by order invest such Bench with any of the powers conferred or conferrable by or under this Code on a Magistrate of the first, second or third class, and direct it to exercise such powers in such cases, or such classes of cases only, and within such local limits, as the Local Government thinks fit.

Benches of Magis-
trates.

(2) Except as otherwise provided by any order under this section, every such Bench shall have the powers conferred by this Code on a Magistrate of the highest class to which any one of its members, who is present taking part in the proceedings as a member of the Bench, belongs,

Powers exercisable
by Bench in absence
of special direction.

and as far as practicable shall, for the purposes of this Code, be deemed to be a Magistrate of such class.

AS A BENCH, &c., as an aggregate body. A case triable by a Magistrate exercising the powers of the first class came before a Bench of Magistrates neither of whom individually exercised those powers but sitting together the Bench was so invested. At the adjourned trial only one of those Magistrates was present, *held* he alone was not competent to try the case and the orders passed by him were set aside as illegal, 2 O.L.R. 318; 29 C. 483. An Honorary Magistrate is not entitled to give judgment and pass sentence in a case unless he has been a member of the Bench during the whole hearing of the case, 20 C. 870; 18 M. 394.

SUCH CASES OR CLASSES OF CASES.—A complicated and somewhat difficult case is by no means one which it is desirable to place before a Bench of Magistrates, 2 C. 23 at 32. Having regard to cl. (2) of this section, Benches have power to deal with all matters. Under the Code of 1872 a Bench had no powers to deal with miscellaneous matters, other than trials, *e.g.*, proceedings under S. 145, *infra*. Unless its powers are specially restricted, power to deal with such matters exists under sub-S. (2).

See the decision in 33 M. 797 as to the legality of a conviction where all the members of a Bench which began a trial did not take part in the recording of evidence and pronouncing judgment. See also 21 M. 216; Weir II, 18; 15 A.L.J. 483; 16 A.L.J. 881—19 Cr. L.J. 1004—48 Ind. Cas. 443. But it has been held in 33 M. 301 that where an accused was convicted by a Bench of five Magistrates, one of whom had not heard all the evidence, the conviction was held bad and a retrial was ordered. This decision was followed in 10 L.W. 386; see also 23 Bom. L.R. 833. S. 350-A has been newly introduced to legalise conviction by Benches properly constituted.

RIGHT OF APPEAL.—This depends upon the class of powers vested in the Bench which tried and convicted the accused. It was held in 9 M. 35 that an appeal under S. 407, *infra* lay from a conviction by a Bench of Magistrates invested with second or third class powers, but no appeal lay from a summary conviction by a Bench of Magistrates. See S. 414, *infra*.

16. The Local Government may, or, subject to the control of the Local Government, the District Magistrate may, from time to time, make rules consistent with this Code for the guidance of Magistrates' Benches in any district respecting the following subjects:—

Power to frame rules for guidance of Benches.

- (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.

SCOPE OF THE SECTION:—This section authorises the Local Government and the District Magistrate with the former's control to make rules for the constitution of benches, to regulate time and place of sitting, but the constitution of the bench cannot be changed during the course of the trial except under the provisions of S. 350, *infra* and at least so many of the Magistrates forming a quorum who commenced the hearing must continue on the bench till the conclusion of trial and failure to have a quorum vitiates a trial, 25 Cr. L.J. 198—75 Ind. Cas. 586. Where the rules regulating a Bench of Magistrates provide a quorum of two

and two Magistrates were not present when evidence was recorded, the evidence so recorded is not recorded by a competent Court and merely reading over that evidence in a Court properly constituted would not render that evidence admissible so as to justify its being acted upon. 27 Cr. L. J. 532=28 Ind. Cas. 1038 (2).

THE LOCAL GOVERNMENT MAY MAKE RULES:—

For Madras, See G.O. dated 5-4-1899, 18-7-1899, 30-7-1890, and 27-8-1891.

For Bengal, See Cal. Gaz. 1889, Pt. I, p. 1071 & 1906; Pt. I, p. 980.

For Bombay, Govt. Notn. No 5848, Bom. Gaz. 1885, Pt. I, p. 1263.

MAGISTRATES' BENCHES:—When there is an irreconcilable difference of opinion between members of a Bench of two Honorary Magistrates, as to the guilt of the accused, they should follow the principle laid down by the Local Government for guidance of Benches though not formally issued by the Magistrate of the District under the section. A reference therefore by the Bench to the District Magistrate is not warranted by the provisions of the Code. The Code does not prescribe that any particular classes of cases alone should be tried by Benches of Magistrates. The fact that for administrative purposes the District Magistrate has allotted any particular area to a particular Bench of Magistrates does not render proceedings invalid if they try a case falling outside the area allotted to them. 25 Cr. L. J. 836=81 Ind. Cas. 44; 18 Cr. L. J. 113; 15 A. L. J. 287. In cases where the view of the Chairman of the Bench of Magistrates is opposed to that of the majority and he is not prepared to write a judgment for the majority one of the Magistrates ought to be asked to write the judgment, otherwise the chairman if he happens to differ from the majority would write only his view of the case whether it be for acquittal or conviction and the rest of the Magistrates would not be in a position to place on record the reasons for their opinion. In such cases the rule ought to be that one of the majority should be asked to write the judgment which should form part of the record to enable the High Court in revision to know the reasons for the opinion of the majority. 23 L. W. 837=27 Cr. L. J. 90=81 Ind. Cas. 393. Constitution of benches cannot be changed during trial except in cases falling under S. 350 *infra*, 23 Cr. L. J. 198.

A Bench may be empowered under S. 190, *infra* to take cognizance of offences, or it may try such cases only as may be made over to it under S. 192, *infra*, or under S. 17, *infra* the District Magistrate may make rules or give special orders consistent with this Code as to the distribution of business among Benches. In a case tried by two Bench Magistrates who are divided in opinion the benefit of doubt should be given to the accused, 9 Cr. L. Rev. 84. A reference should not be made to the District Magistrate. 16 Cr. L. J. 113=27 Ind. Cas. 177. The rule framed by Government that the view of the chairman shall prevail is *ultra vires*. See also 10 C. W. N. 632=3 C. L. J. 492 (F. B.); 8 C. W. N. 862; 18 Cr. L. J. 113=27 Ind. Cas. 177; 18 A. L. J. 463=40 Ind. Cas. 749; 20 C. 870. To meet the decisions in 44 B. 400; 15 M. 410, a new section 350-A has been added with a view to legalise conviction by Benches properly constituted.

17. (1) All Magistrates appointed under sections 12, 13 and 14, and all Benches constituted under section 15 shall be subordinate to the District Magistrate, and he 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; and

Subordination of Magistrates and Benches to District Magistrate;

(2) Every Magistrate (other than a Sub-divisional Magistrate) and every Bench 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.

(3) All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction, and he may, from time to time, make rules consistent with this Code as to the distribution of business among such Assistant Sessions Judges.

(4) The Sessions Judge may also, when he himself is unavoidably absent or incapable of acting, make provision for the disposal of any urgent application by an Additional or Assistant Sessions Judge or, if there be no Additional or Assistant Judge, by the District Magistrate, and such Judge or Magistrate shall have jurisdiction to deal with any such application.

(5) Neither the District Magistrate nor the Magistrates or Benches appointed or constituted under sections 12, 13, 14 and 15, shall be subordinate to the Sessions Judge, except to the extent and in the manner hereinafter expressly provided.

SCOPE OF THE SECTION.—This section enacts that all Magistrates and Benches in any district shall be subordinate to the District Magistrate who is empowered to make rules and give special orders. Rule 122, Criminal Rules of Practice, dealing with powers of supervision suggest very wide powers of superintendence over subordinate Magistrates justifying the stopping of or going on with the trial of any particular proceeding before them. But where a District Magistrate ordered stay of trial pending the disposal of a Civil suit when the complaint was one of rioting and mischief it is liable to be set aside by the High Court. 41 M.L.J. 432—17 L.W. 570—(1923) M.W.N. 276—25 Cr. L.J. 280—75 Ind. Cas. 872.

ALL MAGISTRATES APPOINTED, ETC.—(1) The three classes of Magistrates appointed under S. 12, *vis.*, Magistrates of the first, second and third class; (2) Sub-divisional Magistrates under S. 13. (3) Special Magistrates under S. 14, (4) Benches of Magistrates under S. 15 are to be subordinate to the District Magistrate.

MAY MAKE RULES CONSISTENT WITH THIS CODE.—The rule framed by the Local Government that when the members of a bench of Magistrates are equally divided in opinion the view of the chairman shall prevail was held not inconsistent with this Code although the Court disapproved the rule. 10 C.W.N. 632 (F.B.).

SHALL BE SUBORDINATE TO THE DISTRICT MAGISTRATE.—“It appears that the District Magistrate is clothed with superiority in respect of, not only his executive but also judicial functions. Being subordinate, it is necessarily ‘inferior’ but it is inferior also as being statutorily incompetent to hold or exercise equal powers with the latter Court in many respects. There may be ‘inferiority’ without subordination, but there cannot be subordination without inferiority, as ‘subordinate’ means, inferior in rank”—*per West, J.* in 9 B. 100 at 103. “In a District all other Magistrates are by S. 17 of the Code subordinate to the Magistrate of the District and consequently inferior to him,” 12 C. 473 at 476. See also 8 M. 18; 7 A. 883 (F.B.) A Deputy Magistrate attached to a sub-division is subordinate to the sub-divisional officer of that sub-division. 19 Cr. L.J. 126. In 14 M. 399 it was held that a

Magistrate who is subordinate to a Sub-divisional Magistrate is also subordinate to the District Magistrate for purposes of S. 528 and that neither this section nor Sec. III can be so construed so as to take away the Special power conferred by S. 528 *infra*. Under S. 435 *infra*, the District Magistrate has power to call for the records of any proceeding before any Magistrate in his district. As to distribution of work by the District Magistrate under this section. See 36 A. 468 where it was held that an order by the District Magistrate directing that the senior Honorary Magistrate should distribute work among other Honorary Magistrates was held to be *ultra vires*. There is no provision in the Code which would give the District Magistrate the power to stay proceedings in a Criminal Court subordinate to him and the High Court's power to stay such proceedings can only be exercised under its general powers of superintendence, 43 M.L.J. 642 = (1923) M.W.N. 276 = 17 L.W. 870 = 25 Cr. L.J. 280, where 23 G. 610 and 30 M. 218 are referred to. A District Magistrate has very wide powers of superintendence over all Magistrates of his District, 25 Cr. L.J. 280 = 75 Ind. Cas. 872.

SUB-SECTION (2) :—This sub-section makes all Magistrates other than Sub-Divisional Magistrates and every Bench in a Sub-Division also subordinate to the Sub-Divisional Magistrate subject to the general control of the District Magistrate. For definition of Sub-Divisional Magistrate, See S. 13 *supra*. See also 19 Cr. L.J. 125 = 43 Ind. Cas. 414.

SUB-SECTION (3) :—This sub-section makes Assistant Sessions Judges Subordinate to the Sessions Judge but not Additional Sessions Judges.

SUB-SECTION (4) :—This sub-section provides for the disposal of urgent applications by Additional Sessions Judge or by Assistant Sessions Judge or even by the District Magistrate during the unavoidable absence or incapacity to act on the part of the Sessions Judge.

ADDITIONAL AND ASSISTANT SESSIONS JUDGES.—See notes under S. 9 *supra* at page 30.

SUB-SECTION (5) :—Except as provided by the Code the District Magistrate or other Magistrates subordinate to him are not subordinate to the Sessions Judge, 26 M. 596; 7 A. 853. (F.B.) See Ss. 435 and 437 *infra*. A District Magistrate should comply with the requisitions made by the Sessions Judge in appealable cases and also in references to the High Court and is also bound to submit any explanations called for by the Sessions Judge. See Ss. 123, 193, 195 (3), 408, 435 to 437, where express provision are made as to subordination of Magistrates to the Sessions Judge. The Magistracy are subordinate to the Sessions Judge for reference to the High Court in cases in which revision is required. The duty of criticising the proceedings of the Magistrates is the duty of the superior Magistrate and not of the Sessions Judge, 7 M.H.C.R. Appx. 27, the subordination of Magistracy to the Sessions Judge is strictly limited to the cases specially provided by the Code. An order therefore under the Legal Practitioners Act by the Sessions Judge declaring certain persons as touts and extending the operation of his order to the Criminal Courts in the District other than his own Sessions Court is illegal, 26 M. 596.

D.—Courts of Presidency Magistrates.

18. (1) The Local Government shall, from time to time, appoint a sufficient number of persons (hereinafter called Presidency Magistrates) to be Magistrates for each of the presidency-towns, and shall appoint one of such persons to be Chief Presidency Magistrate for each such town.

Appointment of
Presidency Magis-
trates.

(2) The powers of a Presidency Magistrate under this Code shall be exercised by the Chief Presidency Magistrate, or by a salaried Presidency Magistrate, or by any other Presidency Magistrate empowered by:

the Local Government to sit singly, or by any Bench of Presidency Magistrates.

(3) *A Presidency Magistrate may be appointed under this section for such term as the Local Government may, by general or special order, direct.*

(4) *The Local Government may appoint any person to be an Additional Chief Presidency Magistrate, and such Additional Chief Presidency Magistrate shall have all or any of the powers of a Chief Presidency Magistrate under this Code or under any other law for the time being in force, as the Local Government may direct.*

AMENDMENT.—Sub-S. (3) and (4) are newly added.

PRESIDENCY MAGISTRATE.—The expression 'Magistrate of Police' in S. 1 of Act XIII of 1859 means a Presidency Magistrate. Under Act III of 1888, S. 7, the Commissioner of Police for the town of Madras is *ex-officio* Presidency Magistrate. A Presidency Magistrate has authority to convict a person for an offence under the Penal Code, the said offence having been committed in a British ship during her voyage on the high seas. The charge should be framed with reference to the Indian Penal Code, and in case of conviction the punishment should be awarded under that Code, 25 B. 636 at 638.

ANY BENCH OF MAGISTRATES.—Since sub-S. (2) confers on a Bench of Magistrates the full powers of a Presidency Magistrate the Bench is competent to take action under S. 106 *infra*, 7 Bom. L.R. 883—2 Cr. L.J. 770.

Sub-Ss. (3) and (4) are new. "Power is given to define the term for which a Presidency Magistrate may be appointed and provision is made for the appointment of an Additional Chief Presidency Magistrate to meet the contingency of such an officer being needed, which has been actually experienced in Calcutta"—*Statement of Objects and Reasons*.

19. Any two or more of such persons may (subject to the rules made by the Chief Presidency Magistrate under the power hereinafter conferred) sit together as a Bench.

Benches,

HEREINAFTER CONFERRED.—See S. 21 *infra* as to power of Chief Presidency Magistrate to make rules.

20. 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.

Local limits of jurisdiction.

The powers of a Presidency Magistrate and those of a Coroner under Act IV of 1871 are to a certain extent concurrent and a commitment by the Coroner does not by itself oust the jurisdiction of a Presidency Magistrate to inquire into or try the case and until the High Court has accepted such commitment any order of acquittal or discharge by the Presidency Magistrate will be operative, 31 C. 1 ; 47 C. 147.

A Presidency Magistrate of Bombay has jurisdiction over the port of Bombay up to the high water-mark. His jurisdiction and the jurisdiction upon which it borders are mutually exclusive, *Ratanlal 193*. A Presidency Magistrate has jurisdiction under this section read with S. 199 of the Calcutta Port Act to try an offence committed outside the limits of the town but within those of the Port of Calcutta, *47 C. 137*. He can also convict a person for an offence under the I. P. C. committed in a British Ship on the High Seas, *25 B. 636*. See also the Indian Ports Act XV of 1908, Ss. 4 and 5. As to his jurisdiction under the Prisons and Emigration Acts, see *32 M. 303* and *32 B. 10*.

21. (1) Every Chief Presidency Magistrate shall exercise within the local limits of his jurisdiction all the powers conferred on him by this Code or which by any law or rule in force immediately before this Code comes into force are required to be exercised by any Senior or Chief Presidency Magistrate, and may, from time to time, with the previous sanction of the Local Government, make rules consistent with this Code to regulate—

(a) the conduct and distribution of business and the practice in the Courts of the Magistrate of the town;

(b) the times and places at which Benches of Magistrates shall sit;

(c) the constitution of such Benches;

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

(e) any other matter which could be dealt with by a District Magistrate under his general powers of control over the Magistrates subordinate to him.

(2) The Local Government may, for the purposes of this Code, declare what Presidency Magistrates *including Additional Chief Presidency Magistrates* are subordinate to the Chief Presidency Magistrate, and may define the extent of their subordination.

SCOPE OF THE SECTION.—The Chief Presidency Magistrate is empowered to distribute the business among the Bench of Magistrates who have the powers of a Presidency Magistrate under S. 18, *supra*. The powers of the Bench of Honorary Presidency Magistrates are conferred by the Legislature and the Chief Presidency Magistrate has no power either to confer, restrict or enlarge them, *7 Bom. L.R. 633=2 Cr. L.J. 770*. When the Chief Presidency Magistrate of Calcutta framed a rule under this section to the effect that in a Bench composed of two members the decision of the chairman shall prevail it was held that the rule was not inconsistent with the provisions of the Code but was arbitrary and not consonant with justice and the Court disapproved the rule, *10 C.W.N. 642 (F.B.)*.

SHALL MAKE RULES.—Honorary Presidency Magistrates shall sit as benches to try cases or such class of cases made over to them by the Chief Presidency Magistrate. Each bench shall ordinarily consist of three Magistrates selected by the Chief Presidency Magistrate and the sittings are to be arranged by him. The Chief Presidency Magistrate or any salaried Presidency Magistrate with the permission of the Chief Presidency Magistrate may

sit as a member of the bench. In order to form a quorum at least two Magistrates shall be present throughout. Any case remaining unheard at the close of the sitting may either be adjourned to the next day or sent back to be disposed of by the Chief Presidency Magistrate. The Chief Presidency Magistrate if present shall be the chairman of the bench, and in his absence the salaried Presidency Magistrate present if any shall be the chairman and in other cases the Magistrates may elect a chairman from among themselves. The chairman shall conduct the proceedings of the Court and exercise all the functions of a stipendiary Magistrate. He shall take down evidence and record judgment. Each member of the bench who has been present throughout, shall have voice, in the finding and sentence. The opinion of the majority shall prevail. The same bench shall hear a case till its conclusion and every Magistrate shall sign the daily calendar of the proceedings at which he is present. The Chief Presidency Magistrate may transfer any case to his own file or to that of any salaried Magistrate or bench and he may delegate any of his powers under the rules to any subordinate salaried Magistrate. For Madras rules see *Fort St. George Gazette*, dated 3rd January, 1911, Pt. I, p. 7 and for Bengal rules see *Calcutta Gazette*, dated 2nd May, 1906, Pt. I, p. 80. For Bombay rules see *Bom. Notification No. 2536*, dated 19th May, 1904. In sub-S. (2) after the words "Presidency Magistrates" the words *including Additional Chief Presidency Magistrates* are newly added in consequence of the addition to S. 18, *supra* so as to permit the definition of the position of an Additional Chief Presidency Magistrate *vis à vis* the Chief Presidency Magistrate. For Madras rules for the guidance of stipendiary Magistrates see *Fort St. George Gazette*, 6th August, 1901, Pt. I, pp. 1414-1415.

MAY DEFINE THE EXTENT TO THEIR SUBORDINATION.—The powers of a Chief Presidency Magistrate are the same as those of an ordinary Presidency Magistrate both as to the entertainment and disposal of cases. Both are empowered to dispose of the same class of cases and inflict the same punishments. The procedure before both is identical and each has territorial jurisdiction over the whole Presidency Town. Appeals from both lie to the same Court and under similar condition. The extent of the subordination is under the sub-section to be defined by the Local Government. G.O. No. 168 dated the 2nd February 1900 directed that the subordination shall be limited to the purposes of Ss. 124, (1), 144 (4), 192, and 528 of the Code. In all other respects the Chief Presidency Magistrate and a Presidency Magistrate are of equal jurisdiction, 10 M.L.T. 218—(1911) 2 M.W.N. 80.

E.—Justices of the Peace.

22. Every Local Government, so far as regards the territories subject to its administration may by notification in the official Gazette, appoint such *persons resident within British India and not being the subjects of any foreign State* as it thinks fit to be Justices of the Peace within and for local area mentioned in such notification.

Justices of the Peace for the mufassal.

SCOPE OF THE SECTION.—Before the amendment only a European British subjects can be appointed a Justice of the Peace outside the Presidency towns. Now by the amendment by repeal of S. 23, Indian British subjects are qualified to be appointed Justices of the Peace. To be appointed a J. P. it is not necessary to be an European British subject. The powers conferred on Justices of the Peace are the ordinary powers conferred on Magistrates, of the first class. They do not include powers with which by virtue of S. 37 a Magistrate of the first class may be invested by one or other of the authorities mentioned in that section, 33 M. 243.

23. *Repealed by Act XII of 1923, S. 4.*

24. *Repealed by Act XII of 1923, S. 4.*

25. In virtue of their respective offices, the Governor-General, Governors, Lieutenant-Governors and Chief Commissioners, the Ordinary Members of the Council of the Governor-General, and the Judges of the High Courts are Justices of the Peace within and for the whole of British India, Sessions Judges and District Magistrates are Justices of the Peace within and for the whole of the territories administered by the Local Government under which they are serving, and the Presidency Magistrates are Justices of the Peace within and for the towns of which they are respectively Magistrates.

Ex-officio Justices of the Peace.

This section specifies who are *ex-officio* Justices of the Peace.

F.—*Suspension and Removal.*

26. All Judges of Criminal Courts other than the High Courts established by Royal Charter, and all Magistrates, may be suspended or removed from office by the Local Government :

Suspension and removal of Judges and Magistrates.

Provided that such Judges and Magistrates as now are liable to be suspended or removed from office by the Governor-General in Council only shall not be suspended or removed from office by any other authority.

The term 'removed' is used in a technical sense and implies dismissal from the Bench and does not include such administrative measures as transfers of officers from one place to another. Madras Government Notification, dated 10th August, 1874. See Act XXXVII of 1850 as amended by Act I of 1897 as to suspension and removal of Judges and Magistrates.

27. The Local Government may suspend or remove from office any Justice of the Peace appointed by it.

Suspension and removal of Justices of the Peace.

In the Code there is no special provision for judicial officers retiring from or resigning their office. 43 M.L.J. 428.

CHAPTER III.

POWERS OF COURTS.

A.—*Description of Offences cognizable by each Court.*

28. Subject to the other provisions of this Code any offence under the Indian Penal Code may be tried—

Offences under Penal Code.

(a) by the High Court, or

(b) by the Court of Session, or

(c) by any other Court by which such offence is shown in the eighth column of the second schedule to be triable.

ILLUSTRATION.

A is committed to the Sessions Court on a charge of culpable homicide. He may be convicted of voluntarily causing hurt, an offence triable by a Magistrate.

SCOPE OF THE SECTION.—“This section is a general section which, subject to the other provisions of the Code, gives power to the High Court and the Court of Sessions to try offences under the Indian Penal Code, and it also enacts that any offence under the Indian Penal Code may be tried by any other Court by which such offence is shown in the eighth column of the second schedule to be triable. This provision as to the other Courts does not cut down or limit the jurisdiction of the High Court or Court of Sessions”—*per Edg. C. J.* in 8 A. 665 at 667. The schedule to the Code must be read along with the Code itself, 24 C. 429. The illustration to the section is intended to show that although an offence according to Sch. II appears as one triable by a Magistrate only if the case is committed to the Court of Session for a more serious offence, the Sessions Court has jurisdiction to convict the accused for a minor offence triable by the Magistrate. But see the case in 19 A. 465 where a commitment to the Court of Session by a Magistrate for an offence punishable under *Opium Act I of 1878* was quashed by the Court on the ground that the offence is made punishable under the *Opium Act* by a Magistrate, and not by a Court of Session which is not empowered to pass sentence. Where a Magistrate and the Sessions Court have concurrent jurisdiction, the Magistrate should use his own discretion according to the circumstances, *Weir II, 19*. It is illegal for a Magistrate to commit even though he is empowered to try the case, 24 C. 429. Where there are aggravating circumstances the inferior Courts should not try, 7 Cr. L.J. 319, *Weir II, 21*. See also *Weir II, 20* and *Weir I, 448*.

SUBJECT TO THE OTHER PROVISIONS OF THE CODE.—For example, except in certain cases of contempt committed in its view or presence, S. 460, *infra* or of certain offences against public justice, such as perjury, forgery and other similar offences committed before himself or in contempt of his authority or is brought under his notice as such Judge or Magistrate in the course of a judicial proceeding in Court, S. 487, *infra*, no Court of Session can take cognizance of any offence as a Court of original jurisdiction unless upon commitment by a competent Magistrate, S. 193 *infra*.

ANY OFFENCE MAY BE TRIED BY THE HIGH COURT.—For definition of High Court, see p. 4 (1) *supra*. The High Courts are constituted by Royal Charter. A High Court may take cognizance of an offence upon a commitment to it, S. 194. Such commitment in the presidency-towns is to be made by a Presidency Magistrate and the accused may be an European British subject, or an Indian British subject or any subject of any country outside British India or of any State in alliance with His Majesty. The provisions of this section as to other Courts do not restrict the powers of the High Court, 8 A. 665.

29. (1) Subject to the other provisions of this Code, any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court.

Offences under other laws.

(2) When no Court is so mentioned, it may be tried by the High Court or subject as aforesaid by any Court constituted under this Code by which such offence is shown in the eighth column of the second schedule to be triable.

OFFENCES AGAINST OTHER LAWS.—The last portion of Sch. II deals with offences against other laws. The schedule must be read along with the Code itself, 24 C. 429.

WHEN ANY COURT IS MENTIONED, BE TRIED BY SUCH COURT.—“It is within the power of the legislature when creating a new offence to make it cognizable only by a

particular tribunal, and mode of procedure and the intention of the legislature that this offence should be tried in a summary manner and punished by a Magistrate and by no other tribunal appears to be clear from the words of the section. The offence and the specifically prescribed mode of conviction and punishment to which alone the offender is liable are inseparable. Many English authorities have established the rule that where a statute makes unlawful that which was lawful before, and inseparably connects with the prohibition of offence a specific remedy, that remedy must be pursued and no other," 5 M.H.C.R. 277 at 279. Therefore a conviction at a Criminal Sessions of the Madras High Court for supplying liquor without a license made punishable by Act I of 1866 was held to be without jurisdiction as the Act which declares it illegal made it punishable by a Magistrate. See 19 A. 465 where a commitment to the Court of Sessions by a Magistrate under the Opium Act was held to be without jurisdiction as the offence made punishable by the Act was triable by a Magistrate. So also by exercising the power of transfer an offence under a special law cognizable by a Magistrate invested with special powers cannot be transferred to Magistrate exercising ordinary powers, 1836 A.W.N. 289. See also 23 C. 442 ; Ratanlal 198, 864 and 783. See S. 184 *infra* which says that all offences against the provision of any law relating to Railways, Telegraphs, the Post Office or Arms and Ammunitions may be tried by a Presidency Magistrate whether the offence is stated to have been committed within the presidency town or not, provided the offender and all the witnesses for the prosecution are to be found there ; see also 7 M. 347 followed in Weir II, 25 where it was held that this section does not affect the jurisdiction given to a second-class Magistrate by the Registration Act to try offences under that Act.

WHERE NO COURT IS MENTIONED :—See 9 C W N. 816 = 2 Cr. L.J. 532 (2) where it was held that a Magistrate has jurisdiction to try a landlord for an offence under S. 58 (3) of the Tenancy Act, *viz.*, failure to prepare and retain counterfoils of rent receipts. " Reading the definition of offence in S. 4 (a) with S. 20 (2) and the last entry in Sch. II of the Code, we entertain no doubt that the Magistrate had jurisdiction to try the case."

29A. *No Magistrate of the second or third class shall inquire into or try any offence which is punishable otherwise than with fine not exceeding fifty rupees where the accused is an European British subject who claims to be tried as such.*

Trial of European British subjects by second and third class Magistrates.

This section is new and was added by Act XII of 1923 ; it enables second and third class Magistrates to try European British subjects, but an European British subject who claims his privilege as such, cannot be tried except for offences punishable with fine not exceeding Rupees Fifty. All first class Magistrates are now empowered to try European British subjects.

29B. *Any offence, other than one punishable with death or transportation 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 by a District Magistrate or a Chief Presidency Magistrate, or by any Magistrate specially empowered by the Local Government to exercise the powers conferred by Section 8, sub-section (1) of the Reformatory Schools Act, 1897, or, in any area in which the said Act has been wholly or in part repealed by any other law providing for the custody, trial or punishment of youthful offenders, by any magistrate empowered by or under such law to exercise all or any of the powers conferred thereby.*

Jurisdiction in the case of juveniles.

This section has been newly added for the benefit of juveniles, and provides that offence committed by children not being very serious shall be tried by District Magistrate, Chief Presidency Magistrate or by a Magistrate specially empowered under S. 8 (1), Reformatory Schools Act. See also Madras Act, IV of 1930. "The existing procedure of Committal to a Court of Session is lengthy and often involves the prolonged detention of juvenile offenders as undertrial prisoners, although the offences generally committed by them seldom require to be so severely punished as to necessitate the intervention of a Sessions Court the sentence or order eventually passed being often incommensurate with the time and energy expended upon a committal and Sessions trial." *Statement of Objects & Reasons.*

30. In the territories respectively administered by the Lieutenant-Governors of the Punjab and Burma and the Chief Commissioners of Oudh, the Central Provinces, Coorg and Assam, in Sind, and in those parts of the other provinces in which there are Deputy Commissioners or Assistant Commissioners the Local Government may, notwithstanding anything contained in section 29, invest the District Magistrate or any Magistrate of the first class, with power to try as a Magistrate all offences not punishable with death.

SCOPE OF THE SECTION.—This section must be read with S. 84 *infra*. Any Magistrate so empowered can pass a sentence of imprisonment not exceeding seven years including such solitary confinement as is authorized by law. The object of conferring special powers on District Magistrates is to accelerate proceedings, by avoiding delay consequent on commitment to Sessions Court which sit only at considerable intervals and also to afford relief to those who are to attend as witnesses, 7 C.W.N. 357. He must purport to act under his special powers, 7 Cr. L.J. 46 and he is subordinate to the Session Court, 1 Cr. L.J. 163. Where a Sessions Judge is of opinion that a Magistrate empowered under this section has in fact tried a case which he is not competent to try he should report the case to the High Court for an order that the accused be committed for trial to the Court of Session, 27 Cr. L.J. 846—88 Ind. Cas. 746.

TO TRY AS A MAGISTRATE.—Where a Deputy Commissioner tries a case exclusively triable by a Court of Session under the special powers conferred by this section he does so as a Magistrate, 10 C.W.N. 347—4 Cr. L.J. 44.

ALL OFFENCES NOT PUNISHABLE WITH DEATH.—When there is evidence which if believed would sustain a charge of murder—an offence punishable with death—it is undesirable that a Magistrate should under this section try the case on a minor charge. By doing so he incurs a grave responsibility, 10 C. 85, but where the charge was under S. 302 read with 120B, a Magistrate specially empowered under this section can try the offence if murder is not committed in pursuance of the conspiracy so that the offence was not punishable with death. 28 Cr. L.J. 1241—82 Ind. Cas. 169.

A Magistrate exercising special powers under this section should not himself try a case when there is evidence which if believed would substantiate a charge of an offence beyond his jurisdiction, 10 C. 85 ; 12 M. 54 at 55.

APPEAL.—See S. 408 *infra*. In 9 C. 513 at 516 it was held that the expression "District Magistrate" in S. 408 *infra* includes a District Magistrate specially empowered under this section.

B.—Sentences which may be passed by Courts of various Classes.

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

Sentences which High Courts and Sessions Judges may pass.

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

(3) An Assistant Sessions Judge may pass any sentence authorized by law, except a sentence of death or of transportation for a term exceeding seven years or of imprisonment for a term exceeding seven years.

PASS ANY SENTENCE AUTHORISED BY LAW.—These words so far as Sessions Judges are concerned must be read subject to S. 34A, *infra*. So a sentence of whipping on a European British subject cannot legally be passed by a Sessions Judge, Additional Sessions Judge or an Assistant Sessions Judge. See S. 53, I.P.C., which gives the punishments to which the offenders are liable under the I. P. C. *vis.* death, transportation, penal servitude imprisonment (simple or rigorous), forfeiture of property and fine, whipping and detention in a reformatory may also be passed. If a criminal were to ask the Court to pass a sentence upon him not authorized by law instead of a sentence which the law warrants, the request would not render valid a sentence otherwise unlawful—*per Peacock, C. J.*, in 2 B.L.R. (Ap. Cr.) 50 at 52. See also S. 59, I.P.C., as to commutation of a sentence of imprisonment into transportation but transportation can be awarded in lieu of a substantive term of imprisonment for a term of seven years or upwards, 5 M. 28. But transportation is to be abolished shortly, and a Bill has been introduced already, in the Legislative Assembly.

Sentences which Magistrates may pass.

32. (1) The Courts of Magistrates may pass the following sentences, namely:—

(a) Courts of Presidency Magistrates and of Magistrates of the first class :

Imprisonment for a term not exceeding two years, including such solitary confinement as is authorized by law ;
Fine not exceeding one thousand rupees ;
Whipping.

(b) Courts of Magistrates of the second class :

Imprisonment for a term not exceeding six months, including such solitary confinement as is authorized by law ;
Fine not exceeding two hundred rupees.

(c) Courts of Magistrates of the third class :

Imprisonment for a term not exceeding one month ;
Fine not exceeding fifty rupees,

(2) The Court of any Magistrate may pass any lawful sentence combining any of the sentences which it is authorised by law to pass.

The nature and limit of sentences are generally prescribed by the law defining the offence and it is within such limits that the powers of individual Magistrates should be exercised subject to jurisdiction to try the particular offence set forth in Sch. XI, col. 8 of this Code and to special local jurisdiction (Ch. XV). The provisions of this section are not affected by S. 75 I.P.C. although magistrates frequently quote wrongly S. 75 I.P.C. when passing a severer sentence. Ratanlal 688; 6 Bom. L.R. 548. An appellate Court when varying the sentence passed by the lower Court is bound by the limitation contained in this section 45 A, 594.

IMPRISONMENT :—It means imprisonment of either description (i.e. rigorous or simple) as defined by S. 53 I.P.C. S. 9 (26), General Clauses Act. The period during which a person was kept in custody as an undertrial prisoner cannot count as a part of the sentence nor can the Court order it to be so considered as such. 5 Lah. L.J. 223—24 Cr. L.J. 593—68 Ind. Cas. 817.

SOLITARY CONFINEMENT :—Solitary confinement is regulated by Ss. 73 and 74, I.P.C. It is not illegal to impose solitary confinement as part of the sentence in a case tried summarily under Chap. XXII, 6 A. 83. S. 262 *infra* only limits the term of imprisonment but does not take away the Court's powers under S. 73 I.P.C. A Court has no jurisdiction to impose a sentence of solitary confinement when convicting an accused under S. 22 of the Criminal Tribes Act as S. 73 prescribes the punishment, 36 A. 114, nor has the court power to award solitary confinement when convicting an accused person under a special or local law such as the Arms Act, 25 Cr. L.J. 190—76 Ind. Cas. 184.

FINE :—This section gives power to a Presidency Magistrate and a Magistrate of the first class only to fine up to Rs. 1,000. The fact that several offences have been committed, and therefore the Magistrate's power to fine would extend to more than Rs. 1,000 is not affected by this section. 20 C. 678 as 681. The power of a Magistrate to pass a sentence of fine is in all cases limited to rupees thousand. The power of Sessions Court and the High Court to impose a sentence of fine is unlimited. But regard must be had to the pecuniary circumstances of the offender and to the character and magnitude of the offence. A sentence of fine which when imposed is wholly impossible for an accused to pay without ruining himself and without inflicting great hardship upon his family should not be imposed. In cases of offences of an aggravated nature imprisonment is undoubtedly more suitable than fine. 24 Cr. L.J. 278—71 Ind. Cas. 938, followed in 27 Cr. L.J. 480—93 Ind. Cas. 704. It should never be inflicted in order that a further term of imprisonment in default should be suffered. If the substantive sentence which could be passed by a Magistrate is insufficient for the offence, the proper course is to send the case for trial to a Court which can pass an adequate sentence. An order to pay a daily fine is illegal. 27 C. 565. See also 24 A. 309; 22 B. 766. Imprisonment in default of payment of fine may be of any description, S. 66, I.P.C., but when the offence is punishable with fine only, then simple imprisonment shall be imposed, S. 67, I.P.C. and the imprisonment shall cease immediately the fine is either paid or levied by process of law, S. 68 I.P.C. As to payment of compensation out of fine, See Ss. 545 and 546, *infra*.

WHIPPING :—Where the law empowers a particular Magistrate to do a particular act or to make a certain order it should always appear upon the proceedings that the Magistrate making the order or doing the act is a Magistrate who had jurisdiction to do it, 22 W.R. (Cr.) 30. Under the Whipping Act IV of 1909 Second Class Magistrates are no longer competent to sentence offenders to whipping. For general instructions as to whipping, See *Pro. of Govt. of India Dept. (Jud.) Home*, 11-1-1892. It is competent to a Magistrate in British India to pass a sentence which should take effect after the expiration of a previous sentence in a foreign territory; e.g., Mysore, 20 M. 444. As a general proposition, it is clearly the duty of a Magistrate, when pronouncing a sentence, to define precisely the nature of the sentence, which, like a Civil Court decree, ought to be self-contained, so that the functionary who has to execute it should have no doubt as to the directions give therein, 24 M. 13.

MAY PASS ANY LAWFUL SENTENCE.—A Magistrate is entitled to release a first offender on probation of good conduct, discharge him with an admonition, to require an accused to notify his residence or change of residence after release. A sentence of imprisonment for the period an accused was in the lock up as an undertrial prisoner is bad, but imprisonment till the rising of the Court is good. When a prisoner is liable to be sentenced to imprisonment and fine for a particular offence, some term of imprisonment however short should be imposed. A consolidated sentence should not be passed for a number of offences, 25 Cr. L. J. 896.

Power of Magistrates to sentence to imprisonment in default of fine.

33. (1) The Court of any Magistrate may award such terms of imprisonment in default of payment of fine as is authorised by law in case of such default:

Provided that—(a) the term is not in excess of the Magistrate's powers under this Code; (b) in any case decided by a Magistrate where imprisonment has been awarded as part of the substantive sentence, the period of imprisonment awarded in default of payment of the fine shall not exceed one-fourth of the period of imprisonment which such 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.

SCOPE OF THE SECTION.—This section does not authorise a Magistrate to pass a sentence of imprisonment in default of payment of fine in excess of the term prescribed by S. 65 I.P.C., 10 M. 168 (F.B.) and 168 (foot note) *overruling* 1 M. 277. It only regulates the proceedings of Magistrates whose powers are limited, 1 A. 461 (F.B.). Thus there are two limitations as to the term of imprisonment which could be awarded—(1) that imposed by S. 65 I.P.C., (2) that imposed by cl. (1) (b) of this section and S. 92 *supra*. The excess fare and fare referred to in S. 113 (4) of the Indian Railways Act cannot be a fine although it can be recovered as such. Therefore a Magistrate has no power to impose imprisonment in default of payment, 18 B. 440 at 441.

AS IS AUTHORIZED BY LAW.—Courts are first to comply with the provisions of S. 92 *supra* and to conform to the provisions of Ss. 64 to 70, I.P.C. and this section only regulates the proceedings of Courts which are thus limited, 1 A. 461 (F.B.)

IMPRISONMENT IN DEFAULT OF PAYMENT OF FINE.—See Ss. 64 and 65, I.P.C., as to cases where the offence is punishable with imprisonment as well as fine and Ss. 66 and 67 and S. 25 General Clauses Act, with regard to cases where the offences are punishable with fine only. In cases of simple imprisonment ordered in default of payment of fine the general rules of Ss. 32 and 33 are applicable, and the principle of S. 67, I.P.C. read with this Code is unaffected by Ch. XXII of this Code (Summary Trials), 6 A. 81. Owing to omission to notify part-payment of the fine, the full term of imprisonment was served out by the accused and even in such a case the Court had no power to order a refund of the amount paid. 4 B H. C.R. (Cr. Ca.) 87.

PROVISO (1) (b).—Where the accused were sentenced by the Presidency Magistrate under S. 58 of the Bengal Excise Act to a fine of Rs. 100 each in default to 3 months' imprisonment and also each of the accused to 6 months' imprisonment which was the maximum term that could be awarded under S. 74 of the Act, it was held that the sentence of imprisonment

under S. 74 was not in excess of the Magistrate's power and would not affect the sentence under S. 58 and that the three months' imprisonment in default was a legal sentence. 6 C. 575 at 578-79.

34. The Court of a Magistrate, specially empowered under section 30, may pass any sentence authorised by law, except a sentence of death or of transportation for a term exceeding seven years or imprisonment for a term exceeding seven years.

Higher powers of certain District Magistrates.

This section prescribes the limit to the sentence which could be passed by Magistrate exercising higher powers. As to the rules of trial see sections 28, 29 and 30 *supra*. Generally cases on the border line of jurisdiction and cases of great difficulty ought to be committed to the Court of Session. Where the offence charged appears to be beyond the jurisdiction of the Magistrate the proper course is to commit to the Court of Session, e.g., if the offence disclosed was one of attempting to wage war against the King, the Magistrate should not try it as one of dacoity. See 10 C. 85.

Sentences which Courts and Magistrates may pass upon European British subjects.

34A. Notwithstanding anything contained in sections 31, 32 and 34—

(a) no Court of Session shall pass on any European British subject any sentence other than a sentence of death, penal servitude, or imprisonment with or without fine, or of fine, and

(b) no District Magistrate or other Magistrate of the first class shall pass on any European British subject any sentence other than imprisonment which may extend to two years, or fine which may extend to one thousand rupees, or both.

This section was newly added by Act XII of 1923 and provides for sentences which could be passed on European British subjects by Courts of Session, District Magistrate, and Magistrates of the first class. Whipping as a sentence is included by this section. See notes to S. 80 *supra*. A sentence by a Magistrate acting under this section exceeding four years' imprisonment, or any sentence of transportation is appealable direct to the High Court. S. 408, proviso (b) *infra*. No cases in which a Magistrate exercising special powers under this section shall be tried summarily, S. 260 (1) proviso.

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 or transportation 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.

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

(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 as follows :—

(a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years :
 Maximum term of punishment.

(b) if the case is tried by a Magistrate (other than a Magistrate acting under section 34), the aggregate punishment shall not exceed twice the amount of punishment which he is, in the exercise of his ordinary jurisdiction, competent to inflict.

(3) For the purpose of appeal, *the aggregate of consecutive sentences passed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.*

AMENDMENT.—The explanation and illustration to this section are now repealed. Sub-section (1) is so amended as to make its meaning clear; For the word "aggregate" the words "*aggregate of consecutive*" have been substituted.

SCOPE OF THE SECTION.—The object of this section is to award a specific punishment for each particular offence of which an accused person may be proved guilty, when all the charges against him are tried together, so that, in case some one or other of the charges break down on appeal, the amount of punishment to be remitted may be known, 2 B. L. R. (Ap. Cr.) 3 ; 4 M. H. C. R. Appx. 27. This section has now been amended so as to restore the previous view of the law in 17 B. 250 to the effect that separate sentences are quite legal. The word "*distinct*" in sub-section (1) and the explanation to the section have now been repealed and the only qualification is that separate sentences are subject to the provisions of S. 71, I.P.O., this prevents the offender from being punished with a more severe punishment than the Court could inflict or could have awarded for any one of the offences coming within the scope of the section. 49 B. 916 at 918. This section now definitely states that it must be read subject to S. 71, I.P.O., which regulates punishment for offences and has nothing to do with procedure. The object of this section is to declare in what cases and subject to what limitations a Court may exceed its ordinary powers of passing sentence under S. 92, *supra*. This section is only permissive, and no Court is bound to pass separate sentences. This section is confined to separate charges against the same person, and convicted at one trial. 3 A. 303 (F.B.) ; Weir II 30 and 31 ; 5 Bom. L.R. 25. This section applies to trials only, and not to miscellaneous proceedings, 31 M. 515 ; 16 Cr. L.J. 622 ; 5 Bom. L.R. 25 ; 4 Bom. L.R. 376. Separate sentences can now legally be passed under this section for offences under Ss. 360 and 457, I.P.O., 41 C.L.J. 553—26 Cr. L.J. 1253—88 Ind. Cas. 997. So also for rioting and hurt when the Court finds that each accused took individual part in causing hurt, 41 C.L.J. 471—26 Cr. L.J. 1297—89 Ind. Cas. 211. It is also competent now to pass separate sentences for rioting armed with deadly weapon S. 148, I.P.O., and causing grievous hurt under S. 326, I.P.O., but the two sentences must not exceed the sentencing power of the Court, 49 B. 916. The power to pass concurrent sentences was given by the Code of 1893. The decisions in 25 C. 537, 20 A. 1, 10 A. 58, 10 B. 255 are no longer law.

IS CONVICTED :—The accused may be convicted under the Indian Penal Code or under any special or local law. There is no provision of law authorising a Court to refrain from passing a sentence provided by the Code when convicting an accused, 22 C. 805.

AT ONE TRIAL.—The section does not embrace a case of separate trials held on the same or subsequent days for separate offences committed by the same person, but has reference only to the conviction of the accused of two or more offences at one trial. Weir II, 30 followed in Weir II, 31; 22 C.W.N. 597; 23 C.L.J. 53=20 C.W.N. 1300; 13 Cr. L.J. 3=13 Ind. Cas. 109; 22 Cr. L.J. 520; 12 Bom. L.R. 129; 19 A.L.J. 310; 11 Cr. L.J. 679; 21 C.L.J. 398; 25 Cr. L.J. 85=76 Ind. Cas. 21; 14 Cr. L.J. 338=20 Ind. Cas. 212. If the trials are separate, the sentence that a Magistrate can pass in each case is limited to his ordinary powers, 3 A. 305 (F.B.). In order to bring a case under this section so as to enable a Magistrate to exceed his ordinary powers, the accused must have been convicted of two or more distinct offences in the same trial, 23 B. 706 (F.B.). The accused must be convicted at one trial of two or more distinct offences to enable the Court to pass concurrent sentences. Sentence passed in one trial cannot be ordered to run concurrently with the sentence passed in other trials. 47 A. 89. The section does not authorize a Court to direct that two or more sentences shall run concurrently except when the sentences are passed in one trial, see S. 397 *infra*. The section applies to sentences on conviction at one trial, 22 C.W.N. 597; 27 Cr. L.J. 806=95 Ind. Cas. 471, distinguishing 13 Bom. L.R. 300=12 Cr. L.J. 241=10 Ind. Cas. 769, and has no application to imprisonment under S. 123 *infra* in default of giving security for good behaviour, 5 Bom. L.R. 26, where a person is convicted of separate offences and sentenced to pay a fine in default to suffer imprisonment for of a specified period for each of the offences of which he was convicted, the sentences in default of payment of fine cannot be directed to run concurrently. This sub-section only authorises concurrent punishment in the case of imprisonment or transportation. It does not authorise concurrent fines. A Magistrate if he wants to fine for a second offence he is entitled to inflict a nominal fine considering the fine already imposed, 27 Cr. L.J. 111=91 Ind. Cas. 543, following 13 Cr. L.J. 536=15 Ind. Cas. 805. Separate sentences can now legally be passed in under this section for offences under Ss. 380 and 457, I.P.C., 41 C.L.J. 563. So also for rioting and hurt when the Court finds that each accused caused hurt individually, 41 C.L.J. 471. But separate sentences cannot be passed under Ss. 147 and 353, I.P.C., where the act which converts the accused into an unlawful assembly was the same as rendered them liable to punishment under S. 353 I.P.C., 27 Cr. L.J. 834=95 Ind. Cas. 764.

MAY SENTENCE.—This section is permissive and no Court is bound to pass a separate sentence for each of the offences of which one is found guilty at one trial; generally it is better to pass a separate sentence for each offence.

IMPRISONMENT OR TRANSPORTATION.—This section is not restricted to cases where the several punishments are all of the same kind, i.e., are all sentences of imprisonment or all sentences of transportation notwithstanding the use of the word 'or' between the words 'imprisonment' and 'transportation,' the section was intended to cover cases where one of the punishment inflicted is imprisonment while the other is transportation; otherwise the result will follow that the Legislature has made no provision for such cases. 23 C.L.J. 596

ONE AFTER THE EXPIRATION OF THE OTHER.—An order to this effect is necessary and if omitted the judgment will be irregular. A Magistrate in British India is competent to pass a sentence which should take effect after the expiry of a sentence in Mysore, 20 M. 443.

UNLESS THE COURT DIRECTS SUCH PUNISHMENTS SHALL RUN CONCURRENTLY.—These words were first introduced in the 1898 Code; the decisions 25 C. 557 and 20 A. 1 are no longer law but there must be separate conviction at one trial to pass a concurrent sentence. It is, however, permissible for a Judge, when sentencing an accused person to take into account an existing sentence passed by another Judge in another trial for passing only a

(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 as follows :—

(a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years :
 Maximum term of punishment.

(b) if the case is tried by a Magistrate (other than a Magistrate acting under section 34), the aggregate punishment shall not exceed twice the amount of punishment which he is, in the exercise of his ordinary jurisdiction, competent to inflict.

(3) For the purpose of appeal, *the aggregate of consecutive sentences passed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.*

AMENDMENT.—The explanation and illustration to this section are now repealed. Sub-section (1) is so amended as to make its meaning clear; For the word "aggregate" the words "*aggregate of consecutive*" have been substituted.

SCOPE OF THE SECTION.—The object of this section is to award a specific punishment for each particular offence of which an accused person may be proved guilty, when all the charges against him are tried together, so that, in case some one or other of the charges break down on appeal, the amount of punishment to be remitted may be known, 2 B. L. R. (A. Cr.) 8 ; 4 M. H. C. R. Appx. 27. This section has now been amended so as to restore the previous view of the law in 17 B. 260 to the effect that separate sentences are quite legal. The word "*distinct*" in sub-section (1) and the explanation to the section have now been repealed and the only qualification is that separate sentences are subject to the provisions of S. 71, I.P.O., this prevents the offender from being punished with a more severe punishment than the Court could inflict or could have awarded for any one of the offences coming within the scope of the section. 49 B. 916 at 918. This section now definitely states that it must be read subject to S. 71, I.P.O., which regulates punishment for offences and has nothing to do with procedure. The object of this section is to declare in what cases and subject to what limitations a Court may exercise its ordinary powers of passing sentence under S. 32, *supra*. This section is only permissive, and no Court is bound to pass separate sentences. This section is confined to separate charges against the same person, and convicted at one trial. 3 A. 308 (F.B.) ; Weir II 30 and 31 ; 5 Bom. L.R. 28. This section applies to trials only, and not to miscellaneous proceedings, 31 M. 515 ; 16 Cr. L.J. 622 ; 5 Bom. L.R. 25 ; 4 Bom. L.R. 876. Separate sentences can now legally be passed under this section for offences under Ss. 360 and 457, I.P.O., 41 C.L.J. 563—26 Cr. L.J. 1253—88 Ind. Cas. 937. So also for rioting and hurt when the Court finds that each accused took individual part in causing hurt, 41 C.L.J. 371—26 Cr. L.J. 1297—89 Ind. Cas. 231. It is also competent now to pass separate sentences for rioting armed with deadly weapon S. 148, I.P.O., and causing grievous hurt under S. 326, I.P.O., but the two sentences must not exceed the sentencing power of the Court, 49 B. 816. The power to pass concurrent sentences was given by the Code of 1898. The decisions in 25 C. 557, 20 A. 1, 10 A. 58, 10 B. 253 are no longer law.

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MAY SENTENCE.—This section is permissive and no Court is bound to pass a separate sentence for each of the offences of which one is found guilty at one trial; generally it is better to pass a separate sentence for each offence.

IMPRISONMENT OR TRANSPORTATION.—This section is not restricted to cases where the several punishments are all of the same kind, *i.e.*, are all sentences of imprisonment or all sentences of transportation notwithstanding the use of the word 'or' between the words 'imprisonment' and 'transportation,' the section was intended to cover cases where one of the punishment inflicted is imprisonment while the other is transportation; otherwise the result will follow that the Legislature has made no provision for such cases. 23 C.L.J. 596

ONE AFTER THE EXPIRATION OF THE OTHER.—An order to this effect is necessary and if omitted the judgment will be irregular. A Magistrate in British India is competent to pass a sentence which should take effect after the expiry of a sentence in Mysore. 20 M. 443.

UNLESS THE COURT DIRECTS SUCH PUNISHMENTS SHALL RUN CONCURRENTLY.—These words were first introduced in the 1898 Code; the decisions 25 C. 557 and 20 A. 1 are no longer law but there must be separate conviction at one trial to pass a concurrent sentence. It is, however, permissible for a Judge, when sentencing an accused person to take into account an existing sentence passed by another Judge in another trial for passing only a

nominal sentences, or pass an adequate sentence and then report the case for orders to the Local Government, 21 Cr. L. J. 898.

SUB-SECTION (2).—This sub-section enhances the sentencing power given to Magistrate under S. 32 *supra*. The limits of punishment fixed by this section do not apply to cases of offences committed by persons who are already undergoing sentence of imprisonment, 7 W.R. (Cr.) 1. The words "in the case of consecutive sentences" were added in the 1898 Code. This sub-section enacts that it is not necessary for the Court when the consecutive sentences passed for the several offences being in excess of the sentencing power of the Court to send the offender for trial before a higher Court. The proviso (a) makes it clear that in no case shall the offender be sentenced to imprisonment for more than fourteen years.

SUB SECTION (3).—The addition of the words "the aggregate of consecutive sentences" now removes the conflict of decisions which previously existed as to whether this clause applied to consecutive sentences also. It was held in 17 C.W.N. 72 and 15 C.W.N. 734 that the aggregate of the concurrent sentences determined the right of appeal, although taken individually, the sentence was not appealable. But in 40 C. 631, 23 C.W.N. 613, 17 C.L.J. 392 a different view was taken, and in 17 C.W.N. 823, 11 Bom.L.R. 544, 35 A. 154 it was held that this clause applied only to cases of consecutive and not concurrent sentences. The decision in 3 Pat. L. J. 138 took the same view. This sub-section now makes it clear that in cases of conviction for several offences at one trial, the aggregate of sentences passed if they are made to run consecutively shall be deemed to be a single sentence for purposes of appeal. The term "aggregate sentences" applies only to consecutive and not concurrent sentences; so no appeal lies to the High Court when the whole sentence did not exceed four years, 3 Pat. L.J. 138. See also 23 C.W.N. 613 Consecutive sentences are allowed to be taken in the aggregate as one sentence for purposes of appeal. The new amendment makes this quite clear. Passing of concurrent sentences of imprisonment in default of payment of fine is not warranted by this section, 27 Bom. L. R. 1351=27 Cr. L. J. 111=91 Ind. Cas. 543 following 13 Cr. L. J. 836=15 Ind. Cas. 808. See S. 415 *infra* which explicitly excludes a sentence of imprisonment in default of payment of fine; imprisonment in default of finding security under S. 123 cannot also be taken into account. See 15 C. W. N. 734 and 17 C. W. N. 72. The offences under Ss. 147 and 226 I.P.O. are not distinct offences and so not liable to separate punishments for each offence, 37 C.L.J. 171=24 Cr. L.J. 851=74 Ind. Cas. 1013. So also separate sentences under S. 147 and S. 325/149 I.P.O. are illegal even when they are made to run concurrently 51 C. 79, followed in 27 Cr. L.J. 113=91 Ind. Cas. 689; See also 17 B. 260; 23 B. 705. But See 49 B. 916. Separate sentences can be passed for house-breaking to commit theft under S. 457 I.P.O. and theft in a house under S. 380 I.P.O., 41 C.L.J. 563=26 Cr. L.J. 1253=88 Ind. Cas. 997. The decision in 27 Cr. L.J. 388=92 Ind. Cas. 880 of the Lahore High Court holding that separate sentences for abduction to commit rape and for committing rape cannot be awarded, is of doubtful authority as reliance is placed on a decision based on the illustration to this section which has now been repealed.

The explanation and the illustration to this section which had been added to set at rest the conflict of rulings of the Allahabad High Court has now been repealed as they occasioned considerable difficulty in construing the section, and it is now definitely stated that this section must be read subject to S. 71, I.P.O.

C.—Ordinary and Additional Powers.

36. All District Magistrates, Sub-divisional Magistrates and Magistrates of the first, second and third classes, have the powers hereinafter respectively conferred upon them and specified in the third schedule. Such powers are called their "ordinary powers."

Ordinary powers
of Magistrates.

ORDINARY POWERS.—The term “ordinary powers” does not mean general powers of the Magistrate under the Code such as to entertain complaints, 4 L.W. 405 ; 34 M. 343 and 316. Ordinary powers are to be found in Columns 1, 2 and 3 of Schedule III. See §1 M. 315 as to power of a District Magistrate to remand a person to custody under this section read with S. 107 (4). *infra*.

This section is not exhaustive. See Col. 8 of Sch. II as to jurisdiction to try offences. See S. 32 as to the power of passing sentence and S. 12 and Chap. XV *infra* as to local jurisdiction of Magistrates.

37. In addition to his ordinary powers, any Sub-divisional Magistrate or any Magistrate of the first, second or third class may be invested by the Local Government or the District Magistrate, as the case may be with any powers specified in the fourth schedule as powers with which he may be invested by the Local Government or the District Magistrate.

Additional powers
conferable on
Magistrates.

Ordinary powers of Magistrates are mentioned in S. 36 *supra*. Additional powers may be conferred on them by the District Magistrates or Local Government. See S. 41 as to withdrawal of powers by Local Government.

Control of District
Magistrate's invest-
ing power.

38. The power conferred on the District Magistrate by section 37 shall be exercised subject to the control of the Local Government.

D.—Conferment, Continuance and Cancellation of Powers.

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

Mode of conferring
powers.

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

OR BY VIRTUE OF THEIR OFFICE:—In the Madras Presidency in taluks when there are no Stationary Sub Magistrates all second class powers are conferred on Tahsildars but in taluks where there are Stationary Sub-Magistrates all second class powers except under Ss. 190 and 206 are conferred on them: Fort, St. George Gazette 1893, Pt. 1, p. 579.

EMPOWER SPECIALLY BY NAME OR OFFICIALS GENERALLY.—This section declares that the Local Government may empower classes of officials generally or by their official titles, or persons specially by name or in virtue of their office. When therefore a class of officials is invested with powers to try certain offences it would appear that they are “generally” empowered. The word “generally” is in contrast to the word “specially” which is used in speaking of individuals, (1915) M.W.N. 269 at 270—17 M.L.T. 191—16 Cr. L.J. 268.

EVERY ORDER SHALL TAKE EFFECT FROM THE DATE OF COMMUNICATION.—This sub-section clears the doubt expressed in 6 C 476. A Magistrate of the second class began

a trial, but before passing sentence he was invested with first-class powers, it was held by a Full Bench of the Allahabad High Court that he could pass sentence as a First Class Magistrate, 7 A. 414 (F.B.)

40. Whenever any person holding an office in the service of Government who has been invested 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 Local Government, he shall, unless the Local Government otherwise directs, or has otherwise directed, exercise the same powers in the local area in which he is so appointed.

Powers of officers appointed.

The new amendment is intended to save the powers of officers on return from leave without the formality of re-gazetting them.

EXERCISE THE SAME POWERS IN THE LOCAL AREA TO WHICH HE IS APPOINTED.—See Weir II, 36 and 15 M. 132. In the latter case it was held that a Sub-Registrar who was appointed Magistrate of a particular town, on transfer, could exercise in another locality the powers conferred on him unless withdrawn by the Local Government, and further when the Government order withdrawing his power was not communicated to him till he had decided certain cases the proceedings are not void. An Honorary Magistrate ceases to be a Magistrate only when his resignation is accepted by the Local Government and not when he sends in his resignation, 45 M.L.J. 798 ; 48 M. 309.

APPOINTED TO EQUAL OR HIGHER OFFICE.—A Magistrate who was acting as a District Magistrate when transferred to another District not as a District Magistrate will not carry with him the powers of a District Magistrate, since he is not appointed to an equal or higher office of the same nature, 3 A. 563 (F.B.); 14 Cr. L. J. 239. But where a Head Assistant Magistrate having almost completed the trial of a criminal case was appointed to the office of Deputy Magistrate in another station in the same district and the case was transferred to him by the District Magistrate, it was held that the trial need not be commenced *de novo* but could be proceeded with from the point at which it was left before the transfer, 22 M. 47. See also 3 A. L. J. 828, where it was held that when an officiating District Magistrate reverted as a Joint Magistrate in the same district during the pendency of the trial of a case and continued it after reversion without objection of the parties, he had jurisdiction to do so. Cases pending on the file of a Magistrate relieved of his charge of a sub-division do not automatically pass into the hands of his successor merely because the first Magistrate is transferred to another sub-division in the same District ; S. 12 *supra* does not lay down such a rule, 42 A. 649 at 653.

SAME LOCAL GOVERNMENT.—These words were introduced to meet the objections raised in 2 O. 117.

41. (1) The Local Government 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 District Magistrate may be withdrawn by the District Magistrate.

Under sub-section (2) a District Magistrate may withdraw the powers conferred by him under section 13 or 37 *supra* on Subordinate Magistrates.

Powers may be cancelled.

PART III.

GENERAL PROVISIONS.

CHAPTER IV.

OF AID AND INFORMATION TO THE MAGISTRATES, THE POLICE AND PERSONS MAKING ARRESTS.

42. Every person is bound to assist a Magistrate or police-officer reasonably demanding his aid whether within or without the presidency-towns,—

Public when to assist Magistrates and police.

(a) in the taking or preventing the escape of any other person whom such Magistrate or police-officer is authorised to arrest ;

(b) in the prevention or suppression of a breach of the peace, or in the prevention of any injury attempted to be committed to any railway, canal, telegraph or public property.

EVERY PERSON IS BOUND TO ASSIST.—This section expressly declares that every person whether an official or private citizen is bound on reasonable demand by a Magistrate or Police-officer to render personal assistance in executing processes or preventing or suppressing breaches of the peace or preventing injury to public properties. The word 'assistance' implies that the party who assists is doing something which, in the ordinary circumstances, the party assisted can do for himself, 26 M. 419 (F.B.). S. 137 makes an intentional omission to assist a public servant punishable. As to persons required to assist in the dispersion of unlawful assemblies, see Ss. 125 to 127, *infra*. See Ss. 54 to 57, 128, 151 and 157, *infra* as to the circumstances under which a police-officer may lawfully arrest.

REASONABLY DEMANDING AID.—The assistance that can be demanded under this section is *personal assistance* of the individual of whom it is demanded, and not the supply of a contingent of men to assist. Weir II 37. The refusal to comply with the demand on the ground that it was not reasonable, might render him liable under S. 137, and it would then be determined whether the demand is reasonable. Where a Magistrate directed a land-holder to find a clue in a case of theft within 15 days and to assist the police, *held* such order was not authorised by law, and a conviction under Ss. 137 and 138, I.P.O. for disobedience of such order was not sustainable, 3 A. 201; 42 A. 314. The word "assistance" referred to in the first part of S. 137, I.P.O. is *ejusdem generis* with the various forms of assistance specified in the latter half of the section. The assistance must have some direct personal relation to the execution of the duty by the public officer. It was not reasonable to ask for the assistance of a member of the public to arrest a large number of unknown persons whose precise whereabouts were also unknown at the time when the request for assistance was made. Obviously the law does not intend that police-officers should have a general power of calling upon members of the public to join them in doing the work for which they are paid, such as tracing out the whereabouts of an absconding criminal or collecting evidence to warrant his conviction, 42 A. 313. Similarly omission to assist the police to bury a dead body will not come within this section as held by the Nagpur Chief Court.

43. When a warrant is directed to a person other than a police-officer, any other person may aid in the execution of such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of the warrant.

Aid to person, other than police officer, executing warrant.

TO A PERSON OTHER THAN A POLICE-OFFICER.—See Ss. 77 and 78, *infra*.

MAY AID.—The assistance to be given to a private person is not obligatory as in the case of a Magistrate or police-officer under S. 42, *supra*. For rights and liabilities of a person acting under this section, see Explanation (2) to S. 99, I.P.C.

44. (1) Every person, whether within or without the presidency-towns, aware of the commission of, or of the intention of any other person to commit any offence punishable under any of the following sections of the Indian Penal Code (namely), 121, 121A, 122, 123, 124, 124A, 125, 126, 130, 143, 144, 145, 147, 148, 302, 303, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 456, 457, 458, 459, and 460, shall, in the absence of reasonable excuse, the burden of proving which shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police-officer of such commission or intention.

Public to give information of certain offences.

(2) For the purposes of this section the term “offence” includes any act committed at any place out of British India which would constitute an offence if committed in British India.

See Ss. 176 and 202, I. P. C., which make intentional omission punishable, and also S. 177, I.P.C., which makes giving false information punishable; see S. 154, I.P.C., which makes owners or occupiers of land punishable for failure to give information as to the formation of an unlawful assembly or rioting on the land.

SHALL FORTHWITH GIVE INFORMATION.—Where once information of a crime has reached the authorities, the object of this section is fulfilled, and no further duty imposed by it remains, Ratanlal 674 and 778; 7 M. 436; 20 C. 315. The burden of proving that there was reasonable excuse for not giving the information is cast on the person who has the information.

SUB-SECTION (2).—This sub-section was introduced in the 1898 Code, and extends the obligation to acts or omissions out of British India which if committed in British India would constitute an offence.

45. (1) Every village-headman, village-accountant, village-watchman, village-police-officer, owner or occupier of land, and the agent of any such owner or occupier *in charge of the management of that land* and every officer employed in the collection of revenue or rent of land on the part of Government or the Court of Wards, shall forthwith communicate to the nearest Magistrate or to the officer-in-charge of the nearest police-station, whichever is the nearer, any information which he may possess respecting—

Village headman, accountants, land-holders and others bound to report certain matters.

(a) the permanent or temporary residence of any notorious receiver or vendor of stolen property in any village of which he is headman, accountant, watchman or police-officer, or in which he owns or occupies land, or is agent, or collects revenue or rent;

(b) the resort to any place within, or the passage through, such village of any person whom he knows, or reasonably suspects, to be a thug, robber, escaped convict or proclaimed offender ;

(c) the commission of, or intention to commit, in or near such village any non-bailable offence or any offence punishable under section 143, 144, 145, 147 or 148 of the Indian Penal Code ;

(d) the occurrence in or near such village of any sudden or unnatural death or of any death under suspicious circumstances or *the discovery in or near such village of any corpse or part of a corpse, in circumstances which lead to a reasonable suspicion that such a death has occurred or the disappearance from such village of any person in circumstances which lead to a reasonable suspicion that a non-bailable offence has been committed in respect of such person ;*

(e) the commission of, or intention to commit, at any place out of British India near such village any act which, if committed in British India, would be an offence punishable under any of the following sections of the Indian Penal Code, namely, 231, 232, 233, 234, 235, 236, 237, 238, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459, 460, 489A, 489B, 489C and 48' D ;

(f) any matter likely to affect the maintenance of order or the prevention of crime or the safety of person or property respecting which the District Magistrate, by general or special order made with the previous sanction of the Local Government, has directed him to communicate information.

(2) In this section—

(i) "village" includes village-lands ; and

(ii) the expression "proclaimed offender" includes any person proclaimed as an offender by any Court or authority established or continued by the Governor-General in Council in any part of India, in respect of any act which, if committed in British India, would be punishable under any of the following sections of the Indian Penal Code, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460.

(3) Subject to rules in this behalf to be made by the Local Government, the District Magistrate or *Sub-divisional Magistrate* may from time to time appoint one or more persons *with his or their consent to perform the duties of a village-headman under this section whether a village-headman has or has not been appointed for that village under any other law.*

Appointment of village-headmen by District Magistrate or Sub-Divisional Magistrate in certain cases for purposes of this section.

AMENDMENT.—In sub-Sec. (1) the words “in charge of the management of that land” after “occupier” have been added; and for the word “obtain” the word “possess” has been substituted. In sub-Sec. 1 (d) after “suspicious circumstances” the words “the discovery of a corpse or part of a corpse in or near such village which lead to a reasonable suspicion of death or disappearance of any person, etc.,” have been added. In sub-Sec. (1) (e), Ss. 231—238, 489A to 489 D, I.P.O., have been added. By the amendment in sub-Sec. (3), a Sub-divisional Magistrate is empowered to appoint a village-headman, a power till now exercised by the District Magistrate.

OBJECT OF THE SECTION.—The object of this section is to ensure that information obtained be not intentionally withheld by those, whose position in the locality renders them liable to it. Its provisions are not to be used for the purpose of vexation. 7 M. 338; 20 C. 316. The provisions of this section are not intended to be punitive in themselves but are intended to facilitate information as to the commission of an offence and thereby facilitate steps being taken in the investigation of the same. 23 Cr. L.J. 162 = 65 Ind. Cas. 626.

VILLAGE-HEADMAN.—The expression village-headman in the Madras Presidency means a Village Munsif or a Village Magistrate. 32 M. 258 (F.B.). Under S. 8 of Reg. XI of 1816 every Village-headman should reciprocally communicate any information which he may receive regarding offences committed or of gangs of robbers or of suspicious characters having entered or taken refuge in each other's villages and should co-operate in apprehending them. Under S. 9 of the same regulation they are to report to a Police-officer the arrival of strangers and suspicious persons in their village. Under this section the village-headman is bound forthwith to communicate to the nearest first-class Magistrate or the officer-in-charge of a police-station, whichever is the nearer, any information which he may obtain respecting certain grave offences. In point of fact in this Presidency the complaint or information to the Village Magistrate is ordinarily the first step in setting the Criminal Law in motion in the case of grave offences specified in this section. 32 M. 258 at 262 (F.B.).

OWNER OR OCCUPIER OF LAND.—The words ‘in or near such village’ are now added. By the nature of the case they were evidently intended, for the Legislature could never have meant that a person by the mere circumstance of his being the owner or occupier in charge of the management of the land would be bound to give information in respect of the occurrence of any sudden or unnatural death occurring in any remote part of the country from where the land was owned and held. See 23 W.R. (Cr.) 60 at 61. In 12 Mad. 92, it was held that the owner or occupier of a house within a village was not an owner of land within the meaning of S. 45. See also Weir I, 101. Land does not mean an irrigation tank; and so a father was held by the Madras High Court (Cr. R. Case 67 of 1905) not bound to report the death of his child by drowning in such a tank under this section.

AGENT OF SUCH OWNER OR OCCUPIER.—The words “in charge of the management of such land” have been newly added. The liability of a resident agent of an owner arises when the owner is not resident and has no personal knowledge of the fact; when he has such knowledge the liability attaches to the owner. 23 W.R. (Cr.) 60 at 61. See 28 C. 504, where it was held that a landlord was liable for the acts of commission and omission not only of himself but also of his agent or manager.

FORTHWITH.—This word must be construed with reference to the object of the enactment. Where a village *kulkarni* gave information to the Police some 7 or 8 hours after he was aware of the occurrence, it was held that the information was not given forthwith as required by this section. Ratanlal 784.

COMMUNICATE ANY INFORMATION.—Mere rumour which a Zamindar of a village and his agent had heard of a disappeared man having been killed is not information within the meaning of this section, 1900 A.W.N. 207; 9 Cr. L.J. 224. Where the only information which a Village Munsif had was that a jewel was missing, but it was not known whether it was stolen or lost, it was held that there was not such information of the commission of the offence which he was bound to communicate under this section. 5 M.L.T. 257. But the provisions of this section should not be put in force against a person for purpose of vexation.

where the police actually obtained information from other sources, 4 C. 628, followed in 20 C. 316; see also 7 M. 438 at 438, 28 Cr. L.J. 182—65 Ind. Cas. 626 where it was held that these provisions of law ought not to be worked solely for the purpose of vexation, but for the purpose where information was wilfully withheld by those whose position makes them liable to give it, and that it is not reasonable that every person other than him or those from whom the information has been actually obtained, who may possibly be bound to give the information, should be prosecuted for not having done so, See Ss. 176, 177, 179 and 217, I.P.C., for punishment for omission to give the information.

NOTORIOUS RECEIVER OR VENDOR OF STOLEN PROPERTY.—For definition of stolen property, see S. 410, I.P.C. and for habitually dealing in stolen property see S. 413, I.P.C. See 19 C. 190.

A THUG, is one who habitually associates with others for committing robbery, decoying persons for robbing and murdering them. See S. 310, I.P.C.

ESCAPED CONVICT.—See S. 222 I.P.C.

PROCLAIMED OFFENDER.—The persons included in the expression 'proclaimed offender' are persons over and above those to whom, the words in their ordinary signification apply and who might but for the expression have escaped out of the category of proclaimed offenders. 1901 A.W.N. 10; 7 M. 435.

SUB SECTION (3):—An order passed by the District Magistrate in accordance with the rules framed by Government under this sub-section *et c.*, dismissing a village headman is an executive order and is therefore not subject to the revisional jurisdiction of the High Court, 29 A. 583.

CHAPTER V.

OF ARREST, ESCAPE AND RETAKING.

A.—Arrest generally.

46. (1) In making an arrest the police-officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police-officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with transportation for life.

ARREST.—Manual detention is not essential to constitute arrest. Weir I 203. The Court is a jealous guardian of the right of personal freedom and requires any interference with the liberty of the subject to be strictly justified. 52 C. 615 at 616; see also 13 A. 43 at 47; 1888 A.W.N. 59 (F.B.). See S. 80, *infra* which lays down that if the arrest be under a warrant, the substance should be notified to the person to be arrested, and, if so required, the warrant should be shown. See Ss. 224 and 225, I.P.C., which make resistance or obstruction to lawful arrest punishable. Illegality of the arrest does not affect the jurisdiction of the Magistrate to try the offence though that fact is a material in cases of prosecution for resistance to police in arresting. See 38 B. 225; 26 M. 124. See Ss. 53,

66, 67, 77, and 78, *infra* as to arrest by private persons. See Ss. 130 and 131 as to arrest by military officers and Ss. 64 to 67 as to arrests by Magistrates.

47. If any person acting under a warrant of arrest, or any police-officer having authority to arrest, has reason to believe that the person to be arrested has entered into, or is within, any place, the person residing in, or being in charge of, such place shall, on demand of such person acting as aforesaid or such police-officer, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

Search of place entered by person sought to be arrested.

Under Ss. 77 and 78, *infra*, warrants of arrest may be directed to persons not police-officers, and Ss. 54 and 58, *infra* apply to arrests by a police-officer. This section is not intended to restrict the powers of the police to enter the place to be searched. It is a provision compelling house-holders to afford the police facilities in carrying out their duties, and S. 48 provides that if difficulties are placed in the way of a police officer, he may use force to obtain ingress, 31 C. 350 at 376. There must be a demand to enter and free ingress ought to be allowed into the place and he should also be afforded reasonable facilities for a search therein. If difficulties as to ingress and search are placed in the way of a police officer, he may use force to obtain ingress under the next section.

48. If ingress to such place cannot be obtained under section 47 it shall be lawful in any case for a person acting under a warrant and in any case in which a warrant may issue, but cannot be obtained without affording the person to be arrested an opportunity of escape, for a police-officer to enter such place and search therein, and in order to effect an entrance into such place, to break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other person, if after notification of his authority and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance :

Procedure where ingress not obtainable.

Provided that, if any such place is an apartment in the actual occupancy of a woman (not being the person to be arrested) who, according to custom, does not appear in public, such person or police-officer shall, before entering such apartment, give notice to such woman that she is at liberty to withdraw, and shall afford her every reasonable facility for withdrawing, and may then break open the apartment and enter it.

Breaking open zanana.

For arresting a suspected person if the police-officer enters into a building, his action would be *prima facie* justifiable. 26 C. 433. See S. 90 as to a case in which a warrant may issue when summons which may be issued may not be obeyed.

49. Any police-officer or other person authorised to make an arrest may break open any outer or inner door or window of any house or place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein.

Power to break open doors and windows for purposes of liberation.

This section empowers a Police officer who having lawfully entered a house for making an arrest finds himself locked inside and in such a case he may break open door, etc., to liberate himself.

50. The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.

No unnecessary restraint.

See also Ss. 62 and 63 in this connection. In no case is a police-officer justified in detaining a person for a single hour except on reasonable grounds justified by the circumstances of the case 6 W.R. (Cr.) 88 ; 19 W.R. (Cr.) 36. Abuse of the power conferred by this section is punishable under S. 220, I.P.C. and S. 29 of the Police Act V of 1861. Authority to arrest implies authority to detain. Ratanlal 220. A police officer is not warranted in detaining a person pending instructions from his superior officer as to whether he should take cognisance. 24 W.R. (Cr.) 51.

51. Whenever a person is arrested by a police-officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail, but the person arrested cannot furnish bail, and whenever a person is arrested without warrant, or by a private person under a warrant, and cannot legally be admitted to bail, or is unable to furnish bail,

Search of arrested persons.

the officer making the arrest or, when the arrest is made by a private person, the police-officer to whom he makes over the person arrested, may search such person, and place in safe custody all articles, other than necessary wearing apparel, found upon him.

Under this section a private person making an arrest is not entitled to make any search. He is to make over the person arrested without delay to a police-officer who may search such person. Under S. 523, *infra* the seizure of property shall be forthwith reported to the Magistrate and S. 53, *infra*, provides for the custody of offensive weapons taken from the arrested person.

52. Whenever it is necessary to cause a woman to be searched, the search shall be made by another woman, with strict regard to decency.

Mode of searching women.

The word 'decency' was substituted for the words 'habits and customs of the country' which occurred in the 1872 Code.

53. The officer or other person making any arrest under this Code may take from the person arrested any offensive weapons which he has about his person, and shall deliver all weapons so taken to the Court or officer before which or whom the officer or person making the arrest is required by this Code to produce the person arrested.

Power to seize offensive weapons.

ANY OFFENSIVE WEAPONS.—Such as swords, daggers, rifles, guns, clubs or the like.

B.—Arrest without Warrant.

When police may
arrest without war-
rant.

54. (1) Any police-officer may, without an order from a Magistrate and without a warrant, arrest—

first, any person who has been concerned in 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 been so concerned ;

secondly, any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking ;

thirdly, any person who has been proclaimed as an offender either under this Code or by order of the Local Government ;

fourthly, any person in whose possession anything is found which may reasonably be suspected to be stolen property *and* who may reasonably be suspected of having committed an offence with reference to such thing ;

fifthly, any person who obstructs a police-officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody ;

sixthly, any person reasonably suspected of being a deserter from Her Majesty's Army or Navy or of belonging to Her Majesty's Indian Marine Service and being illegally absent from that service ;

seventhly, any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of British India, which, if committed in British India, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in British India ;

eighthly, any released convict committing a breach of any rule made under section 565, sub-section (3) ; and

ninthly, any person for whose arrest a requisition has been received from another police-officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

(2) This section applies also to the police in the town of Calcutta .

AMENDMENT.—Cl. (9) is new.

POLICE-OFFICER.—In 35 C. 381 it was held that a *Duffadar* under Bengal Act VI of 1870 is not a police-officer. A *Choukidar* in the N.W.P. is not a member of the police force, and cannot arrest under this section. 14 A.L.J. 789; 3 A. 60; 2 C.W.N. 637. But a police constable deputed by his superior officer to be on the look out for one against whom a warrant has been issued was held to be a police officer within this section. 38 A. 6. See also 40 M. 1028. The police of an adjoining Native State cannot lawfully arrest a person suspected of having committed an offence in a Native State, in British territory, 29 A. 377.

MAY ARREST.—Where a police officer arrests and tells the person arrested expressly that he is doing so under a particular authority which he claims to arrest him and such arrest is resisted, it will be for the prosecution on a charge for resistance to establish that the police-officer had power to act under the authority he claimed to have and not under some other provision of law to arrest. 47 M. 442. The question whether the officer who effected the arrest was acting within or beyond his powers in making the arrest does not affect the question whether the accused was guilty or not guilty of the offence with which he was charged, 28 M. 124. Illegality of arrest does not vitiate extradition proceedings provided further action was gone thoroughly, 39 C. 164. A police constable not in police uniform has authority to arrest a person suspected of having committed a cognizable offence without a warrant. 21 A.L.J. 791—25 Cr. L.J. 652. A police constable, who knew a warrant of arrest had been issued against the accused, and who was asked by his Inspector to look out for him, may arrest even though he has no warrant with him, 40 M. 1028. If a Court is competent to try case, it does not in the least matter how the accused came before the Court, whether he was legally or illegally arrested, 31 C. 557; 35 B. 225; 26 M. 124.

REASONABLE COMPLAINT OR SUSPICION.—What is a reasonable complaint or suspicion must depend on the circumstances of each particular case, but it must at least be founded on some definite fact, tending to throw suspicion on the person arrested and not on a mere surmise or information. A general definition of what constitutes reasonableness in a complaint or suspicion or credibility of information cannot be given, but must depend upon the existence of some tangible proof within the cognizance of the arresting officer and he must judge whether it is sufficient to establish the reasonableness or credibility of the charge, information or suspicion, 52 C. 319. The complaint referred to in this section need not be made to the police constable himself who arrests the person. But it is sufficient if it was made to a Magistrate who issues a warrant of arrest. In such a case there is a reasonable complaint of the accused being concerned in a cognizable offence, and the arrest by the constable without a warrant is justified under this section, 21 A.L.J. 791—22 Cr. L.J. 758—64 Ind. Cas. 278. Still less have the police any power to arrest the persons as they appear sometimes to do merely on the chance of something being hereafter proved against them on a complaint being made—*per Markby, J.* in 7 W.R. (Cr.) 3 at 8. See also 12 B. 377 as to what is reasonable suspicion,

CREDIBLE INFORMATION.—As to what is credible information, see 36 A. 6. Where a constable who knowing the existence of the warrant of arrest against a person for the offence of cheating, tried to arrest him, was held to have reasonable suspicion and credible information within this clause. Reasonable suspicion and credible information must be based upon definite facts which the police-officer must consider for himself before he acts under the section. 43 C. 78. Omission to notify substance of the order for arrest to the person arrested is an irregularity cured by S. 537, *infra*. 18 Cr. L.J. 666—40 Ind. Cas. 314.

CLAUSE (2).—Proclamation under the Code is one made under S. 87, *infra*.

CLAUSE (3).—**STOLEN PROPERTY.**—For definition of stolen property see S. 410, I.P.C. Possession of stolen property must be recent and exclusive, 8 W.R. (Cr.) 23. This clause refers only to property reasonably suspected to have been stolen and not to anything which the police may choose to imagine to have been stolen, 10 W.R. (Cr.) 20. See Ss. 523 to 525 *infra* as to the procedure to be followed when stolen goods are found.

CLAUSE (5).—OBSTRUCTS.—The word "obstruction" is not defined in the Indian Penal Code. In ordinary language it means impeding the progress of anything but *Es*, 186, 224 and 225 make obstruction penal. A person who obstructs a police officer trying to seize property which he believes to be stolen may be arrested under this section, 12 *B* 377.

ESCAPE FROM LAWFUL CUSTODY.—This section permits an arrest upon reasonable suspicion of the commission of an offence, and therefore the custody is none the less legal because it is not followed by conviction or trial on the merits, 1895 *A.W.N.* 151. See also 28 *C*, 252; 21 *C*. 327; 29 *A*. 377; 19 *M* 310; 11 *M*, 441 and 480. A detention by a village head-man for an offence is lawful custody, 17 *M*. 103.

CLAUSE (6).—See *S*. 549 which enables the Governor-General in Council to make rules as to cases in which persons subject to military law shall be tried by a Court to which the Code applies or by a Court-martial, and the procedure to be adopted by a Magistrate in such cases.

CLAUSE (7).—To satisfy the requirements of this clause two conditions must be present first, that the person to be arrested has been concerned in any act committed at any place out of British India which if committed in British India would have been punishable as an offence, or against the person a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in such act; and second, that the person is liable for such act to be apprehended or detained in custody in British India under any law relating to extradition or under the Fugitive Offenders' Act 1881 or otherwise. The first of these requisites contemplates either the proof of a fact, *viz.*, the fact that the person having been concerned in the act, or a reasonable complaint, or credible information or a reasonable suspicion of his having been concerned therein. The wording of this part of the clause is very similar to that of cl. (1) of the section. Under that clause it has been held (45 *C*. 76) that that section gives a police officer personal authority and involves personal responsibility and the reasonable suspicion and credible information must be based upon definite facts which the police officer must consider for himself before he acts under this section and that he cannot delegate his discretion or take shelter under the belief or judgment of another police-officer. The wording of the clause clearly indicates that the arresting officer has to exercise his own judgment and to form his own opinion as to whether he should or should not act and to enable him to do so he must have the necessary facts before him. What is a reasonable complaint or suspicion must depend on the circumstances of each particular case but it must be at least founded on some definite fact tending to throw suspicion on the person arrested and not a mere vague surmise or information. A general definition of what constitutes reasonableness in a complaint or suspicion or credibility of an information cannot be given but must depend upon the existence of some tangible proof within the cognizance of the arresting police-officer, and he must judge whether it is sufficient to establish the reasonableness or credibility of the charge, information or suspicion. The second requisite is that there must be a present liability for apprehension or detention and not a future possible liability for apprehension or detention. The issue of some sort of process under the law would create such a liability though the process may not have been allowed and is not available for execution. These conditions being made out and an arrest being validly and lawfully made, the police must forthwith produce a person arrested before a Magistrate, 52 *C*. 319. *S*. 53 authorises a police-officer to pursue any person to be arrested into any place in British India. He cannot pursue an offender into any place outside British India, say a Native State, and arrest him there. 25 *C*. 20 (*P.C.*); 1 *Lah*. 406. This clause authorises the arrest in British India of a British subject committing outside British India criminal breach of trust or any one of the offences mentioned in the schedule to the Extradition Act of 1903, thus superseding the decision in 19 *B*. 72. The police in British India can now arrest fugitives from Native States without a warrant under this clause. 7 *Bom. L.R.* 453.

CLAUSE (8).—This clause refers to rules made by Local Governments relating to notification of residence by a released convict under *S*. 565, *infra* and any released convict committing a breach of the rule may be arrested.

CLAUSE (9).—This clause has been newly added to provide for cases when one police-officer has to act on the requisition issued by another police-officer restricting the responsibility of

the arresting police-officer to the conditions mentioned in this clause. In cases however where the clause "firstly" applies, the responsibility is that of the arresting officer himself and the principle laid down in (34 C. 76) still holds good. This new clause does not affect the provisions of "seventhly", 52 C. 319.

Arrest of vaga-
bonds, habitual rob-
bers, etc.

55. (1) Any officer in charge of a police-station may, in like manner, arrest or cause to be arrested—

(a) any person found taking precautions to conceal his presence within the limits of such station, under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence; or

(b) any person within the limits of such station who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself; or

(c) any person who is by repute an habitual robber, house-breaker or thief, or an habitual receiver of stolen property knowing it to be stolen, or who by repute habitually commits extortion or in order to the committing of extortion habitually puts or attempts to put persons in fear of injury.

(2) This section applies also to the police in the town of Calcutta.

SCOPE OF THE SECTION.—This section is independent of Chapter VIII, although proceedings under Chap. VIII may follow such an arrest as a natural consequence. Therefore a police-officer under this section may arrest without an order from a Magistrate any person against whom proceedings under S. 131 are contemplated, 35 A. 407 at 408. Where certain persons were arrested on suspicion of having been concerned in a dacoity and committed to jail on the Magistrate's warrants, and before the formal conclusion of the investigation by police-offices reported to the Magistrate that there was no sufficient evidence as to their participation in the dacoity, but the Magistrate directed them to be detained in jail pending police inquiry as to their liability to be proceeded against under S. 110 and information was laid before the Magistrate some time afterwards, and an order under S. 112 passed, it was held that the detention was illegal unless and until they were re-arrested by the police under this section, 43 A. 185; 41 A. 483; 1883 A.W.N. 212. Compare the provisions of this section with S. 109, *infra* and see the notes thereunder; See also 14 Cr. L.J. 618.

OFFICER IN CHARGE OF POLICE-STATION.—See for definition S. 4 (p), *supra*, and also S. 550, *infra*, which includes officers of higher rank also in this expression. It is not any police officer who is empowered to arrest under this section. Officers in charge of police-stations are armed with exceptional powers under this section for the purpose of restraining bad characters. They provide very strong remedies and should never be put in force either by the officer in charge of a police-station, or the Magistrate of the district without the greatest deliberation, and except upon evidence which convinces the Magistrate that in the interests of public welfare it is absolutely necessary to demand from the person before him security to be of good behaviour. Comparing this section with S. 112, *infra*, and the following sections, there is little doubt that this section was intended for suppression of habitual bad characters whom an officer in charge of a police-station suddenly finds within his circle, or about whom he has good cause to fear that they will commit serious harm before there is time to apply to the nearest Magistrate, 15 A. 45 at 46. It is intolerable that the police should pursue the investigation of crime by defying all the provisions of law for the protection of the

liberty of the subject under the colourable pretension that no actual arrest has been made, when, to all intents and purposes a person has been in their custody. Such a procedure is illegal and is a gross and unwarranted breach of the powers entrusted to the police officers. 1888 A.W.N. 83 (F.B.) at 59. This section does not empower the police to arrest a person on suspicion of unlawful gaming. 3 Cr. L.J. 26 ; 25 Cr. L.J. 553.

IN LIKE MANNER.—These words refer to the previous section which applies to certain specified cases and mean without a warrant and order from a Magistrate.

SUB-SECTION (2).—The police in Calcutta are empowered to act under this section. 31 C. 557.

56. (1) When any officer in charge of a police-station or any police-officer making an investigation under Chapter XIV requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence) any person who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and the offence or other cause for which the arrest is to be made.

Procedure when
police-officer deposes
subordinate to
arrest without
warrant.

The officer so required shall, before making the arrest, notify to the person to be arrested the substance of the order and, if so required by such person, shall show him the order.

(2) This section applies also to the police in the town of Calcutta.

AMENDMENT.—By the addition of the words "any police-officer making investigation," etc., power is given also to investigating officer to depute a subordinate to effect an arrest. The last portion of sub-section (1) is newly added.

AN ORDER IN WRITING.—An order in writing is an authority to a subordinate police-officer to make an arrest, which the superior officer, if present, would himself make on his own responsibility. The issue of an order under this section does not limit the power of the officer under S. 54 *supra*, 3 Patna 533. S. 80, *infra* only applies to execution of warrants and not to an order in writing under this section, and so the officer making the arrest is not bound to show the authority under which he is acting though it may be desirable to do so, 27 C. 320, but the last portion of sub-section (1) newly introduced provides a real safeguard against abuse of powers by the Police. See 25 Cr. L.J. 563. No order in writing is necessary if the offence is a cognizable one. S. 54, *supra* empowers any police-officer to arrest on his own responsibility. Where a head-constable verbally ordered a constable to arrest one suspected of dacoity which the constable did in the presence of his superior, it was held that the arrest was legal, as dacoity is an offence for which any police-officer may arrest without a warrant and the arrest was virtually made by the head constable, 11 W.R. (Cr.) 20. It is perfectly competent to the officer in charge of the *thana*, if he had felt so disposed to have issued to any constable subordinate to him an order in writing under this section for arresting a person. The Magistrate having issued his warrant for arrest of the person, did not exclude the jurisdiction of the officer in charge of the *thana* and prevent him from issuing his written order under this section; but it might be different if the Magistrate had decided to issue a summons only. Mere writing of the names of any of the constables on the back of the copy of the warrant and the signing of that endorsement by the police-officer did not constitute the copy of the warrant "an order in writing" with the meaning of this section; but if the officer writes on the copy of the warrant "Arrest D, the person within named for the offence within named" and had put the names of the constables on the copy of the warrant and had signed such endorsement, he would have made an order in writing within the meaning of this section. 18 A. 245 at 248-49. See also Ss. 55, 92 '107 (3) and 114, *infra*. A *chaukidar*

arresting under an order given by an S. H. O. is not bound to show the order unless asked to produce it. 28 Cr. L.J. 795—86 Ind. Cas. 427.

OR OTHER CAUSE.—As to other causes for which action can be taken. See Ss. 55, 92, 107 (3) and 114. *infra*.

57. (1) When any person who in the presence of a police-officer has committed or has been accused of committing a non-cognizable offence refuses, on demand of such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained.

(2) When the true name and residence of such person have been ascertained, he shall be released on his executing a bond, with or without sureties, to appear before a Magistrate if so required :

Provided that, if such person is not resident in British India, the bond shall be secured by a surety or sureties resident in British India.

(3) Should the true name and residence of such person not be ascertained within twenty-four hours from the time of arrest or should he fail to execute the bond, or, if so required, to furnish sufficient sureties, he shall forthwith be forwarded to the nearest Magistrate having jurisdiction.

REFUSES ON DEMAND TO GIVE NAME AND RESIDENCE.—This is the only instance in which a police-officer is empowered to make an inquiry in a non-cognizable case, and the scope of such inquiry is limited as laid down by this section. See S. 153, *infra* as to procedure on receiving information in non-cognizable cases. See 5 Bom. L.R. 597 where the action of a constable who arrested one who was quarrelling on the public road and detained him till his name and address were ascertained was justified under this section. A person who was tried and acquitted of dacoity was re-arrested by the police under S. 55 and detained in custody for 12 days on the pretext that they did not know his true name and residence, *held* that he should have been released on his executing a bond under this section. For a police-officer or a Magistrate to detain an accused person when orders have been passed by the Sessions Judge for his immediate release is a most grave irregularity and might expose the Magistrate and a police-officer to very serious results, 41 A. 483.

SUB SECTION (2).—A police-officer other than an officer in charge of a police station may release a person on his executing a bond for appearance before a Magistrate. This and S. 59 (3) are the only two instances where an inferior police-officer is empowered to release a person arrested. S. 60, *infra* provides that in any other case he is bound to send the arrested person to a station-house officer or to a Magistrate without unnecessary delay.

58. A police-officer may, for the purpose of arresting without warrant any person whom he is authorised to arrest under this Chapter, pursue such person into any place in British India.

Arrest by a police-officer in a Native State of a person charged with an offence committed in British India is illegal, as he is only entitled to pursue and arrest in any place in British India, 25 C. 20 (P.C.) ; 1 Lah. 426.

As to arrest without a warrant see Ss. 54 and 55, *supra*. For definition of British India, see notes to S. 1 where S. 3 (7) of the General Clauses Act is set forth.

59. (1) *Any private person may arrest any person who in his view commits a non-bailable and cognizable offence, or any proclaimed offender, and, without unnecessary delay, shall make 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.*

(2) If there is reason to believe that such person comes under the provisions of section 54, a police-officer shall re-arrest him.

(3) If there is reason to believe that he has committed a non-cognizable offence, and he refuses on the demand of a police-officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of section 57. If there is no sufficient reason to believe that he has committed any offence, he shall be at once released.

AMENDMENT.—Sub-section (1) is redrafted, the chief alteration is “cause him to be taken.” It is not now obligatory for the person arresting to take the person himself to the police-station. Any private person may arrest.

SCOPE OF THE SECTION.—It is not obligatory on a private person to make an arrest under this section. Under the Common Law of England, a private citizen has a right to arrest any person who is about to commit a breach of the peace, a power every essential to the orderly government of society and preservation of the peace. In 44 M. 913, following this common law principle it was held that a private citizen (village headman) had the right to arrest a drunken and disorderly person when there was a reasonable apprehension that he would commit a breach of the peace and be danger to villagers as such power of arrest is very essential to the orderly government of society and the preservation of the peace. But the Full Bench decision in 46 M. 808 held that the power of arrest was not by virtue of the Rule of English Common Law but by reason of the provisions of ss. 81, 95 to 105, I.P.C., and the person cannot plead and invoke the aid of the Common Law of England as a defence when charged for illegal arrest. The decision in 44 M. 913 was affirmed not on the grounds of the applicability of the English Common law on which the decision was based, but on the provisions of the Indian Penal Code relating to private defence. The Common Law of England relating to arrest by private individuals does not run in India. The general law on the subject is to be found in this section. This section is not happily worded but the intention of the Legislature appears to have been to restrict the right of arrest by private persons to cases in which a cognizable and non-bailable offence has been committed in the presence of the person who arrests or causes the arrest of the offender. It is not necessary that the person should himself physically arrest the offender. He may cause such offender to be arrested by another. 52 C. 615 at 618-19 where 11 M. 480 is followed and 35 C. 361 is dissented from.

IN HIS VIEW COMMITS A NON-BAILABLE AND COGNIZABLE OFFENCE.—Private persons are not empowered to arrest in cases which involve suspicion. In 35 C. 361 it was held that when a theft had been completed before a *Duffadar* came up, and the offence of theft not being a continuing offence, he had no power to arrest the thief who was carrying the stolen property. This case is dissented in 52 C. 615. See 27 C. 366; 23 Cr. L.J. 32=64 Ind. Cas. 371. The words “in his view” mean in the

presence of "or within the sight of" and the section provides that if an offence is committed in the presence of or within the sight of such person, any private person, when such person is entitled to arrest the offender if the offence is non-bailable and cognizable. To construe the words as meaning "in his opinion" is unwarranted. The Legislature did not intend to give a private person authority to arrest an offender if upon information received or from other circumstances appearing before him he is of opinion, that an offence has been committed. Consequently the person arrested by a private individual cannot be said to be in lawful custody, if no offence has been committed in the presence of the person arresting and within his sight, but was found hiding himself inside a house, 26 Cr. L.J. 1462—89 Ind. Cas. 1030. One should not put too strained a construction on the words 'in his view.' Where out of three persons who went out to commit theft of toddy from a tree two went up the trees to bring the toddy and the third man was standing at the foot of the tree collecting the toddy in a pot which he had in his hands with a view to carry it away his arrest with toddy in his hands as a thief committing theft in his view was legally justified, 18 L. W. 818—23 Cr. L. J. 792—81 Ind. Cas. 812, where 35 C. 381 and 23 Cr. L.J. 32—84 Ind. Cas. 371 are distinguished.

TAKE SUCH PERSON OR CAUSE HIM TO BE TAKEN.—The words "cause him to be taken" are new, and it is not obligatory on the private citizen to take the arrested person himself to the nearest police station. It is in accordance with the rulings in, 11 M. 480; 23 A. 268; 29 A. 575.

MAKE OVER PERSON SO ARRESTED TO A POLICE-OFFICER.—Where a private person *bona fide* makes an arrest under this section but instead of taking him to the nearest police-station takes him to a Magistrate he is protected from a charge of wrongful confinement, 5 Pat. L.J. 129. The provisions of this section are not complied with, if the arrested person is made over to a *Choukidar* to be taken to a police-station as the *Choukidar* is not a police-officer under this section and escape from his custody is not punishable. 41 C. 17; see 27 C. 366; but escape from the custody of a servant of the person who arrested while on his way to the nearest police-station was held punishable. 11 M. 480. See also the new amendment, Rescue from the custody of a private person who arrested a thief while in the act of stealing punishable under S. 225, I.P.C., 11 M. 441 and 480; see also 17 M. 103; 5 M. 22 and 29 A. 575.

WITHOUT UNNECESSARY DELAY.—As a general rule the person arrested should be taken directly to the Magistrate and nothing that is avoidable will justify the non-compliance of this rule. Twenty-four hours mentioned in S. 61 *infra* is the maximum period of detention. A police-officer has not at all events the power to detain an arrested person for more than 24 hours. A police-officer should in no case detain an arrested person for a single hour except on reasonable grounds justified by the circumstances. Ratanlal 22; 6 W.R. (Cr.) 83; 7 W.R. (Cr.) 3; 19 W.R. (Cr.) 36.

60. A police-officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, to take or send the person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police-station.

Person arrested to be taken before Magistrate or officer in charge of police-station.

SCOPE OF THE SECTION.—A police-officer arresting a person should not keep him in a place of confinement selected by him, but should send him immediately to the police-station, and thus place the arrested person in the custody of the officer in charge of the station who is the person entrusted by the Act in the conduct of the inquiry. 7 W.R. (Cr.) 3. He has no authority to detain the arrested person for 24 hours under S.61 *infra*, Ratanlal 22.

PROVISIONS HEREIN CONTAINED AS TO BAIL.—See Ss. 63, 169, 170 (1), 496 and 497 *infra* which provide for the taking of bail. When the police arrest a person under S. 55 *supra* they are bound to give the person arrested the option of bail and that bail shall

be, as the Code requires not excessive and in accordance with the position in life occupied by him.....To deprive any person of his liberty is a most serious step to take and it is hardly too much to say that every step in the process should show extreme deliberation and care and if a person has to be arrested previous to inquiry he should be given the option of release upon proper bail. 14 A. 45 at 47 ; 82 C. 615.

61. No police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

Person arrested not to be detained more than twenty-four hours.

SCOPE OF THE SECTION.—This section applies only to the case of *arrest without a warrant*, and S. 81 *infra* provides for the case of *arrest under a warrant*. The intention of the Legislature having regard to this section and S. 167 *infra*, and to the requirement of justice generally, is that an accused should be brought before a Magistrate competent to try or commit, with as little delay as possible, 11 M. 98. This section does not apply to the Police in Calcutta, 44 C.L.J. 134, though the improper exercise of such power may be corrected by the High Court under S. 491 *infra*. See also 44 C.L.J. 136 (F.B.)

CUSTODY.—The retaining of a person in a particular place or compelling him to go in a particular direction by force of an exterior will over-powering or suppressing in a way his own voluntary action is an imprisonment on the part of the person exercising that exterior will. 2 M.H.C.R. 396 ; see also 7 W.R. (Cr.) 3 ; 4 Bom. L.R. 79.

CUSTODY NOT TO EXCEED 24 HOURS.—This section provides that the accused must not be kept in custody for more than 24 hours, but the law cannot mean that the number of hours an accused person is detained at a *thana* is to be added irrespective of the circumstances. There must be a continuous detention of 24 hours to bring the parties within the scope of this section, 1 W.R. (Cr.) 5. "Even if a person be rightly arrested it does not rest with the discretion of the police-officer to keep the prisoner in custody where and as long as he pleases. Under no circumstances can he be detained without the special order of a Magistrate for more than 24 hours. At the expiration of 24 hours, unless the special order has been obtained, the prisoner must either be discharged or sent on to the Magistrate, and any longer detention is absolutely unlawful ; and though the Code is not so express upon the place as the time of confinement, still, we think it is perfectly clear that it was intended that, where a police-officer arrested any person, the prisoner should not be kept in confinement in any place which the subordinate officer might select but that he should, if possible, be sent immediately to the police-station and be placed in the custody of the officer in charge of the station, who is the person entrusted by the Act with the conduct of the inquiry." 7 W.R. (Cr.) 3 at 6 ; see also 6 W.R. (Cr.) 88 at 89 ; Ratanlal 22 ; 19 W.R. (Cr.) 36. The 24 hours detention and the additional time necessary to bring the accused before a Magistrate allowed by this section and the 15 days additional detention allowed under S. 167 *infra*, having expired an accused person must either be released by the police under the provisions of S. 109 *infra* security being taken for his appearance before a Magistrate, if and when required of the accused, must, under the provisions of S. 170 *infra*, forwarded under custody to a Magistrate who is empowered to take cognizance of the offence upon a police report. The law as laid down in the sections of the Code seems to be this, that on the expiration of the maximum period of 15 days detention and the additional time necessary to bring him before the Magistrate under this section and S. 167 *infra*, an accused must be released by the police under S. 169, security for appearance being taken, the Magistrate empowered must either take cognizance, if he has a police report before him under S. 173 *infra* which makes out a *prima facie* case or he must release him. 28 C.W.N. 490 at 492. The intention of the

Legislature is that an accused person should be brought before a Magistrate competent to try or to commit with as little delay as possible. 51 C. 402.

EXCLUDING TIME NECESSARY FOR JOURNEY.—The twenty-four hours specified herein are to be counted up to the time the arrested person leaves the police station to the Magistrate's Court. The time occupied by the journey is not to be counted in the period but it is the duty of the Magistrate to see that the time so occupied is reasonable having regard to the distance to be traversed and other local considerations. Ratanlal 22.

SPECIAL ORDER OF A MAGISTRATE UNDER S. 167.—S. 167 *infra* fixes 15 days in the whole as the extreme period for which a Magistrate can authorize detention in police custody during investigation. The special order under S. 197 is different from an order of adjournment and remand under S. 844 or S. 247. *infra*, S. 844 *infra* also declares that the term of police custody is not to exceed 15 days at a time. A Magistrate authorising detention in police custody under S. 167, *infra* should record his reasons for doing so. He can make an order only when the accused is produced before him. 5 B.L.R. 274; 13 W.R. (Cr.) 27; see also *Weir II*, 409.

62. Officers in charge of police stations shall report to the District Magistrate, or, if he so directs, to the Sub-divisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

Police to report apprehensions.

SCOPE OF THE SECTION.—This section is enacted with the object of prompt exercise of judicial authority with regard to arrests by the police and see that no one is kept unnecessarily in custody and it is the duty of the District Magistrate to examine carefully the reports of arrests made under this section by the Police, Ratanlal 254.

OR OTHERWISE.—These words mean released under sub-S. (3) of S. 59, *supra*.

63. No person who has been arrested by a police-officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate.

Discharge of person apprehended.

DISCHARGED ON HIS OWN BOND OR ON BAIL.—See Ss. 57, 59, 169, 170, 496 and 497 as to discharge on bond or bail.

UNDER SPECIAL ORDER OF A MAGISTRATE.—Compare the language of S. 61, *supra*; the special order contemplated is one under S. 167, *infra*.

64. When any offence is committed in the presence of a Magistrate within the local limits of his jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail, commit the offender to custody.

Offence committed in Magistrate's presence.

This section is clearly not intended to trench upon the great principle embodied in S. 556, *infra*, and therefore the Magistrate is disqualified from exercising his judicial function in relation to the offence committed in his presence, Ratanlal 339. See Ss. 496 and 497 as to bail.

65. Any Magistrate may at any time arrest or direct the arrest in his presence, within the local limits of his jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.

Arrest by or in presence of Magistrate.

MAGISTRATE MAY ARREST OR DIRECT THE ARREST IN HIS PRESENCE.—

When the Legislature empowers an officer to delegate an authority to do certain act to another person, it necessarily implies that the original authority to do such act is fully and completely in the officer himself but that it is necessary for the exigencies of business that it should be done in the majority of cases by persons acting under authority derived from him. This principle is adopted by the Legislature in Ss. 65 and 105 of the Code. S. 65 authorises a Magistrate to make an arrest himself, or direct an arrest in his presence in cases in which he is competent at the time and in the circumstances to issue a warrant and S. 105 provides similarly for a search by him or in his presence. 31 B. 338 at 345.

Acting under this section and S. 190 *infra* in respect of a complaint under S. 448, I.P.C., a Magistrate went and arrested a person hiding in a temple without making any final order on the occurrence report he had received previously, it was held that independently of the occurrence report the Magistrate's action was justified, and no action will lie against him for damages. 52 Ind. Cas, 609.

66. If a person in lawful custody escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in British India.

Power, on escape, to pursue and retake.

Under this section any private person who makes an arrest under S. 59, *supra* is empowered on escape of the arrested person in his custody, to pursue and retake the arrested person. The expression used is "the person from whose custody he escaped," which will certainly include a private person. Escaping, rescuing and attempts to escape or rescue are punishable under Ss. 224 and 225, I.P.C. With regard to general power of arrest see S. 55, Cl. (5) *supra* and S. 58, *supra* which authorises pursuit of offenders into other jurisdictions in British India.

67. The provisions of sections 47, 48 and 49 shall apply to arrests under section 66, although the person making any such arrest is not acting under a warrant, and is not a police-officer having authority to arrest.

Provisions of Ss. 47, 48 and 49 to apply to arrests under S. 66.

SECTIONS 47, 48 and 49.—These sections relate to search of the place entered into by the person sought to be arrested, what should be done when ingress is not obtainable and to break open doors and windows for purpose of liberation, etc.

CHAPTER VI.

OF PROCESSES TO COMPEL APPEARANCE.

A.—*Summons.*

68. (1) Every summons issued by a Court under this Code shall be in writing, in duplicate, signed and sealed by the presiding officer of such Court, or by such other officer as the High Court may, from time to time by rule, direct.

Form of summons.

(2) Such summons shall be served by a police-officer, or, subject to such rules as the Local Government may prescribe in this behalf, by an officer of the Court issuing it or other public servant.

Summons by whom served.

(3) This section applies also to the police in the towns of Calcutta and Bombay.

SCOPE OF THE SECTION.—Under this section a summons may be (a) to the accused, (b) to witness, (c) to a person to show cause against some order by a Magistrate, (d) to attend as a Juror or Assessor in a sessions trial. 1 C.W.N. cxy1. Under the 1872 Code the corresponding section related only to service of summons on the accused. The law for the service of summons in criminal cases is on the same lines as the rules for the service of summons in civil cases, 53 Ind. Cas. 720. As to form of summons to an accused, see Sch. V, Form Nos. 1 and 12; to witnesses, see Form No. 31; to Juror or Assessor, see Form No. 33. Summons should be clear and specific as to the court at which, the day and time of the day when the attendance of the person summoned is required, 7 M.H.C.R. Appx. 14 and 43; 5 A. 7. An accused person summoned must wait a reasonable time if he finds the Magistrate absent, 10 B. 93. So also a witness, 14 W.R. (Cr.) 30. It is not an offence to disobey a summons directing a person to appear at a place outside British India, 16 M. 465. There is no provision in the Code for the issue by a Magistrate either of summons or warrant requiring a person to appear before a police-officer, 24 C. 320.

EVERY SUMMONS SHALL BE IN WRITING.—But there is nothing illegal in a Magistrate verbally directing a person who appears on the first day to appear on a subsequent day, Welr I. 87. Expressions referring to writing include reference to printing, lithography, photography, and other mode of representing or reproducing words in a visible form, S. 3 (58) of the General Clauses Act X of 1897.

EVERY SUMMONS SHALL BE SIGNED.—When the formalities are not strictly complied with, a conviction for disobedience of summons under S. 174, I.P.C., cannot stand. 5 A. 7; 20 M. 34; 11 C. 111. See 23 C. 886 where a warrant not signed but merely initialled was held invalid.

EVERY SUMMONS SHALL BE SEALED.—A summons which is not sealed as required by this section is illegal and prosecution for disobeying such void summons is not sustainable. 37 M.L.J. 588—7 L.W. 754 where 42 C. 708 is referred to. See also Welr I, 89; 21 Cr. L.J. 800.

69. (1) The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons.

Signature of receipt for summons.

(2) Every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

(3) Service of a summons on an incorporated company or other body corporate may be effected by serving it 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 British India. In such case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.

SHALL BE SERVED PERSONALLY.—The mere showing to a witness of a summons is not sufficient service. Either the original should be left with him or should be exhibited to him and a copy of the summons delivered or tendered to the witness. 5 B.H.C.R. (Cr. Ca.) 20. Mere tendering of summons amounts to sufficient service if the person to be served

refuses to take the summons, 1886 A.W.N. 93; 28 M.L.J. 505 at 508. A process-server has no right to enter a house to serve summons without the owner's permission, 28 M.L.J. 505.

SHALL SIGN A RECEIPT.—Mere refusal to sign a receipt is not an offence under S. 173 or 180, I.P.C.; 20 C. 358; 3 C. 621; 5 B.H.C.R. (Cr. Ca.) 34; 6 A.L.J. 777; 5 M. 199; Weir I 80; 1 Rang. 47. Service of a summons on the pleader of a party is not sufficient service, 6 C.W.N. 927.

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

Service when person summoned cannot be found.

SCOPE OF THE SECTION.—This section is analogous to O. V, r. 15, C.P.C.; service on adult member of the family is considered sufficient. Unlike the provision of the C.P.C. in the presidency-town, service on a servant residing with the person sought to be served is sufficient.

PERSON SUMMONED CANNOT BE FOUND.—See the next section as to procedure when service cannot by the exercise of due diligence be effected, "not finding a man in his house when summons is taken is not attempt to find him, 1882 A.W.N. 170; 19 C. 201; 26 C. 101; 21 M. 419 and 324.

71. If service in the manner mentioned in sections 69 and 70 cannot by the exercise of due diligence be effected, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides; and thereupon the summons shall be deemed to have been duly served.

Procedure when service cannot be effected as before provided.

SCOPE OF THE SECTION.—It is plain that the procedure which is provided by this section cannot be made use of unless service in the manner mentioned in Ss. 69 and 70 *supra* cannot be effected by the exercise of due diligence. The return of the peon should show that first service could not be effected personally on the person summoned by delivering or tendering him one of the duplicates as provided by S. 69 and then it must be shown that service could not be effected by leaving one of the duplicates with some adult male member of the family of the person summoned and if these modes fail then only service by affixure should be resorted to under this section. 53 C.L.J. 113 at 115=27 Cr. L.J. 715=94 Ind. Cas. 907. It is only when reasonable grounds exist for believing that the person summoned is keeping out of the way to avoid service or that for other reasons it cannot be served in the ordinary way that substituted service should be ordered, 29 M. 324. The law as to service of summons in criminal cases is on the same lines as the rules for service of summons in civil cases, 53 Ind. Cas. 720. This section corresponds to O. V, r. 17 of the C.P.C. The provisions of this section should be resorted to when service in the manner mentioned in the last two preceding sections cannot be effected after due diligence. Then only, what is termed "substituted service" can be resorted to by affixing one of the duplicates to some conspicuous part of the house or homestead in which the person summoned ordinarily resides, and thereupon the summons shall be deemed to be duly served. See 23 Cr. L.J. 732=69 Ind. Cas. 627.

This section is confined to summons issued by a Court of Justice, and not to orders made by police-officers investigating a crime, 18 Cr. L.J. 733=40 Ind. Cas. 733=10 Cr. L. Rev. 1. See S. 90 as to procedure to be adopted if the person summoned fails to appear.

SHALL AFFIX ONE OF THE DUPLICATE OF SUMMONS TO CONSPICUOUS PART OF HOUSE.—The affixture is to be only done after proper attempts have been made to find out the person summoned; going to a man's house and not finding him there, is not attempting to find him. But the process-server should go to the house, make inquiries and if necessary follow him. Enquiry should be made to find out when he is likely to be at home, and go to the house at that time when he can be found. It must be shown that proper efforts have been made to find out when and where the man is likely to be found—not as seems to be done, in this country, to go to his house in a perfunctory way, and because he has not been found there; to affix a copy of the summons to the outer door of his house. 19 C. 204; 21 M 419. If information obtained by the serving officer leads him to think that the person summoned will only be absent for a short time, he should wait and effect service personally. 29 M. 324.

72. (1) Where the person summoned is in the active service of the Government or of a Railway company, the Court issuing the summons shall ordinarily send it in duplicate to the head of the office in which such person is employed; and such head shall thereupon cause the summons to be served in manner provided by section 69, and shall return it to the Court under his signature with the endorsement required by that section.

Service on servant of Government or of Railway Company.

(2) Such signature shall be evidence of due service.

The words '*under his signature*' occurring in sub-section (1) and sub-section (2) were added in the 1899 Code. The return should now therefore contain the signature of the head of the office where the person summoned is employed, in addition to the signature of the person summoned, and such signature shall be evidence of due service.

73. When a Court desires that a summons issued by it shall be served at any place outside the local limits of its jurisdiction, it shall ordinarily send such summons in duplicate to a Magistrate within the local limits of whose jurisdiction the person summoned resides or is, to be there served.

Service of summons outside local limits.

OUTSIDE THE LIMITS OF ITS JURISDICTION.—The procedure prescribed by this section, viz., to send the summons in duplicate to the Magistrate within whose jurisdiction the person summoned resides is to be adopted to serve summons at any place outside the limit of the Magistrate's jurisdiction. For example service on witnesses resident in the Presidency Towns is to be effected through the Chief Presidency Magistrate not through the Commissioner of Police.

74. (1) When a summons issued by a Court is served outside the local limits of its jurisdiction, and in any case where the officer who has served a summons is not present at the hearing of the case, an affidavit, purporting to be made before a Magistrate, that such summons

Proof of service in such cases and when serving officer not present.

has been served, and a duplicate of the summons purporting to be endorsed (in manner provided by section 69 or section 70) by the person to whom it was delivered or tendered or with whom it was left, shall be admissible in evidence, and the statements made therein shall be deemed to be correct unless and until the contrary is proved.

(2) The affidavit mentioned in this section may be attached to the duplicate of the summons and returned to the Court.

This is the only section in the Code for use of affidavits as evidence before a Magistrate. The affidavit may be attached to the duplicate of the summons and returned to the Court as proof of service, and the production of the affidavit dispenses with the presence of the serving officer at the hearing of the case. The provisions of Ss. 526 and 539, *infra* regarding the use of affidavits are confined to the High Court.

Form of affidavit :—I, A son of B, hereby solemnly declare that I did on the day of serve son of of , with summons now shown to me and marked 'A' by delivering (tendering) a duplicate to him (or by leaving a duplicate for him with an adult male member of his family residing with him or by affixing a duplicate to a conspicuous part of his house or homestead. Taken the day of 192 place. Before me. (Sd), Magistrate.

B.—Warrant of Arrest.

There is no doubt that the law is just as jealous of personal liberty in India as it is in England and that liberty cannot lightly be taken away except under circumstances which are clearly prescribed by positive law. 13 W.R. (Cr.) 27=4 B.L.R., App 1. A Magistrate should arrest on personal knowledge *i.e.*, on sworn testimony given before him that a person has committed an offence unless and until a Magistrate has good reasons to believe that there is a real likelihood of a charge being proved, a purda lady of good position should not ordinarily be compelled to appear in Court in person.

75. (1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer, or in the case of a Bench of Magistrates, by any member of such Bench; and shall bear the seal of the Court.

Form of warrant of arrest.

(2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.

Continuance of warrant of arrest.

EVERY WARRANT OF ARREST.—Like a summons a warrant of arrest may be for attendance (a) of an accused (b) of a witness (c) of a juror or assessor (d) of a person to show cause against a Magistrate's order. Cases falling under (b) and (c) are subject to the provisions of S. 90, *infra*. A summons is always addressed to a person for his attendance but a warrant is an order to the Police to arrest a person and produce him in Court if the warrant is non-bailable and take bail for appearance if bailable. 5 W.R. (Cr.) 71; 2 C.L.J. 625. See Sob, V, Form No. 2 as to form of warrant of arrest. When any Act does not provide a form of warrant, the form to be used is the ordinary one prescribed by the Code of Criminal Procedure, 18 B. 636 at 638.

TO BE SIGNED BY THE PRESIDING OFFICER.—The affixing of a signature with a stamp and not with a pen was held to be more than a mere irregularity, 6 M. 398.

See 23 C. 896, where a warrant of arrest not signed but *initialled* by the Magistrate was held to be illegal. In 2 Patna L.J. 437, it was held that a warrant not signed is a void document, and resistance to it is no offence. A contrary view was taken in 8 A. 293. The repeal of illustration to S. 537 confirms the former view.

SHALL BEAR THE SEAL OF THE COURT.—The reason for requiring the seal of the Court is that the attaching of the seal shows that the document to which it is attached has not been issued without due deliberation, as well, of course, as to prove the authenticity of the instrument. 9 B.H.C.R. 184 at 188. A warrant of arrest issued without the seal of the Court is invalid, as under this section the seal of the Court is essential to the validity of the warrant; arrest made under such a warrant is therefore illegal. 42 C. 708; 18 B. 638. See 37 M.L.J. 588, where the principle enunciated in this ruling is adopted in the case of a summons issued under S. 68 *supra*.

SUB-SECTION (2).—A warrant once issued remains in force until it is executed. This section and S. 76 *infra* should be read together. If a warrant issued contained a direction as to bail and fixed a date as required by S. 76 (2) (c) at which the accused was to attend before the Court, the warrant itself will not lapse, the date fixed having passed. 13 C.W.N. 1091 at 1092—10 Cr. L.J. 479—4 Ind. Cas. 31. A warrant shall remain in force until it is executed *i.e.*, the warrant is exhausted when the accused is brought before the Court. 13 W.R. (Cr). 1—4 B.L.R. Appx. 1; 13 W.R. (Cr). 27—5 B.L.R. 274; 17 W.R. (Cr). 55—9 B.L.R. 354; 28 B. 129; 1 C.W.N. 650. A warrant once cancelled is at an end and cannot be reissued. 1 C.W.N. 650.

76. (1) Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court; the officer to whom the warrant is directed, shall take such security and shall release such person from custody.

Court may direct security to be taken.

(2) The endorsement shall state—

- (a) the number of sureties;
- (b) the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound; and
- (c) the time at which he is to attend before the Court.

(3) Whenever security is taken under this section, the officer to whom the warrant is directed, shall forward the bond to the Court.

FOR HIS ATTENDANCE BEFORE THE COURT.—These words have been substituted for the words "to answer the complaint," thus expressly extending the benefit of this section to witnesses as well as to accused person. Weir II. 39.

MAY IN ITS DISCRETION DIRECT.—This sub-section is permissive. 13 C.W.N. 1091—10 Cr. L.J. 479—4 Ind. Cas. 31. The discretion allowed under this section is certainly a beneficial provision of law and should be exercised freely, especially in the case of respectable citizens who would voluntarily appear to answer any charge against them and indiscriminate arrest of such persons will certainly bring the administration of justice into contempt.

TO TAKE SUCH SECURITY.—Security may be given by depositing a sum of money or Government promissory note to the amount specified, see S. 513 *infra*. S. 170 *infra* provides for taking security by a police-officer from an accused, for his appearance before a Magistrate.

whenever on investigation there appears to be reasonable grounds for suspicion or sufficient evidence that he has committed a cognizable and bailable offence.

TO ATTEND BEFORE THE COURT.—A warrant of a Magistrate must be for attendance before himself or some other Magistrate. It cannot be for attendance before a police-officer conducting an investigation. 24 C. 320. For form of endorsement, see Sch. V, Form 2.

77. (1) A warrant of arrest shall ordinarily be directed to one or more police-officers, and when issued by a Presidency Magistrate, shall always be so directed; but any other 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.

Warrants to whom directed.

(2) When a warrant is directed to more officers or persons than one, it may be executed by all, or by any one or more, of them.

Warrants to several persons.

This section is *directory* and *not mandatory*. It directs that a warrant shall ordinarily be directed to one or more police-officers. It does not say that the name and designation of the police-officer is to be inserted in it. It would certainly be extremely difficult to carry on police administration if every warrant is to be directed by name to a police-officer and upon his transfer, it were to become incapable of execution until the name of some other officer is substituted in its place. 3 Pat. L.J. 493.

WARRANT TO BE DIRECTED TO A POLICE OFFICER.—In 8 W.R. (Cr.) 74 the Calcutta High Court condemned the practice of issuing a warrant to a person other than a police-officer as a direct violation of the law. S. 79 *infra* authorizes a police-officer to whom a warrant is directed to endorse it for execution to another police-officer. But when, the Magistrate could not obtain the assistance of a police-officer, and execution of the warrant is urgently required, he can issue the same to a private person, 13 W.R. (Cr.) 27=5 B.L.R. 274.

78. (1) A District Magistrate or sub-divisional Magistrate may direct a warrant to any landholder, farmer, or manager of land within his district or sub-division for the arrest of any escaped convict, proclaimed offender or person who has been accused of a non-bailable offence, and who has eluded pursuit.

Warrant may be directed to landholders, etc.

(2) Such landholder, farmer or manager shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued, is in, or enters on, his land or farm, or the land under his charge.

(3) When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest police-officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under section 76.

PROCLAIMED OFFENDER.—See S. 87 *infra* which provides for the issue of a proclamation for the appearance of a person against whom a warrant of arrest has been issued but cannot be executed; see also S. 54, cl. (3).

79. A warrant directed to any police-officer may also be executed by any other police-officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed.

Warrant directed to police-officer.

MAY BE EXECUTED BY OTHER POLICE-OFFICER WHOSE NAME IS ENDORSED ON THE WARRANT.—The endorsement referred to therein should be regularly made by name to a certain person in order to authorize him to arrest, and when there is no endorsement by the person having authority to do so; the arrest is not legal, 4 C.W.N. 85 followed in 1918 Patna 282=19 Cr. L.J. 747. When a warrant is endorsed over to a particular officer for execution another officer who was doing temporarily the current duties during the absence of that officer cannot endorse the warrant, 27 C. 457. No person other than a police-officer is competent to execute a warrant under endorsement from a police-officer. So, arrest by process-serving peons is illegal, 27 C. 437; 18 A. 246.

80. The police-officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant.

Notification of substance of warrant.

SCOPE OF THE SECTION.—The provisions of this section should not be extended to an arrest to be made by the police on an order in writing under S. 56 *supra*, so as to require the officer to notify the substance of the order in writing to the person to be arrested. Such a course may be desirable, but to hold it to be obligatory before a person can be arrested is to extend the law beyond the limits laid down by the Legislature, 27 C. 320.

SHALL NOTIFY THE SUBSTANCE THEREOF.—The words 'shall notify the substance' are not to be taken to mean that a police-officer is to explain to the person to be arrested the reasons which prompted the order which he is carrying out. There should be no argument or altercation but the duty of the officer is only to state the substance of the order clearly and briefly and then to show a determination to carry out the order by that quiet and firm demeanour that precludes discussion. If he does not notify he is not acting in the discharge of his public function, 10 C. 18.

SHALL SHOW IT TO THE PERSON TO BE ARRESTED.—The warrant is to be shown so that the person to be arrested might read it, 27 C. 738; 25 C. 457. The person sought to be arrested is entitled to see that the person arresting has authority to do so, 10 C. 43; 13 B. 168; 23 C. 898; 26 C. 738; 18 A. 246; a police-officer should not proceed to arrest unless he has a warrant with him, 5 A. 318. See S. 46 as to how an arrest is to be made. This section requires that the substance of the warrant shall be notified to the accused, and if the accused demands it, he shall have an opportunity of reading it, so that he may know on what charge he has been arrested and before what Court he is to appear and take steps for arranging for his defence, 1918 Patna 289=3 Pat. L.J. 493. A police-officer executing a warrant of arrest shall notify its substance. The arresting officer must have the warrant of arrest in his possession when making the arrest, 27 A. 258 and the police-officer who arrests without a warrant in a non-cognizable case is liable to be dealt with under S. 342, I.P.C., but a police-officer acting *bona fide* under this section is protected, 24 C.W.R. (Cr.) 5; 19 W.R. (Cr.) 36; 6 W.R. (Cr.) 86. A warrant specially authorising a particular officer by name to arrest cannot be delegated, 10 Cr L.J. 3. Duty to notify the substance of the warrant is imperative, and failure to do so is fatal, although the police-officer showed in his hands the warrant along with several

other warrants but gave no opportunity to the person to be arrested to read the warrant, 25 C. 748 ; see also 27 C. 320 where it was held that it was obligatory on the police-officer if called upon, to show the authority under which he was acting. Resistance to a warrant which is *ultra vires*, illegal or has ceased to be in force is no offence, 10 C. 18 ; 13 B. 168 ; 24 C. 320 ; 22 C. 286 ; 28 C. 399 ; 35 A. 109.

81. The police-officer or other person executing a warrant of arrest shall (subject to the provisions of section 76 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person.

Person arrested to be brought before Court without delay.

WARRANT OF ARREST :—The warrant referred to herein is not a warrant for commitment, but merely an order authorising the police-officer to whom it is addressed to arrest the person and bring him before the Magistrate. The warrant is exhausted as soon as the person arrested is produced before the Magistrate, 13 W.R. (Cr.) 1-4 B.L.R. (Appx.) 1 ; 13 W.R. (Cr.) 17-5 B.L.R. 274.

BRING THE PERSON ARRESTED BEFORE THE COURT.—There is no provision in the Code authorizing a Magistrate to issue a warrant requiring a person to appear before a police-officer for the purpose of giving evidence at an investigation held by him. Reading S. 76 and this section together it would appear that a Magistrate is competent to issue a warrant of arrest for the production of a person before his own court and not before the police, 24 C. 320 at 323.

82. A warrant of arrest may be executed at any place in British India.

Where warrant may be executed.

BRITISH INDIA.—See notes under S. 1, *supra* at p. 14 and 25 C. 20 (P.C.).

83. (1) When a warrant is to be executed outside the local limits of the jurisdiction of the Court issuing the same, such Court may, instead of directing such warrant to a police-officer, forward the same by post or otherwise to any Magistrate or District Superintendent of Police or the Commissioner of Police in a presidency-town within the local limits of whose jurisdiction it is to be executed.

Warrant forwarded for execution outside jurisdiction.

(2) The Magistrate or District Superintendent or Commissioner to whom such warrant is so forwarded shall endorse his name thereon and, if practicable, cause it to be executed in manner hereinbefore provided within the local limits of his jurisdiction.

WHEN A WARRANT IS TO BE EXECUTED.—There are no words in this section limiting its operation to warrants issued under this Code only. For example a warrant issued under Workmen's Breach of Contract Act XIII of 1859, S. 1 may be executed outside the local limits of the jurisdiction of the Magistrate issuing the same, 20 M. 235 foll. in 20 A. 224 ; 2 M. 357.

IN MANNER HEREINBEFORE PROVIDED,—See Ss. 78-80, *supra*.

84. (1) When a warrant directed to a police-officer is to be executed beyond the local limits of the jurisdiction of the Court issuing the same, he shall ordinarily take it for endorsement either to a Magistrate or to a police-officer not below the rank of an officer in charge of a station, within the local limits of whose jurisdiction the warrant is to be executed.

(2) Such Magistrate or police-officer shall endorse his name thereon and such endorsement shall be sufficient authority to the police-officer to whom the warrant is directed to execute the same within such limits, and the local police shall, if so required, assist such officer in executing such warrant.

(3) Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or police-officer within the local limits of whose jurisdiction the warrant is to be executed, will prevent such execution, the police-officer to whom it is directed may execute the same without such endorsement in any place beyond the local limits of the jurisdiction of the Court which issued it.

(4) This section applies also to the police in the town of Calcutta.

DIRECTED TO BE EXECUTED.—This will include a warrant endorsed to another for execution by the officer to whom it is originally issued.

85. When a warrant of arrest is executed outside the district in which it was issued, the person arrested shall, unless the Court which issued the warrant is within twenty miles of the place of arrest or is nearer than the Magistrate or District Superintendent of Police or the Commissioner of Police in a presidency-town within the local limits of whose jurisdiction the arrest was made, or unless security is taken under section 76, be taken before such Magistrate or Commissioner or District Superintendent.

Security under S. 76, *supra* is taken from the person arrested and released on security for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court. When this is not done, the person arrested is to be produced before the nearest Magistrate, the District Superintendent of Police or the Commissioner of Police in a Presidency Town.

86. (1) Such Magistrate or District Superintendent or Commissioner shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court:

Procedure by Magistrate before whom person arrested is brought.

Provided that, if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate, District Superintendent or Commissioner, or a direction has been endorsed under section 76 on the warrant and such person is ready and willing to give the security required by such direction, the Magistrate, District Superintendent or Commissioner shall take such bail or security, as the case may be, and forward the bond to the Court which issued the warrant.

(2) Nothing in this section shall be deemed to prevent a police-officer from taking security under section 76.

See Sch. V, form No. 3 for form of security bond. As to cases where persons arrested may be discharged on executing bonds without sureties, see S. 496, *infra*.

C.—Proclamation and Attachment.

87. (1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

Proclamation for person absconding.

(2) The proclamation shall be published as follows :—

(a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides ;

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village ; and

(c) a copy thereof shall be affixed to some conspicuous part of the Court-house.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

SCOPE OF THE SECTION.—Action under this section can be taken only when a Court has reason to believe that any person against whom a warrant has been issued has absconded or is concealing himself, so that such warrant cannot be executed, 23 Cr. L.J. 484=67 Ind. Cas. 726. Sch. III, Cl. (4) authorizes all Magistrates to issue proclamations in cases coming judicially before them. This section, read with S. 88 *infra*, shows that even in summons cases and as against witnesses, a proclamation may be issued for the arrest of a person against whom a warrant has been issued. A Magistrate may simultaneously issue a proclamation against an absconding accused under this section and also make an order under S. 88 *infra* attaching his property, 29 C. 417.

ANY COURT.—All Magistrates are empowered to issue a proclamation under this section. See Cl. (4) of Sch. III.

HAS REASON TO BELIEVE.—S. 26, I.P.C., enacts that a person is said to have reason to believe a thing if he has sufficient cause to believe that thing and not otherwise.

WHETHER AFTER TAKING EVIDENCE OR NOT.—These processes of proclamation and attachment are not to issue whenever a warrant fails in its effect. The officer sent to serve the warrant should be examined as to the measures adopted by him to serve it; and if on evidence in any other manner the Magistrate is satisfied that the accused is evading justice, then and then only can the process of proclamation and attachment issue, 3 W.R. (Cr.) 63; see also 6 W.R. (Cr.) 73; 19 W.R. (Cr.) 12—10 B.L.R. Appx. 14.

WARRANT HAS BEEN ISSUED.—Before a proclamation under this section could be issued, a warrant must have been previously issued for the attendance of the person before the Court. The previous issue of a warrant is a condition precedent to the issue of a proclamation.

HAS ABSCONDED.—In order that the Court may issue a proclamation and an order of attachment under S. 88 *infra*, it must be satisfied on materials before it, that the person against whom the proclamation is to be issued has absconded or concealed himself for avoiding service of the warrant previously issued against him, 10 B.L.R. (Appx.) 11—19 W.R. (Cr.) 12. Absconding does not necessarily imply change of place but may be effected by concealment. The term "abscond" is not to be understood as implying necessarily that a person leaves the place in which he is. Its etymological and ordinary sense is to hide oneself and it matters not whether a person departs from a place or remains in it, if he conceals himself, nor does the term apply only to the commencement of the concealment. If a person having concealed himself before process is issued, continues to do so after it is issued, he absconds, 4 M. 293 at 397. To be deemed an absconder, it is not necessary that the person should be proclaimed as such under this section. It should also be noted that an absent person should not be assumed to be an absconder without due inquiry and notice. Weir II, 40. A person who files a petition against the order issuing a warrant against him and takes steps to procure an order of a superior Court that he should be allowed to remain on bail after such warrant has been issued, can neither be said to be absconding nor concealing himself, 23 Cr. L.J. 331—67 Ind. Cas. 726. An absconder must be dealt with under the provisions of the Code and not under S. 172, I.P.C., (absconding to avoid service of summons, etc.) as a warrant issued is not summons, notice, order, etc. within the meaning of S. 172, I.P.C., 7 N.W.P.H.C.R. 302; 9 W.R. (Cr.) 70.

COURT MAY PUBLISH A WRITTEN PROCLAMATION.—What is contemplated here is the act of publishing and not the mode of publishing the proclamation dealt with by sub-S. (2). The act of publishing is optional but the mode of publication is compulsory under sub-S. (2). For forms of proclamation see Nos. 4 and 5 of Sch. V.

REQUIRING HIM TO APPEAR.—A person against whom a proclamation has been issued must be regarded as in contempt until he has surrendered and the Court will not entertain any application on his behalf. He should first surrender and then apply to be discharged from contempt and also for the release of the property attached, 2 N.W.P.H.C.R. 441; 5 W.R. (Cr.) 71. S. 174, I.P.C. provides punishment for not appearing in obedience to the proclamation.

NOT LESS THAN 30 DAYS FROM THE DATE OF PROCLAMATION.—A proclamation under this section against an absconding person should give 30 days' time for his appearance from the date of the proclamation; when this is not done, the proceedings are illegal, 21 Cr. L.J. 210; 17 M.L.J. 338—6 Cr. L.J. 332; 19 M. 3.

PROCLAMATION SHALL BE PUBLISHED.—The provisions of cl. (2) of this section are imperative and failure to comply with them will vitiate a proclamation. The use of the word 'And' is significant. All the three modes contemplated by cl. (2) must be adopted

27 A. 572; 19 M. 3. Any error, omission or irregularity in the proclamation will not vitiate the proceedings unless such error etc., has occasioned a failure of justice. See S. 537 *infra*.

TO SOME CONSPICUOUS PLACE OF SUCH TOWN, ETC.—Affixing the proclamation to the Court-house is not sufficient; it must be affixed to some conspicuous place in such town or village, 19 M. 3.

STATEMENT IN WRITING BY COURT, OF DUE PUBLICATION.—When there is no endorsement or statement by Court in writing, validating the proclamation as required by cl. (3) of this section, there is no proclamation according to law, 22 A. 216.

SUB-SECTION (3).—An order under this sub-section stating that the proclamation was duly published, but omitting to specify the date of the publication cannot be considered as conclusive evidence of the requirements of the sections, 21 Cr. L.J. 210. The prosecution in a case against an absconder ought to produce the statement under this sub-section to prove the fact of absconding, 17 Cr. L.J. 78, and the proclamation made, ought to be preserved to prove that all the legal formalities have been complied with, 14 Bom. L.R. 163. A proclamation is not sufficiently proved by proving attachment and sale under the next section. 7 M. 435. A Magistrate ought to preserve the proclamation and the record must be so clear as to satisfy the Court that all the legal formalities were duly complied with. Where neither the proclamation nor a copy of it is forthcoming, the vague indefinite statement of an accused as to a proclamation being issued at some indefinite date cannot be accepted as evidence sufficient to prove that all the legal formalities were complied with, 14 Bom. L.R. 163—13 Cr.L.J. 293—14 Ind. Cas. 757.

A Magistrate may in a proper case issue simultaneously a proclamation and an order of attachment, 29 C. 417.

As to punishment for absconding and failing to attend in obedience to a proclamation under this section, see Ss. 173 and 174, I.P.C.

88. (1) The Court issuing a proclamation under section 87 may at any time order the attachment of any property, Attachment of property of person absconding. moveable or immoveable, or both, belonging to the proclaimed person.

(2) Such order shall authorise the attachment of any property belonging to such person within the district in which it is made; and it shall authorise the attachment of any property belonging to such person without such district when endorsed by the District Magistrate or Chief Presidency Magistrate within whose district such property is situate.

(3) If the property ordered to be attached is a debt or other moveable property, the attachment under this section shall be made—

(a) by seizure; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or

(d) by all or any two of such methods, as the Court thinks fit.

(4) If the property ordered to be attached is immoveable, the attachment under this section shall, in the case of land paying revenue

to Government be made through the Collector of the district in which the land is situate, and in all other cases—

(e) by taking possession ; or

(f) by the appointment of a receiver ; or

(g) by an order in writing prohibiting the payment of rent or delivery of property to the proclaimed person or to any one on his behalf ; or

(h) by all or any two of such methods, as the Court thinks fit.

(5) If the property ordered to be attached consists of live-stock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court.

(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under Chapter XXXVI of the Code of Civil Procedure.

(6A) If any claim is preferred to, or objection made to the attachment of, any property attached under this section within six months from the date of such attachment, by any person other than the proclaimed person, on the ground that the claimant or objector has an interest in such property, and that such interest is not liable to attachment under this section, the claim or objection shall be enquired into, and may be allowed or disallowed in whole or in part :

Provided that any claim preferred or objection made within the period allowed by this sub-section may, in the event of the death of the claimant or objector, be continued by his legal representative.

(6B) Claims or objections under sub-section (6A) may be preferred or made in the Court by which the order of attachment is issued or, if the claim or objection is in respect of property attached under an order endorsed by a District Magistrate or Chief Presidency Magistrate in accordance with the provisions of sub-section (2), in the Court of such Magistrate.

(6C) Every such claim or objection shall be inquired into by the Court in which it is preferred or made :

Provided that, if it is preferred or made in the Court of a District Magistrate or Chief Presidency Magistrate, such Magistrate may make it over for disposal to any Magistrate of the first or second class or to any Presidency Magistrate, as the case may be, subordinate to him.

(6D) Any person whose claim or objection has been disallowed in whole or in part by an order under sub-section (6A) may, within a period

of one year from the date of such order, institute a suit to establish the right which he claims in respect of the property in dispute; but subject to the result of such suit, if any, the order shall be conclusive.

(6E) If the proclaimed person appears within the time specified in the proclamation, the Court shall make an order releasing the property from the attachment.

(7) If the proclaimed person does not appear within the time specified in the proclamation, the property under attachment shall be at the disposal of Government; but it shall not be sold until the expiration of six months from the date of the attachment and until any claim preferred or objection made under sub-section (6A) has been disposed of under that sub-section, unless it is subject to speedy and natural decay, or the Court considers that the sale would be for the benefit of the owner, in either of which cases the Court may cause it to be sold whenever it thinks fit.

AMENDMENT.—Sub-section (6A) to (6E) are new and in sub-section (7) the words "until any claim preferred or objection made under sub-section (6A) has been disposed of," have been newly added.

MAY AT ANY TIME.—An order for attachment under this section made simultaneously with the issue of a proclamation under S. 87 *supra* is in accordance with law, 29 C. 517 at 418.

ANY PROPERTY BELONGING TO SUCH PERSON.—The property should belong to such person and not subject to other right by an attachment of a civil Court, 13 Cr. L.J. 568. In *Weir II, 43* (foot-note) it was held that there was nothing in the language of this section to restrict the meaning of the word 'property' which must include the rights and interests of persons who are members of an undivided family holding jointly the family property; but a contrary opinion was expressed by *Subramania Aiyar, J.*, in *Weir II, 43*, where it was held that the undivided interest of an absconding co-parcener in a joint Hindu family or the undivided property itself cannot be attached. The Full Bench decision in 39 M. 831 followed the view in *Weir II, 43* (foot-note) and dissented from the view of *Subramania Aiyar, J.*, and held that the word 'property' in this section must include the rights and interests of persons who are members of an undivided family jointly entitled to the property of the family. The share of the defaulting member of the family is to be attached subject to the rights of the other members of the family and may be realised by a receiver in a suit for partition or otherwise. With regard to ancestral property, all that can be attached under this section is the interest of the absconder and on his death the property should be released in favour of his heirs, 26 Cr. L.J. 1138—88 Ind. Cas. 480.

Sub-sections (6A) and (6C) are new and they provide for continuance of proceedings by legal representatives of a claimant, who may die pending the enquiry into his claim and for the case of claims to property in another district and for the period of limitation within which proceedings in Civil Court to establish the claim disallowed by a Magistrate must be instituted. O. XXI, rr. 58-62, of the Code of Civil Procedure, Act V of 1908, provide for hearing objections and investigation of claims in respect of attached properties. Such a provision did not previously exist in this Code empowering Magistrates to do so. It was proposed at first to add a new clause similar to S. 278 of Act XIV of 1882 (Civil Procedure) conferring on Magistrates similar powers. The amendment then fell through, but has been retained in the new Act. This is a salutary provision and the needlessly cumbersome procedure of a civil suit by the injured party has been got rid of.

Sub-Section (6D) provides for right of suit to a defeated claimant but an absconder cannot sue, 21 Cr. L.J. 475; 5 Pat. L.J. 321 at 327; and sub-Section (6E) provides for an order to release the property from attachment of the proclaimed person appearing within the specified time.

SUB-SECTION (7).—The property becoming one at the disposal of government is not confiscated or sold until after the expiry of six months. When selling the property all the formalities required are to be observed, 19 M. 3; 27 A. 372. Once the sale is effected there is no provision to set aside the sale or order its restoration, 12 Cr. L.J. 142; 27 A. 372. If the land is sold subject to a lease, the lessee's rights are unaffected, 8 Cr. L.J. 260. By the confiscation of the property after due compliance with the formalities required by this section, the title of the person who absconded has been put an end to, and he has no remedy by way of suit, 25 Bom. L.R. 228; but when a sale is illegal a suit lies, 1904 A.W.N. 159; 20 M. 88.

REVISION.—An order under this section refusing to release certain property from attachment is a proceeding within the meaning of S. 495 *infra* and is therefore subject to the Revisional Jurisdiction of the High Court, 25 Cr. L.J. 82—76 Ind. Cas. 16 where 3 Cr. L.J. 260 is followed.

89. If, within two years from the date of the attachment, any person whose property is or has been at the disposal of Government under sub-section (7) of section 88, appears voluntarily or is apprehended and brought before the Court by whose order the property was attached, or the Court to which such Court is subordinate, and proves to the satisfaction of such Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and that he had not such notice of the proclamation as to enable him to attend within the time specified therein, such property, or, if the same has been sold, the nett proceeds of the sale, or, if part only thereof has been sold, the nett proceeds of the sale and the residue of the property, shall, after satisfying thereout all costs incurred in consequence of the attachment, be delivered to him.

SCOPE OF THE SECTION.—From the date of attachment it cannot be said on a perusal of the language of Ss. 87 to 89 that the interest of an absconder is severed and vests in Government, 39 M. 81 (F.B.). This section prescribes a remedy where there is a good and legal publication, but offers no facility for contesting the legality of the proclamation, 22 A. 216 at 219.

If no application is made for restoration of the property attached under the preceding section within two years, the High Court has no power under S. 561-A *infra* to order its restoration, because such an order, if made, will be contrary to the provisions of this section. The proper remedy in such a case is to apply to Government for relief, 26 Bom. L.R. 719—25 Cr. L.J. 1233—82 Ind. Cas. 363.

WITHIN TWO YEARS FROM DATE OF ATTACHMENT.—These words qualify not only the word 'appears' but also the word 'proves' which is connected with the word "appears" by the conjunction "and" and so, proof that the accused had not absconded should be offered within two years of the date of attachment, 15 Bom. L.R. 175—13 Cr. L.J. 237—19 Ind. Cas. 333.

NETT PROCEEDS OF THE SALE AND THE RESIDUE OF THE PROPERTY.—

When a sale is held and purchasers have acquired title, the Court cannot set aside the sale but the owner is entitled only to the sale proceeds and not to the identical property sold, 22 A. 216; 27 A. 372. Where property has been sold and subsequently an application under this section is made and allowed, the applicant can only get the net-proceeds of the sale of the property, 25 Cr. L.J. 373—73 Ind. Cas. 269. It is not necessary that the absconder should himself personally apply for the restoration of the property. If the requirements of this section are satisfied, an application can be made by any one on his behalf, 12 Cr. L.J. 142—9 Ind. Cas. 823.

PROVE TO THE SATISFACTION OF SUCH COURT.—It is open to the absconder to prove that he did not abscond and that there was not publication, or defective publication, 2 Lah. L.J. 82; 21 Cr. L.J. 210.

APPEAL AND REVISION.—Orders passed under this section are appealable under S. 405 *infra* and also subject to revision by the High Court, 19 M. 3; 22 A. 216. But appeal lies only at the instance of one whose property has been attached. After his death his legal representatives have no *locus standi* to have the order set aside, 10 Cr. L.J. 260; but see 18 Bom. L.R. 175—14 Cr. L.J. 237—19 Ind. Cas. 333, which held that any person may apply on behalf of the absconder for the restoration of the property, if other requirements of the section are satisfied, and appeal from the order refusing to release attachment.

D.—Other Rules regarding Processes.

90. A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person other than a juror or assessor, issue, after recording its reasons in writing, a warrant for his arrest—

Issue of warrant in lieu of, or in addition to summons.

(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or

(b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.

SCOPE OF THE SECTION.—The normal course to be adopted by the Court under this section is to issue a summons in the first instance; it can however issue a warrant in either of the cases mentioned in cls. (a) and (b) of this section, but in either case it can do so only after stating its reasons in writing, 38 C.L.J. 77 at 90—27 C.W.N. 837—24 Cr. L.J. 881. The language used in this section is "any person" which will include a witness. This section empowers a Court to issue a warrant only in cases in which it is entitled to issue a summons. If the Court is not entitled to issue a summons, no warrant could be issued. A Magistrate cannot issue a warrant of arrest against a witness unless he is satisfied that the witness will disobey or has disobeyed the summons served on him, 13 W.R. (Cr.) 20; or unless due service of summons is proved, 7 W.R. (Cr.) 37. A warrant is to be issued only when the Magistrate is satisfied that the witness would not attend unless compelled to do so. 13 W.R. (Cr.) 1; a Magistrate is competent to admit such a witness to bail, Weir II 39. Before issuing a warrant the Court must record its reasons for taking this extreme step, otherwise the warrant is illegal, 10 Cr. L.J. 306—3 Ind. Cas. 573. The adoption of stereotyped printed forms is not

sufficient, 33 C. 789; 38 M. 1088; but see 18 A.L.J. 1149 and 24 Cr. L.J. 88 (F.B.) which disapproved of. 38 C. 789.

AFTER RECORDING REASONS IN WRITING.—In 38 M. 1088 it was decided that the failure to record reasons in writing vitiated a warrant under this section, and the omission to do so was not cured by S. 537, *infra*, as the recording of reasons was a necessary preliminary to the exercise of the jurisdiction. The section is not mandatory in its terms. The issue of the warrant is to follow the recording of reasons. That is indicated by the use of the preposition "after." But the section, if analysed further does not in so many words prescribe the recording of reasons. Rather, it assumes the recording of reasons and by the word "after" states the order of events. It may not be permissive, but it is far from mandatory, and the rules applicable to the construction of mandatory sections of the Code have no application to it. 38 C.L.J. 77 at 80-81 and 90 91-27 C.W.N. 857-24 Cr. L.J. 881. See also 18 A.L.J. 1149.

ABSCONDED.—See notes under S. 87, *supra*, at p. 83.

91. When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court.

Power to take bond for appearance.

When a Magistrate suspecting that a witness present in Court might be kept out of the way in the future by the accused, arrested and kept her in the lockup, it was held that there was no justification for such a course. 1901 A.W.N. 35. But a bond may be taken from the witness for appearance. 6 Cr. L.J. 375.

92. When any person who is bound by any bond taken under this Code to appear before a Court, does not so appear, the officer presiding in such Court may issue a warrant directing that such person be arrested and produced before him.

Arrest on breach of bond for appearance.

This section refers to the case of a person who is bound by a bond to appear in Court. It provides for a warrant only when the person does not appear at the time he is bound to appear. It does not therefore apply to a case where before the time fixed for appearance, arrest by a warrant is sought to be effected, 38 M. 1088. See S. 14, *supra*.

93. The provisions contained in this Chapter relating to a summons and warrant, and their issue, service and execution, shall, so far as may be, apply to every summons and every warrant of arrest issued under this Code.

Provisions of this chapter generally applicable to summonses and warrants of arrest.

PROVISIONS OF THIS CHAPTER SHALL APPLY TO EVERY SUMMONS AND EVERY WARRANT.—Having regard to the provisions of this section and S. 76, *supra*, it was held that a Magistrate was competent to admit to bail a recalcitrant witness arrested under S. 90, *supra*, Weir II, 39.

EVERY WARRANT OF ARREST ISSUED UNDER THIS CODE.—This section unlike S. 83, *supra* is applicable only to warrant of arrest issued under this Code. S. 83 is in general terms and applies to warrants issued under other laws also.

CHAPTER VII.

OF PROCESSES TO COMPEL THE PRODUCTION OF DOCUMENTS AND OTHER MOVEABLE PROPERTY, AND FOR THE DISCOVERY OF PERSONS WRONGFULLY CONFINED.

A.—Summons to produce.

94. (1) Whenever any Court, or in any place beyond the limits of the towns of Calcutta and Bombay, any officer in charge of a police-station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power, such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

Summons to produce document or other thing.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed to affect the Indian Evidence Act, 1872, sections 123 and 124, or to apply to a letter, post-card, telegram or other document or any parcel or thing in the custody of the Postal or Telegraph authorities.

SCOPE OF THE SECTION.—This section is not limited to documents which form the subject of the offence under investigation but also to documents or things which are or can be used as evidence in support of the prosecution, 5 Bom. L.R. 980 at 982; 15 C. 109; 19 C. 52. The words of this section are of the widest possible character. Any person in whose possession or power a document or other thing which the Court considers necessary or desirable for the purpose of any investigation, inquiry or trial is, may be summoned to produce it, 15 C. 109 at 122. It is competent under this section to a Magistrate to issue a summons to an accused person to produce a document or a thing the production of which might lead to incriminate him. 13 Cr. L.J. 493=15 Ind. Cas. 493 following 15 C. 109. Under this section the Court has power to call upon the Police to produce the inquest report so that the accused be granted a copy of the statements made by the witnesses at the inquest, 20 L.W. 755.

ANY DOCUMENT.—For the definition of the term 'document', see S. 3 (16) of the General Clauses Act X of 1894 and S. 3 of Indian Evidence Act I of 1872.

PRODUCTION NECESSARY OR DESIRABLE.—The words 'necessary or desirable' mean really necessary in the ends of justice, 8 A. L. J. 517; 16 Cr. L.J. 225=27 Ind. Cas. 397; 25 Cr. L.J. 426=35 Ind. Cas. 42. The Magistrate is given a discretion to decide whether the production of a particular document or book is necessary or desirable for the purpose of any trial, and he is to exercise this discretion *judicially*, in the sense that he must satisfy himself that the document or book has a bearing upon or is relevant to the case. When he is so satisfied, his jurisdiction to order its production comes into play and this carries with it, jurisdiction to permit the production and to have inspection of the same, 5 Bom. L.R. 980; 15 C. 109; but a general search for stolen property is not-

authorized, and the law cannot be got over by using such an expression "stolen property relevant to the case," 16 C.W.N. 1078. It is not open to a Magistrate to issue an order allowing the prosecution to inspect the entries in the books of the accused relating to the subject-matter of the charge at the office of the accused's pleader, 5 Bom. L.R. 978.

COURT MAY ISSUE A SUMMONS, ETC.—An order upon the police to take possession of the account books of a firm, without issuing a summons under this section or a warrant under S. 96 *infra* was held to be illegal, 38 C. 68.

TO THE PERSON IN WHOSE POSSESSION OR POWER SUCH DOCUMENT IS.—The words herein used are of the widest character, 15 C. 109. The person need not be party, 19 C. 52. It is enough that the document is in his possession or power. The provision of this section cannot be taken to apply to the case of an accused person on his trial. No summons could be issued to him to produce an incriminating document, and failure to comply with this requisition is no offence under S. 175, I.P.C., 12 C.W.N. 1016—8 C.L.J. 320. But this decision was *dissented from* by Benson, J., in 37 M. 112, where His Lordship followed the earlier Calcutta rulings in 15 C. 109 and 19 C. 52 on the ground that a Magistrate had power to issue a search-warrant, and a summons to produce is only another form of attaining the same. This section is limited to a specific document or thing and does not empower a Magistrate to issue a general search for stolen property in the house of an absconding person, 38 C. 304, but in 16 C.W.N. 1078, it was held that the police-officer can search an accused's house for property relevant to the case, 38 C. 304 held otherwise; it is not good law, see 41 C. 261. It is competent for a Magistrate to issue a summons to an accused to produce an incriminating document or other thing, 37 M. 112; 41 C. 261; 15 C. 109; 19 C. 52. The provisions of this section cannot be got over by using general expressions "stolen property relevant to the case" as the law requires mention of specific things, 16 C.W.N. 1078; 13 C.W.N. 485.

INDIAN EVIDENCE ACT, SECTIONS 123 and 124.—These sections regulate the giving of evidence as to affairs of state and the disclosure of official communications. Under S. 123 no one is permitted to give evidence derived from unpublished official records relating to affairs of state, except with the permission of the officer at the head of the department concerned and under S. 124 no public-officer can be compelled to disclose official communications made in confidence when public interests will suffer by such disclosure.

REVISION.—Under Ss. 435 and 439 *infra* the High Court has ample powers to interfere in revision in any case where the Magistrate has either refused to exercise a discretion vested in him by law, or has exercised that discretion in an improper manner. Where a Magistrate erroneously refused to order the production of a certain currency note in the possession of the accused and his legal adviser, the High Court set aside the order in the exercise of its revisional jurisdiction, 19 C. 52.

95. (1) If any document, parcel or thing in such custody is, in the opinion of any District Magistrate, Chief Presidency Magistrate, High Court or Court of Session, wanted for the purpose of any investigation, inquiry, trial or other proceeding under this Code, such Magistrate or Court may require the Postal or Telegraph authorities, as the case may be, to deliver such document, parcel or thing to such person as such Magistrate or Court directs.

(2) If any such document, parcel or thing is, in the opinion of any other Magistrate, or of any Commissioner of Police or District Superintendent of Police, wanted for any such purpose, he may require the Postal or Telegraph Department, as the case may be, to cause search to

be made for and to detain such document, parcel or thing pending the orders of any such District Magistrate, Chief Presidency Magistrate or Court.

All Provincial Magistrates are empowered to order search to be made for letters and telegrams, Sec. III, cl. (7), but in the presidency town only the Chief Presidency Magistrate can act under cl. (1) of the section. If any Magistrate not being a District Magistrate or a Chief Presidency Magistrate issues a search-warrant, for a letter, parcel or other thing in the Post office or a telegram in the Telegraph Department, his proceedings are void, S. 630 (b), *infra*.

The act of issuing a search-warrant is judicial, and the Magistrate should weigh the evidence and circumstances and record reasons before issuing a search-warrant, (1917) M.W.N. 494-6 L. W. 287-44 Ind. Cas. 881; 7 Cr. L. Rev. 476-32 Ind. Cas. 632. A Magistrate has jurisdiction to stay execution of the warrant issued by him conditionally on execution of bond to produce copies of document in Court, 47 C. 164. Search warrants are a species of process exceedingly arbitrary in character and inasmuch as they are resorted to only for very urgent and satisfactory reasons, the rules of law which pertain to them are of more than ordinary strictness. In the first place it is common learning that they are only to be granted in the cases expressly authorised by law and not generally in such cases until it has been shown before a responsible officer on oath that a crime has been committed and that officer has reason to believe that the offender or the property, which is the subject or instrument of a crime is concealed in some specified house or place. The law clearly intends that the evidence shall be given of such facts as shall satisfy the officer issuing the warrant that there is "reason to believe." Suspicion itself is no ground whatever for issue of a warrant of this description. Search warrants are always open to very serious objection and very great particularity is justly required by law in cases where they are authorised before the privacy of man's premises is allowed to be invaded by the minister of the law, 20 C.W.N. 713 at 717.

B.—Search-warrant.

96. (1) Where any Court has reason to believe that a person to whom a summons or order under section 94 or a requisition under section 95, sub-section (1), has been or might be addressed, will not or would not produce the document or thing as required by such summons or requisition,

When search-warrant may be issued.

or where such document or thing is not known to the Court to be in the possession of any person.

or where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection ;

it may issue a search-warrant; and the person to whom such warrant is directed, may search or inspect in accordance therewith and the provision hereinafter contained.

(2) Nothing herein contained shall authorise any Magistrate other than a District Magistrate or Chief Presidency Magistrate to grant a warrant to search for a document, parcel, or other thing in the custody of the Postal or Telegraph authorities.

SCOPE OF THE SECTION.—Search warrants are a species of process exceedingly arbitrary in character and are only to be granted in cases expressly authorised by law and not generally, 27 Cr. L. J. 920=98 Ind. Cas. 284. Under this section before issuing a warrant it is the duty of the Court in the first instance to consider whether a summons to produce would not have the desired effect, the Court ought to remember that it is a grave step to issue a search warrant invading a man's house to search which would not be exercised without full application of the gravity of the step taken for the ends of justice. The informant should be examined on oath if possible and if this not possible the Court should act with due application that it is taking upon itself the responsibility of considering the weight of the information as information preparatory to issuing an order of a very serious nature, 8 A.L.J. 517=12 Cr. L. J. 175=9 Ind. Cas. 991; 15 C. 109.

The words of the section are of the widest possible character. Any person to whom a summons under S. 94 *supra* has been or might be addressed and who, the Court has reason to believe will not and would not produce it, is liable to have his premises searched; search for what? Surely for the document or thing which the Court has reason to believe he will not produce. The whole object of the section would be frustrated if we were to hold, that because form 8 of Sch. V, says "specifying the thing clearly" and not the "document or thing clearly" there was no authority to issue a search warrant for a document; a document cannot be seized unless under a search warrant, 15 C. 109 at 122-233. The power of issuing search-warrant is not intended to give the complainant an opportunity of fishing for evidence but is intended for use in respect of definite existing document which must be clearly specified in the warrant, 36 Ind. Cas. 591. The first para. of this section requires as a condition precedent to the issue of a search-warrant that the Court must have reason to believe that the person against whom the search-warrant is issued is likely not to produce the document or thing in his possession as required by a summons or under S. 94 *supra* or a requisition under S. 95 (1) *supra* served upon him or that he is not likely to produce it, should such summons, order or requisition be served on him. S. Bom. L.R. 1032. Searches can be made (1) Under a search warrant issued under this section. (2) By the Magistrate himself under S. 105 *infra*. (3) By a Police officer under S. 165 *infra*, 36 C. 433.

Inaccuracies in a warrant do not take away the jurisdiction of tender the evidence adduced inadmissible by reason of such inaccuracy, 27 Cr. L.J. 503=98 Ind. Cas. 987; following 27 C. 467 at 800. A search-warrant which mentions a wrong door number of the house to be searched and gives no other description of it to identify the same is an illegal warrant, 27 Cr. L.J. 803=98 Ind. Cas. 987, following 37 B. 402. The question of accused's guilt is entirely different from the question whether the officer was acting within his powers, 26 M. 124.

ANY COURT.—It was held in 36 C. 433, by the majority of the Court that the word "Court" implied that the Magistrate was acting in his judicial capacity and if he conducts a search not acting as a "Court" he would be liable civilly for trespass, but Brett, J., dissented from the view of the majority and said, "Court is nowhere defined in the Code. From Chap. II, of the Code it would, however, appear that the term 'Court' and Magistrate, are in fact synonymous and it should be remembered that under the special conditions prevailing in India a Magistrate is frequently called upon to act as a Court even though he may not be at the time sitting within the four walls of his ordinary Court-building or in fact in any building; the powers of the Court depend upon the power with which the Magistrate presiding in it is vested, 36 C. 433 at 457. This view was approved by the Privy Council in 39 C. 983 at 986; their Lordships held it would seem that the Trial Judge and both the learned Judges who formed the majority of the Court of appeal were misled by the use of the word 'Court' in S. 96. For the sake of brevity the Code uses the term 'Court' and 'Magistrate' generally, if not always, as convertible terms, S. 6 headed classes of criminal Court' enacts
I Court of Session, II Presidency Magistrate.....S. 86 taken in conjunction with Sch. III, places the matter beyond all doubt. The ordinary powers of all Provincial Magistrates are declared to be those

hereinafter conferred upon them and specified in the third schedule. The power to issue search-warrants is specified among the ordinary powers of all Provincial Magistrates but the only section conferring the power is S. 96 to which the schedule itself refers.

HAS REASON TO BELIEVE.—Reason to believe is a condition precedent to the issue of a search-warrant under this section, 8 Bom. L.R. 1032.

A PERSON TO WHOM A SUMMONS HAS BEEN ADDRESSED.—The word person will include an accused person also, 16 Cr. L.J. 228-27 Ind. Cas. 897; 12 Cr. L.J. 98-9 Ind. Cas. 864.

THING.—The word will include any document the production and inspection of which is necessary or desirable or will serve the ends of justice, 16 Cr. L.J. 228-27 Ind. Cas. 897. This section is inapplicable to the case of a person *i.e.*, a woman confined in a house or staying voluntarily there. A person cannot be said to be a "thing" to which alone the section is applicable, S. 100 *infra* applies to such a case and a warrant issued under this section, instead of under S. 100 *infra* is illegal and must be treated as a nullity, 11 C.W.N. 838-6 Cr. L.J. 38.

PURPOSES OF INQUIRY OR OTHER PROCEEDINGS WILL BE SERVED BY A GENERAL SEARCH.—It is lawful for a Magistrate to issue a search warrant when he considers the production of any thing necessary for the purposes of investigation or inquiry under the Code. It is not incumbent on him to wait till the prosecution evidence has been recorded in the presence of the accused. He is entitled to act upon credible information, provided, it is based upon a complaint and the complainant is examined upon solemn affirmation, 13 M. 18, followed in 1910 M.W.N. 18-11 Cr. L.J. 535-7 Ind. Cas. 895; 22 B. 949. A Magistrate ought not to issue a search-warrant simply because a police officer asks for it, 47 C. 597; 21 Cr. L.J. 313; 25 C.W.N. 403. In 8 A.L.J. 517 at 323 it was held when there is no investigation, inquiry or other proceedings under the Code pending, the issue of a search warrant is illegal and S. 597 does not cure the defect. But if the Magistrate subsequently takes cognizance under S. 190 (1) (c) *infra* and then reissues the warrant it is legal, 35 C. 1076. It is necessary that the power to issue search-warrants should be given, but it should not be exercised without full appreciation of the gravity of the step and after the Court has come to the conclusion that the step is really necessary in the ends of justice. The power of issuing search-warrants is not intended to be used for the purpose of giving complainants an opportunity of fishing evidences, but is intended for use in respect of definite documents believed to exist which must be clearly specified in the warrant and before issuing the warrant the Magistrate must have before him some information or evidence that the documents are necessary or desirable for the inquiry before him; to issue a warrant to search a man's house and for production of all papers and books in the house for an inquiry as to whether he had used or sold articles with a counterfeit trade mark, is a perversion of the law, 36 Ind. Cas. 591. A search-warrant is not to be given for attaching property the title to which is in dispute and what is known in civil law as attachment before judgment is foreign to criminal law, Ratanlal 677. The act of issuing a search-warrant is a judicial act, and the Magistrate should weigh the circumstances, and record his reasons before issuing the search-warrant, 1917 M.W.N. 494-6 L.W. 287-44 Ind. Cas. 661; when a search-warrant was issued three weeks after issuing process to accused it was held that it was so dilatory that it could only defeat the object for which such warrants are issued, though the issue of warrant will strictly come within the letter of the law, 22 C.W.N. 719. The Court must have also reason to believe that the person against whom the warrant is issued is not likely to produce the document or thing in his possession as required by the summons under S. 94 *supra*, or a requisition under S. 95 (1) *supra*, 8 Bom. L.R. 1032. The section is somewhat obscurely worded; it is clear from the wording of cl. (3) that the Legislature intended to restrict it to documents forming the subject of a charge as distinguished from documents sought to be used as evidence in a case, 5 Bom. L.R. 880.

SEARCH OR INSPECT.—The word "inspect" seems apply only to locality or place but not to document or thing. The language of S. 97 *infra* to the effect "search or inspe

the place or part so specified" supports this view, 15 C. 409 at 424. Power to search necessarily includes the power to take the thing or document into possession. A Magistrate who is competent to issue a search warrant is also competent himself to conduct a search. 1883 A.W.N. 213. A Magistrate may direct a search in his presence under S. 105, *infra*.

For form of search-warrant see Sch. V, Form No. 8, S. 590, cl. (b), *infra* provides that if any Magistrate not empowered by law in this behalf issues a search-warrant for a letter, parcel or other thing in the Post Office or Telegraph Department, his proceedings are void.

Resistance to illegal search is not protected. See S. 99, I.P.C. No right of private defence exists unless there is an apprehension of death or grievous hurt, 21 M. 296 at 298; 19 M. 319; 23 C. 411; 29 C. 403; 16 C.W.N. 336; 11 C.W.N. 838 but if there is no search-warrant there can be no legal search, and right of private defence is available. 33 C. 304. Illegality of a search cannot be pleaded as a defence when evidence of offence under the Arms Act is discovered in consequence of such illegal search. 37 A. 575; 38 A. 575; see also 46 A. 86.

97. The Court may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection shall extend; and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified.

Power to restrict
warrant.

98. (1) If a District Magistrate, Sub-divisional Magistrate, Presidency Magistrate or Magistrate of the first class, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property,

Search of house
suspected to contain
stolen property, for-
ged documents, etc.

or for the deposit or sale or manufacture of forged documents, false seals or counterfeit stamps or coin, or instruments or materials for counterfeiting coin or stamps or for forging,

or that any forged documents, false seals or counterfeit stamps or coin, or instruments or materials used for counterfeiting coin or stamps or for forging, are kept or deposited in any place,

he may by his warrant authorise any police officer above the rank of a constable—

(a) to enter, with such assistance as may be required, such place, and

(b) to search the same in manner specified in the warrant, and

(c) to take possession of any property, documents, seals, stamps or coins therein found which he reasonably suspects to be stolen, unlawfully obtained, forged, false or counterfeit, and also of any such instruments and materials as aforesaid, and

(d) to convey such property, documents, seals, stamps, coins, instruments or materials before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose thereof in some place of safety, and

(e) to take into custody and carry before a Magistrate every person found in such place who appears to have been privy to the deposit, sale or manufacture or keeping of any such property, documents, seals, stamps, coins, instruments or materials knowing or having reasonable cause to suspect the said property to have been stolen or otherwise unlawfully obtained, or the said documents, seals, stamps, coins, instruments or materials to have been forged, falsified or counterfeited, or the said instruments or materials to have been or to be intended to be used for counterfeiting coin or stamps or for forging.

(2) The provisions of this section with respect to—

- (a) counterfeit coin,
- (b) coin suspected to be counterfeit, and
- (c) instruments or materials for counterfeiting coin,

shall, so far as they can be made applicable, apply, respectively, to—

(a) pieces of metal made in contravention of the Metal Tokens Act, 1889, or brought into British India in contravention of any notification for the time being in force under section 19 of the Sea Customs Act, 1878.

(b) pieces of metal suspected to have been so made or to have been so brought into British India or to be intended to be issued in contravention of the former of those Acts, and

(c) instruments or materials for making pieces of metal in contravention of that Act.

SCOPE OF THE SECTION :—This section is much wider than S. 96, *supra* and does not require the pendency of a criminal proceeding as a pre-requisite for the issue of a search-warrant as in S. 96, *supra*, 38 C. 1076. Strict compliance with the formalities is essential to the exercise of the power under this section, 38 C. 443. If there is no search warrant under this section, the search is illegal, 38 C. 301 but a different view is taken in 42 A. 67.

BY WARRANT AUTHORISE :—For form of a search warrant under this section see Ech. V, Form No. 9. A warrant issued under this section can be endorsed over to any other police officer of the same rank for execution, 10 Cr. L.J. 3. It is not improper to use printed warrants relating to this section for warrants under S. 100, *infra*, 39 C. 403. S. 529 (a) provides that if a Magistrate not empowered by law to issue a search warrant under this section, erroneously and in good faith issues a search warrant his proceedings shall not be set aside on the ground of his not being so empowered.

For definition of 'stolen property,' *theft*, 'extortion', 'robbery,' 'criminal misappropriation', 'criminal breach of trust,' 'forged document', 'counterfeit coin' etc., see the definitions in the Indian Penal Code. By S. 4 (2) *supra*, all words and expressions defined in the Indian Penal Code and not hereinbefore defined shall be deemed to have the meanings respectively attributed to them by that Code.

99. When, in the execution of a search-warrant at any place beyond the local limits of the jurisdiction of the Court which issued the same, any of the things for which search is made, are found, such things, together with the list of the same prepared under the provisions hereinafter

Disposal of things found in search beyond jurisdiction.

contained, shall be immediately taken before the Court issuing the warrant, unless such place is nearer to the Magistrate having jurisdiction therein than to such Court, in which case the list and things shall be immediately taken before such Magistrate; and, unless there be good cause to the contrary, such Magistrate shall make an order authorizing them to be taken to such Court.

A Presidency Magistrate on being requisitioned by a telegram by a District Magistrate to take possession of certain accounts of a person within the jurisdiction of the Presidency Magistrate and send them to the District Magistrate, summoned the person to produce the account books and when they were produced seized and sent them to the District Magistrate purporting to act under S. 96 and this section. It was held that as there was no search warrant neither S. 96, *supra* nor this section applied to the case and as the Magistrate had no authority to summon the person to produce the account books S. 104 *infra* did not apply justifying the sending of the books outside the Magistrate's jurisdiction, Ratanlal 880.

Power to declare certain publications forfeited, and to issue search-warrants for the same.

99A. (1) Where—

(a) any newspaper, or book as defined in the Press and Registration of Books Act, 1867, or

(b) any document, wherever printed, appears to the Local Government to contain any seditious matter or any matter which promotes or is intended to promote feelings of enmity or hatred between different classes of His Majesty's subjects,* that is to say, any matter the publication of which is punishable under section 124A [or section 153A]* of the Indian Penal Code, the Local Government may, by notification in the local official Gazette, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to His Majesty, and thereupon any police-officer may seize the same, wherever found in British India, and any Magistrate may by warrant authorize 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 other document may be or may be reasonably suspected to be.

(2) In sub-section (1) "document" includes also any painting, drawing or photograph, or other visible representation.]

99B. Any person having any interest in any newspaper, book or other document, in respect of which an order of forfeiture has been made under section 99A, may, within two months from the date of such order, apply to the High Court to set aside such order on the ground that the issue of the newspaper, or the book or other document, in respect of which the order was made, did not contain any seditious or other matter of such a nature as is referred to in sub-section (1) of section 99A.*

Application to High Court to set aside order of forfeiture.

* Amended by Act XXXVI of 1926.

Under this section the High Court is to consider only the question whether in fact the matters contained in the document in question contain any seditious matter. It is precluded from going into other questions; the *onus* is on the government to prove that the document contains seditious matter, 47 A. 298 (F.B.).

Hearing by Special Bench.

99C. Every such application shall be heard and determined by a Special Bench of the High Court composed of three Judges.

Order of Special Bench setting aside the forfeiture.

99D (1) On receipt of the application, the Special Bench shall, if it is not satisfied that the issue of the newspaper, or the book or other document, in respect of which the application has been made, contained seditious or other matter of such a nature as is* referred to in sub-section (1) of section 99A, set aside the order of forfeiture.

(2) Where there is a difference of opinion among the judges forming the Special Bench, the decision shall be in accordance with the opinion of the majority of those Judges.

Under this section, the High Court is precluded from considering any other point than the question whether in fact the matters contained in the document were seditious or not and come within the mischief aimed at by S. 124A, I.P.C. The *onus* is on the Local Government having regard to the frame work of the section but it is not a matter of great practical moment and indeed it gives to the Local Government the advantage of opening and of reply, 47 A. 298 (F.B.).

99E. On the hearing of any such application with reference to any newspaper, any copy of such newspaper may be given in evidence in aid of the proof of the nature or tendency of the words, signs or visible representations contained in such newspaper, in respect of which the order of forfeiture was made.*

Evidence to prove nature or tendency of newspapers.

99F. Every High Court shall, as soon as conveniently may be, frame rules to regulate the procedure in the case of such applications, the amount of the costs thereof and the execution of orders passed thereon, and until such rules are framed, the practice of such Court in proceedings other than suits and appeals shall apply, so far as may be practicable, to such applications.

Procedure in High Court.

99G. No order passed or action taken under section 99A shall be called in question in any Court, otherwise than in accordance with the provisions of section 99B.

Jurisdiction barred.

* Amended by Act XXXVI of 1926.

These sections were added by Act XIV of 1921, the Press Law Repeal and Amendment Act 1922 and correspond to Ss. 12, 17, 18, 19, 20, 21 and 22, of the Repealed Indian Press Act I of 1920. Sss 43 M. 145 ; 41 G. 466 at 473, 483 and 487.

C.—Discovery of persons wrongfully confined.

100. If any Presidency Magistrate, Magistrate of the first class or Sub-Divisional Magistrate has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.

SCOPE OF THE SECTION.—A Magistrate is not bound to issue a search warrant under this section unless he has reason to believe that a minor is confined wrongfully. The powers under this section are discretionary. *Ratanlal 839*. An inquiry under this section is a judicial inquiry, 13 C. 109 ; 25 C. 1075 ; (1917) M.W.N. 494.

ANY PERSON IS CONFINED MAY ISSUE.—If the complaint is against a husband for keeping his wife in confinement, the Magistrate will not be justified in passing a hasty order. He should hear both sides and after making such inquiry as may seem necessary pass an order. If he finds the confinement proved he should let go the wife and warn the husband and if he finds against confinement he should advise the wife to go home with her husband warning the husband not to use any coercion in taking her, 11 Cr. L.J. 450—7 Ind. Cas. 354; see 24 C.W.N. 104—29 C.L.J. 603—20 Cr. L.J. 729—52 Ind. Cas. 889. As to a complaint with respect of the removal of a child, the paramount consideration for the Court is the health and safety of the child in its being allowed to live with its natural parents.

SEARCH WARRANT.—Under this section the only kind of warrant that can be issued is a search-warrant, and the person to whom such warrant is directed may search for the person so confined, and such search shall be made in accordance therewith and the person if found, shall be immediately taken before the Magistrate. It is perfectly clear that the form under S. 98, *supra* after scoring out Cls. (a) and (c) would be sufficient for the execution of a process under this section. When there is no printed form under this section, the form under S. 98 is always used for these warrants under this section, 39 C. 403 at 406 and 45 C. 908. It is immaterial what form is used, provided the substance of the warrant complies with the requirements of the section, 45 C. 905. The jurisdiction conferred on a Magistrate under this section is not so wide as that conferred by S. 491 *infra*, *Ratanlal 839*. For the power of the High Courts to issue directions in the nature of *habeas corpus* see S. 491 *infra*. See S. 552 *infra* which deals with the powers of a Presidency Magistrate or District Magistrate to compel the restoration of abducted females. Under S. 25 (2) of the Guardians and Wardes Act VIII of 1890, a District Court for the purpose of arresting the ward may exercise the powers conferred on a Magistrate of the first class by this section.

MAGISTRATE MAY MAKE SUCH ORDER AS IN THE CIRCUMSTANCES SEEMS PROPER.—The Magistrate is bound to hear both parties and pass an order, not hastily, but after making such inquiry as may seem necessary under the circumstances, 11 Cr. L.J. 450—7 Ind. Cas. 384. Where no search-warrant under this section was in fact issued and the boy said to be wrongfully confined was not produced before the Court although a warrant for the production of the boy was ordered and where it is not clear whether the detention was wrongful, no order can be passed directing the boy to be made over to the complainant, 20 Cr. L.J. 729.

D.—General Provisions relating to Searches.

101. The provisions of sections 43, 75, 77, 79, 82, 83 and 84 shall, so far as may be, apply to all search-warrants issued under section 96, section 98, *section 99A* or section 100.

Direction, etc., of search-warrants.

A search that was made without a legal warrant is not illegal and cannot vitiate the trial. There is no question of any legal presumption and any irregularity or illegality in the search can neither vitiate nor affect a conviction, 46 A. 86, following 35 A. 358.

102. (1) Whenever any place liable to search or inspection under this Chapter is closed, any person residing in, or being in charge of such place shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

Persons in charge of closed place to allow search.

(2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in manner provided by section 48.

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched. If such person is a woman, the directions of section 52 shall be observed.

103. (1) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search, *and may issue an order in writing to them or any them so to do.*

Search to be made in presence of witnesses.

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(3) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person at his request.

Occupant of place searched may attend.

(4) When any person is searched under section 102, sub-section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person at his request.

(5) *Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Indian Penal Code.*

AMENDMENT.—Sub-S. (5) is new "We think that the power thus given to the police practically to compel the attendance of respectable witnesses from as near as possible to the place where the search is to be effected, should go far to put an end to the objectionable practice of bringing semi-professional search witnesses from a greater distance, and will also prevent the frustration of searches by the unreasonable refusal of witnesses to attend, which we understand is by no means uncommon. If executive instructions are issued to the police, that with this new sub-section to back them, they are whenever possible, to require the attendance of respectable witnesses from the immediate vicinity, we think that a considerable improvement will be effected." *Sel. Com. Report.*

OBJECT OF THE SECTION.—The object of the section is to see that searches are conducted properly and that no wrong doing such as planting of articles by Police in the house of accused should take place and thus prevent fabrication of false evidence. Object of the Legislature in requiring the presence of two or more respectable witnesses of the locality is to guard against possible discovery and unfair dealings on the part of officers entrusted with search-warrants and to ensure that anything incriminating which may be said to have been found on the premises searched was really found there and was not introduced by the members of the search party, 27 Cr. L.J. 73—91 Ind. Cas. 249. See also 42 Ind. Cas. 783.

THE OFFICER SHALL CALL UPON TWO OR MORE RESPECTABLE INHABITANTS OF THE LOCALITY.—This section requires the officer about to make a search to call upon two or more respectable inhabitants of the locality in which the place of search is situate to attend and witness the search. It is undoubtedly important that an officer making a search should comply with the provisions of this section, for the credibility of his story may in many cases depend on the support it might receive from the persons accompanying him in the search. But if for any reason the officer making the search is unable to get two or more respectable inhabitants of the locality and a search is effected in the presence of one or more men available at the time leading to the discovery of the articles the accused who is found in possession can be convicted all the same if the Court is satisfied from the evidence that an offence has been committed, 24 A.L.J. 173; 23 A.L.J. 364. The intention of the legislature in laying down the procedure as to house search is to protect the person whose house is searched and to give confidence to the neighbours, 42 Ind. Cas. 783. By this it is intended to operate in favour of the accused and in a densely populated town it means persons in the immediate neighbourhood and not persons who live couple of miles away and are friends of the police officer conducting the search, 26 Cr. L.J. 827—86 Ind. Cas. 475; one of the essentials of a valid search is the presence of independent witnesses to the search, 23 Cr. L.J. 609—68 Ind. Cas. 833. The police officer may issue an order in writing to the witnesses to attend and the order is necessary if the witness is to be proceeded against for refusal to attend. There is nothing in this or any other section of the Code to justify the notion that the required witnesses are to be selected by any person other than the officer conducting the search. Assuming what is by no means clear, that the witnesses to the search were not the inhabitants of the locality we do not think that circumstance must necessarily expose the conduct of the police to suspicion or render the evidence of the search inadmissible"; 21 M. 83 at 89; 23 M.L.J. 435—(1912) M.W.N. 1111—13 Cr. L.J. 763; 27 Cr. L.J. 73—91 Ind. Cas. 249. The intention of the enactment is to ensure that searches are conducted with decency and in order that no wrong doing, such as planting articles by the Police in the house searched should take place. Regularity and proper conduct of searches could be secured only if those

should be chosen as witnesses who can be reasonably relied on to secure the desired result and whose trustworthiness and ability towards the conveying out of the particular, duty required of them can be felt, 7 Cr. L.J. 479. The stress is upon the word 'respectable' and not on 'locality.' The person called in at the time of the search should be of some standing and not necessarily those living within a stone's throw of the house to be searched, 42 Ind. Cas. 753. The facts with reference to a search may be proved otherwise than by the production of the search lists, 34 M. 349 (F.B.). Failure to call respectable inhabitants of the locality to witness a search is a failure to comply with the provisions of this section but such failure does not make the search illegal, 23 M.L.J. 445—13 Cr. L.J. 763—(1912) M.W.N. 1111—17 Ind. Cas. 75, where 17 M.L.J. 323 is followed; 2 Pat. L.T. 389 where 53 Ind. Cas. 150 is dissented and 35 A. 358; 31 C. 557 and 26 M. 124 are referred to.

OCCUPANT OF THE PLACE TO BE SEARCHED.—These words are not intended to cover any person who may happen to be in the place but they refer back to the person mentioned in S. 102, *i.e.*, a person residing in or being in charge of the place, 41 C. 350, at 377. A cart is not a place within the meaning of the section as held by the Bombay High Court.

LIST TO BE SIGNED BY THE WITNESSES.—It was held in 26 M. 319 (F.B.) that refusal to sign the search list under this section is not an offence punishable under S. 187, I.P.C.; but now see the new sub-S. (5) which enacts that any person who without reasonable cause refuses or neglects to attend and witness a search when called upon to do so shall be deemed to have committed offence under S. 187, I.P.C. But the order requiring the person to attend must be a written order now, see 38 M.L.J. 27. Unless the list of things seized is signed by the witness as required by this section, the search would not be legal and each page of the search list must be signed by witness, 7 Cr. L.J. 411. See Ss. 165 and 166 *infra* as to mode of making searches by the Police. The Officer's duty is to be present on the spot and to exercise general supervision. This section does not lay down that the officer himself should ransack boxes, examine the roof, dig up the floor, 23 M.L.J. 445 where 21 M. 88 is not followed; see 21 M.L.J. 281 (F.B.)—3 M.L.T. 481—11 Cr. L.J. 576—8 Ind. Cas. 178 and 33 M. 413 as to mode of proving the search list and its contents.

RULES RELATING TO SEARCHES:—Whenever possible the presence of the village-headman should be obtained to witness a search. The witnesses to a search shall enter the premises to be searched and watch the police when they search and before commencing a search the person of the police officer who is to conduct the search shall be examined before the witnesses. The Code does not require a search to be made by day-light but as a rule day-light should be awaited, the inmates of the place being made to evacuate it and the place sealed and guarded. In conducting the search the place shall be inspected to see whether facilities exist for introducing properties from outside. Under S. 165 (2) an S.H.O. or investigating officer must if practicable search himself, if incapacitated, he must deliver to his subordinates an order in writing. A verbal order given on the spot is not legal. The search list is to be in duplicate with a trifolium, and copy to be forwarded to the Magistrate with case-diary and the other attached to the copy of the case diary forwarded to the District or sub-divisional office. Orders Mad. Pol. Ch. XXV, pp. 69 and 70.

E.—Miscellaneous.

Power to impound document, etc., produced. 104. Any Court may, if it thinks fit, impound any document or thing produced before it under this Code.

The section applies only when the document or thing is before the Magistrate in any proceeding before him. Where a Presidency Magistrate on a telegram from a District Magistrate to take possession of certain account books called upon the person to produce them before him and when they were produced sent them to the District Magistrate, it was held that the Presidency Magistrate acted illegally and without jurisdiction, Ratanlal 880.

MAY IMPOUND DOCUMENT OR THING PRODUCED BEFORE IT.—A District Magistrate could not impound a document which has been produced in a pending case before a Subordinate Magistrate, 1 A.L.J. 807. A Magistrate can only conduct a search under this section when he is competent to issue a search-warrant under S. 96, *supra* but the issue of a search warrant by an unauthorized Magistrate is not void, S. 529 (a), *infra*.

Magistrate may direct search in his presence.

105. Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant.

See 39 C. 983, as to the scope of this section, and a Magistrate acting under this section is protected, as held by the Privy Council, by Act XVIII of 1850 (Protection of Judicial Officers). When the legislature empowers an officer to delegate an authority to do a certain act to another person it necessarily implies that the original authority to do the act fully and completely vests in the officer himself, but it is necessary for the exigencies of business that it should be done by persons acting under authority derived from him. This principle is adopted by the Legislature in S. 65 and this section, 31 B. 438 at 448.

PART IV.

PREVENTION OF OFFENCES.

CHAPTER VIII.

OF SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR.

A.—Security for keeping the Peace on Conviction.

106. (1) Whenever any person accused of *any offence punishable under Chapter VIII of the Indian Penal Code, other than an offence punishable under section 143, section 149, section 153A or section 154 thereof, or of assault or other offence involving a breach of the peace, or of abetting the same, or any person accused of committing criminal intimidation, is convicted of such offence before 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,*

and such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace,

such Court may, at the time of passing sentence on such person, order him to execute a bond for a sum proportionate to his means, with or without sureties, for keeping the peace during such period, not exceeding three years, as it thinks fit to fix.

(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 *including a Court hearing appeals under section 407* or by the High Court when exercising its powers of revision.

The object of the Chapter is not to consign bad characters to jail but to prevent them from committing offences and to allay public apprehension, 16 Cr. L.J. 100—27 Ind. Cas. 143. Proceedings under this chapter are inquiries and not trials. All through the chapter the expression used is "inquiries". See S. 117 (2), *infra*. The expression "accused" is not defined in the Code. It is to be noted that nowhere in this chapter is a person called on to give security referred to as an accused person. In chapters dealing with trials and inquiries preliminary to commitment for trial the word "accused" is always used to denote the person proceeded against. *Prima facie*, then a person proceeded against under this chapter would not appear to be an accused person as used in the Code. In 23 C. 493 and 18 B. 661, the word "accused" was held to mean persons over whom a Magistrate or Court was exercising jurisdiction. This interpretation would lead to startling results. A witness compelled by a summons or warrant to appear in Court and give evidence, is clearly a person over whom the Court is exercising jurisdiction, and so a witness would be an accused person and no oath could be administered to him. The learned judges in those cases were considering S. 340 and they decided nothing more. A person called on to give security cannot be said to be a person accused of an offence as defined in S. 4 (1) (c), *supra*. There exist grave doubts whether a person proceeded against under this chapter is an accused, 50 C. 985 at 989-90. See also S. 340 (2) which enacts that any person against whom proceedings are instituted under S. 107 may be examined as a witness.

AMENDMENT.—In sub-S. (1) for the word 'rioting' the words 'any offence punishable under Chapter VIII of the I.P.C. other than S. 149, S. 144, S. 153A or S. 154, thereof' have been substituted thus enlarging the scope of the section and words in sub-S. (1) "or assembling armed men or taking other unlawful measures with the evident intent of committing the same" have been omitted. In sub-S. (3) "after appellate Court" the words 'including a Court hearing appeals under S. 407' have been added.

DIFFERENCE BETWEEN THE PROCEDURE UNDER S. 106 and S. 107.—Under S. 106 the order can be passed on conviction for any of the offences specified in that section but under S. 107 proceedings must be taken, summons in the first instance being issued and evidence recorded as in summons cases (S. 117) to prove that the taking of the bond with or without sureties from an accused person for preserving the peace is necessary. Again under S. 106 the Magistrate has already adjudicated on the evidence at the trial in the presence of the accused and facts are found for requiring security for keeping the peace from the accused but under S. 107 the Magistrate proceeds on information the value of which is to be tested in the presence of the accused who must have an opportunity of showing that it is not reliable, 3 C.L.R. 72.

SCOPE OF THE SECTION.—This section applies when the offence amounts to or constitutes a breach of the peace, in other words when a breach of the peace is a component part or ingredient of the offence. The very fact that a man commits rioting or assault constitutes a disorder, a disturbance of the king's peace, general peace of the Realm. The words "breach of the peace" are the antithesis of the other set of words also occurring in the section "keeping the peace" which connote preservation of the public peace and are direct opposites of the words "breaking the peace." The question in each case is, does the offence brought home to the accused necessarily include or imply a breach of the peace, or does it constitute or amount to a breach of the peace. If it does the section applies, 47 M. 846 at 848. The Magistrate is given a wide discretion to proceed under this section but to justify an order, he must find it in clear and explicit terms that in committing the offence the accused also actually committed a breach of the peace or criminally intimidated the complainant or that he committed the offence for which he was convicted in such circumstances that he evidently intended to do so, 43 C. 671; 35 C. 315; 30 C. 93; 33 A. 771; 42 A. 345; 43 B. 544; Welr II 47; 26 Cr. L.J. 1483—89 Ind. Cas. 1023. Persons against whom proceedings are started under this chapter are accused persons and have a right to be defended by a pleader and notices of the date of hearing should be given to them. 25 A. 375. But they are not accused of an offence and hence an order refusing bail to persons required to execute bonds for keeping the peace under this section is illegal, 7 M.L.T. 104 where 30 A. 334 is referred to.

ANY ACCUSED PERSON.—These words are wide enough to include European British subjects also. See 38 C. 163.

OTHER OFFENCES INVOLVING A BREACH OF THE PEACE.—The expression "other offences" refers to offences *ejusdem generis* with the offences against public tranquillity and of assaults etc., mentioned in this section. 47 M. 846; 23 A.L.J. 1053; 24 Cr. L.J. 271—71 Ind. Cas. 879. The words "breach of the peace" imply some offence against the public. 24 Cr. L.J. 391—72 Ind. Cas. 995. A superior Magistrate to whom a case is referred by a subordinate Magistrate being of opinion that an order under this section is necessary cannot merely pass an order under this section and send back the case for trial to a subordinate Magistrate, 24 Cr. L.J. 784—73 Ind. Cas. 448. No order can be passed under this section as amended, where an accused is only convicted of an offence under the Indian Penal Code read with S. 149, I.P.C. The amendment is not very happily worded for it speaks of an offence punishable under S. 149, no offence is punishable under S. 149 alone. There must be some substantive offence charged to be read with S. 149. So an order demanding security where a person was convicted under S. 325 read with S. 149, I.P.C. was set aside by the Patna High Court, 28 Cr. L.J. 426—85 Ind. Cas. 42. The words offences involving a breach of the peace in this section must be construed to mean offences into which a breach of the peace necessarily enters as a constituting element, 19 M.L.J. 86. The words "involve a breach of the peace" must receive their ordinary and natural meaning. A thing is involved in another when it is necessarily included or implied in it. 47 M. 846. The word "involve" connotes the inclusion not only of a necessary, but also a probable feature, circumstances antecedent, condition or consequence, 25 Cr. L.J. 71—75 Ind. Cas. 983. The words would probably be taken in their ordinary meaning to indicate an offence in which there had actually been and not in which there was, mere likelihood of there being a breach of the peace. The words "breach of the peace" have been given a wider interpretation, including even creating disturbance or excitement and falling far short of riot, 22 Bom. L.R. 168 at 182; 46 A. 103; 23 A.L.J. 1053; 44 M.L.J. 485—17 L.W. 499—(1923) M.W.N. 314; 24 Cr. L.J. 227 and 319. An offence merely provoking or likely to lead to a breach of the peace is not within this section. The offence must be one in which breach of the peace is a necessary ingredient, 28 M. 469; 47 M. 846; 30 C. 386; 43 C. 671; 29 C. 893; 35 C. 315; 29 M. 190; 2 Lah. 279; 27 Cr. L.J. 571—84 Ind. Cas. 139; 4 M.L.T. 468; 20 Cr. L.J. 543, but the Allahabad High Court in 33 A. 771 dissented from the above view and held that where the offence is such, that it was as a matter of experience often followed by breaches of the peace an order under this section was proper. A person who interferes with another's premises and uses violence to him and deprives him of his property commits a breach of the peace in the wider sense of the expression, 21 Cr. L.J. 288; 43 B. 554. In 42 A. 345, it was held that a conviction for criminal trespass where the intent was to commit a breach of the peace an order under this section may lawfully be passed. See also 20 W.R. (Cr.) 87; 7 W.R. (Cr.) 14; 7 C.W.N. 25. Criminal trespass into a man's house for causing bodily injury to him is an offence involving a breach of the peace and when a conviction is had for such an offence an order under this section is valid, 26 Cr. L. J. 1482—89 Ind. Cas. 1030, but where no such intention was found, the trespass being with the object of having illicit intercourse with the complainant's wife, an order under this section was not legal, 28 C. 628; on a conviction for theft, unless it was found that force was employed, or armed men were present, an order under this section cannot be made, 29 C. 393; 8 C.W.N. 847; wrongful confinement *per se* is not an offence involving a breach of the peace, e.g., locking up a room outside when a man is inside the room thus making ingress impossible. But if the accused in using violence seizes another and ties his hands the offence does involve a breach of the peace, 47 M. 846 where 30 M.L.T. 318 is not followed. See also 24 Cr. L.J. 271—71 Ind. Cas. 879; 4 M.L.T. 468; 29 M. 190; 7 W.R. (Cr.) 14; 20 W.R. (Cr.) 87; 7 C.W.N. 25. The expression is so illusive that it must of necessity attract different interpretations. The words cover two classes of cases—(1) where a breach of the peace actually occurs, (2) where the definition of the offence involves a breach of the peace, e.g., S. 504, I.P.C., 20 C.L.J. 543; 22 Bom. L.R. 166 at 178; 48 A. 105.

IS CONVICTED OF SUCH OFFENCE.—A conviction is absolutely necessary before an order for security is passed. The conviction may be in a summary trial, 8 G.W.N. 317; 11 Cr. L.J. 680. No order for security can be made where the accused is acquitted or discharged, 3 C. L.R. 72. A superior Magistrate to whom a case is sent to pass an order under this section cannot merely pass an order without convicting the accused but send back the case for trial to the subordinate Magistrate, 24 Cr. L.J. 784=74 Ind. Cas. 488. Under this section it is the offence for which a person is convicted and not the facts as put in evidence at the trial which determines whether security can be demanded or not, Weir II, 48. There must be an express finding to the effect that the act attributed to the person was likely to cause a breach of the peace, or the evidence must be so clear as to satisfy the Court without an express finding that such was the case, 26 C. 576; 27 C. 983; 30 C. 93 and 366; 29 M. 190; 26 M. 459.

SUB-DIVISIONAL MAGISTRATE.—A Sub-divisional Magistrate may be a Magistrate of the second class in charge of a sub-division. See S. 13, *supra*. A Sub-Divisional Magistrate of the second class has jurisdiction to pass an order under this section calling upon an accused; to furnish security for a period exceeding six months independent of the powers of the Magistrate as provided in S. 32, *supra*, 8 Cr. L. Rex, 153=13 A.L.J. 268.

A MAGISTRATE OF THE FIRST CLASS.—A Bench of Magistrates of which one is a Magistrate of the first class can exercise powers under this section.

SUCH COURT MAY ORDER.—Demanding security for keeping the peace is discretionary with the Magistrate provided he has materials upon which to proceed, 23 W.R. (Cr.) 58. It is necessary before an order can be made under this section that the party should have the opportunity of answering to an accusation of an offence of the kind upon a conviction for which such an order can be made. Where that requirement is not complied with the order under this section cannot stand and must be set aside, 25 C. 623 at 630. When such opportunity is given the accused may be able to show sufficient cause why he should not be bound over although he was unable to make a good defence against the charge. But the section is silent on this matter and it is desirable that there should be a provision for an opportunity to show cause similar to the provision in S. 250 *infra*.

SUCH COURT WHEN PASSING SENTENCE ORDER TO EXECUTE BOND.—An order for taking security under this section must be passed at the time of deciding the original case in the presence of the accused. If no such order is then made, subsequent proceedings should be under S. 107, *infra* after giving the person an opportunity to show cause, 15 W.R. (Cr.) 56; 21 A.L.J. 889. The order for security must be passed in the presence of the accused, and any order passed during his absence is illegal, 3 B.H.C.R. (Cr. Ca.) 1. S. 513 *infra* provides that in lieu of executing a bond, money or Government Promissory note may be deposited, but in cases where security for good behaviour is demanded, the section expressly says that such deposit shall not be made.

WHEN CONVICTION IS SET ASIDE THE BOND SHALL BECOME VOID.—When the conviction is annulled on appeal or otherwise, the order directing the person to find security abates *ipso facto*, and it is not competent for the appellate Court to order the security to be continued, 1895 A.W.N. 14; 30 C. 101; 7 N.W.P.H.C.R. 375.

FOR A SUM PROPORTIONATE TO HIS MEANS.—In fixing the amount of security the Magistrate should consider the station in life of the person concerned and should not go beyond the sum for which there is a fair probability of his being able to find security. The individual should be afforded a fair chance at least of complying with the required condition of security. 4 M.H.C.R. (Appx.) 45; 2 C. 384; 16 B. 372; 23 A. 80. The Magistrate should look to the means of the person called upon to furnish security, not to the means of his master. 22 W. R. (Cr.) 74. A demand for unreasonably heavy security may result in a heavy pecuniary fine in a case of mere suspicion and reputation as the accused might have to pay heavy sums to obtain security, 6 C. 14; 16 B. 372.

ORDER MAY BE MADE BY APPELLATE COURT INCLUDING A COURT HEARING APPEALS UNDER S. 407.—The words 'Appellate Court' include appellate Court other than the High Court, 2 Cr. L.J. 190. The words "including a Court hearing appeals under S. 407" are new. It has been held that an appellate Court cannot pass an order under this section unless the person convicted has been sentenced by a Court not inferior to that of Magistrate of the first class, see 23 Cr. L.J. 457=67. Ind. Cas. 729. "This result does not appear to have been intended, and it is proposed to remove the restriction"—*St. of Obj. and Reas.* 35 C. 434; 29 M. 190; 30 M. 48; 24 Cr. L.J. 308=72 Ind. Cas. 68, are no longer law. The amendment is in accordance with the decisions in 33 B. 33; 37 M. 153 (F.B.) and 33 A. 38; 2 Pat. L.J. 21=(1917) Pat. 57. But when the District Magistrate did not try a case as a Court of appeal, he had no jurisdiction to demand security, 16 A.L.J. 536. The exercise by the appellate Court of the power under sub-S. (3) of this section requiring the appellant to find security to keep the peace after the expiry of the sentence will not amount to an enhancement of the sentence, 2 Cr. L.J. 190; 20 Cr. L.J. 760, and by virtue of S. 423, cl. (1) (d) an appellate Court has power to set aside an order for security under this section even while upholding the conviction, 30 C. 101; but to enable the appellate Court to do so, the substantive sentence must be appealable without taking into account the order under this section or S. 416, *infra*. In the absence of a finding that any breach of the peace occurred, an appellate Court has no power to direct the accused to enter into a bond under this section, 30 M.L.T. 348. But this view is not followed in 37 M. 846.

APPEAL.—No appeal lies from an order demanding security under this section; when the conviction is set aside the bond shall become void, see sub-section. (2). Even when a conviction is confirmed on appeal, the order under this section may be set aside by the appellate Court, 30 C. 101.

For form of bond see Sch. V, No. 10, *infra*. No Court-fee is payable on security bonds under this chapter. If any Magistrate not being empowered by law demands security to keep the peace, his proceedings shall be void, S. 53C, cl. (c), *infra*.

An order under this section may be made on conviction in a summary trial, 1880 A.W.N. 181, and a Bench of Magistrates invested with first class powers under S. 15, *supra* is competent to make an order under this section, 21 W.R. (Cr.) 12; 2 C.L.R. 348 at 349.

B.—Security for keeping the peace in other cases and Security for good Behaviour.

107. (1) Whenever a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is informed 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, the Magistrate *if in his opinion there is sufficient ground for proceeding*, may in 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 to fix.

(2) Proceedings shall not be taken under this section unless either the person informed against or the place where the breach of the peace or disturbance is apprehended is within the local limits of such Magistrate's jurisdiction, and no proceedings shall be taken before any Magistrate other than a Chief Presidency or District Magistrate, unless both

the person informed against, and the place where the breach of the peace or disturbance is apprehended, are within the local limits of the Magistrate's jurisdiction.

(3) When any Magistrate not empowered to proceed under sub-section (1) has reason to believe 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 that such breach of the peace or disturbance cannot be prevented otherwise than by detaining such person in custody, such Magistrate or Court may, after recording his reasons, issue a warrant for his arrest (if he is not already in custody or before the Court), and may send him before a Magistrate empowered to deal with the case, together with a copy of his reasons.

(4) A Magistrate before whom a person is sent under sub-section (3) may in his discretion detain such person in custody pending further action by himself under this Chapter.

AMENDMENT.—The words until the completion of the inquiry herein prescribed have been omitted in sub-S. (4) as it was thought that the powers conferred by the sub-section as it stood was unnecessarily wide. The Magistrates are now given power to detain the accused in custody pending further action by him under this chapter.

SCOPE OF THE SECTION:—Proceedings under this section are intended to be precautionary and not punitive, 31 C. 350 ; 36 M. 315. The object of the order for furnishing security is the prevention of crime and not to secure imprisonment of the person concerned, 22 Bom. L.R. 180 ; 16 Bom. L.R. 138 ; 1 C.L.J. 616 ; 3 C.L.R. 72 ; 25 Cr. L.J. 1226=82 Ind. Cas. 154. "A petition under this section contemplates merely an apprehension that an offence is likely to be committed and not the commission of an offence and the power to refer the matter to the police under S. 161 may not apply as Chap. XIV of the Code relates to information as to the commission of a cognizable offence. It is possible to argue that the words "any offence relating to the commission of an cognizable offence" in S. 164, *supra* may be held to cover information relating to the threatened commission of cognizable offence. It would be better if the Code had contained an express provision empowering Magistrates to refer petitions under S. 107 *supra* to the police for investigation, such petitions habitually referred to police afford a great safety to the subject and no class of cases require more scrutiny from the nature of the allegations. The Code should be revised and an express provision should be made empowering Magistrates in terms to refer to the police," 49 M. 315 at 319 referring to Weir II, 51. Bail cannot be demanded from a person proceeded against and the most that can be required of him is to furnish recognizance and that too when there is a likelihood of a breach of the peace, 11 C.W. N. 415 ; it is illegal and contrary to the provisions of this section to take recognizance from one person in order to prevent another committing a breach of the peace, 17 W.R. (Cr.) 84 ; 14 M.L.J. 491. The Magistrate should use his power to protect the party seeking to exercise its rights allowed by law and to restrain persons threatening to disturb the exercise of such rights, 22 M.L.J. 231=(1912) M.W.N. 47=11 M.L.T. 32=13 Cr. L.J. 143=13 Ind. Cas. 831. To bring a case within the section it is not enough to show that there is a great probability of a breach of the peace ensuing, it must also be shown that the person sought to be bound over is likely to do illegal acts of violence, 8 Bom. L.R. 862. A proceeding under this section does not terminate in an acquittal or discharge of the accused ; therefore the provisions of S. 403, *infra* has no application. This section is not intended to prevent a private person from exercising his right of property because another person would be likely to commit a breach of

the peace, if he did so. 19 W.R. (Cr.) 47. The preventive jurisdiction under this section must be exercised with great caution and the party who has the legal right in him should be protected, 34 C. 935. The party in the wrong should be bound down, 12 G.W.N. 703. Proceedings under this section are not intended for the purpose of enabling two rival claimants to help themselves in recovering possession of immoveable property. Disputes as to possession of immoveable property come properly under S. 145 *infra*. This section applies to *personal disputes only*, 25 C. 559 and 798; 7 G.W.N. 29; 25 A. 537. Though there is no legal prohibition in trying a number of persons under this section it is rightly unfair and unjust to proceed against them jointly, unless it is apparent that they form a gang. The case of each has to be considered separately and this is not likely to be effected if the trial is joint, 21 A.L.J. 841. Two opposing parties to a dispute should not be proceeded against in one proceeding under this section, 25 Cr. L.J. 1238=88 Ind. Cas. 863, S. 545 *infra* is not applicable to proceedings under this section as no fine can be imposed by the Court in such proceedings and any order directing the person proceeded against to pay costs to the person on whose information proceedings were initiated is bad in law. 25 Cr. L.J. 476=77 Ind. Cas. 828.

WHENEVER A MAGISTRATE IS INFORMED.—The report of a Sub-Magistrate is sufficient "information" to authorise the Magistrate to act under this section, S. 114 proviso also shows that the report of a police officer is information on which a Magistrate could act upon, 2 M.H.C.R. 230 at 232. Credible information is necessary to take action, 12 A.L.J. 336. It is not necessary to call witnesses in support of an information laid before a Magistrate previous to issuing summons to show cause under this section, 11 W.R. (Cr.) 6. A statement by complainant believed by the Magistrate that he expected the person informed against at any time to make an attempt on his person or property is sufficient information; 7 W.R. (Cr.) 30; 17 C.W.N. 238, but there must be something more than a bare possibility, a reasonable likelihood of a breach of the peace taking place, 20 W.R. (Cr.) 57. Information must be clear and definite directly affecting the person to be proceeded against, and should disclose tangible facts and details so as to afford notice to such person what he is to come prepared to meet, 6 A. 28 (F.B.); the nature of the information on which the Magistrate acts must appear on the face of the preliminary order, 6 W.R. (Cr.) 93. A subordinate Magistrate should not draw up proceedings merely because the District Magistrate has ordered him to do so. He must use his discretion and if he thinks that it is necessary to do so to prevent a breach of the peace he is entitled to draw up proceedings. If a District Magistrate apprehended a breach of the peace it is his duty to draw up proceedings and then transfer the case for inquiry to a subordinate Magistrate, 24 Cr. L.J. 367=72 Ind. Cas. 867.

IS LIKELY TO COMMIT A BREACH OF THE PEACE.—This section presupposes that the person sought to be proceeded against is *likely* (not *was likely*) to commit a breach of the peace; and it cannot be presumed from the fact that the person has done a wrongful act in the past he is likely to do the same again, 6 Bom. L.R. 663; 26 A. 190 at 193. Again, a hasty speech likely to cause a breach of the peace does not justify an order under this section against the speaker when all fear of a breach of the peace ceases before the order is made, 7 Cr. L.J. 232. Security cannot be demanded in anticipation of a breach of the peace, 3 O.L.R. 280; 7 A.L.J. 1161; 32 A. 371; 38 A. 468; 37 A. 33; 14 A.L.J. 769; the act of which information is given to a Magistrate and in respect of which security is required must be an act which is shown to be in contemplation at the time when information is given and not merely a repetition which may be expected or apprehended from some misconduct of the kind without anything further, Weir II 49; 24 Cr. L.J. 230. See 26 A. 190 where it was held that an order binding over certain persons with a view to prevent the possibility of their creating a disturbance at the next recurrence of an annually recurring festival was held to be bad. See also 6 Bom. L.R. 663; 8 A.L.J. 1080. Nor can an order be passed under this section merely on the ground that there was enmity between two parties, 1 A.L.J. 418. The fact that the accused is found to be quarrelsome and fights and quarrels with everybody is not sufficient indication of a breach of the peace. Nor can arranging defence of property with the help of the police be held to be an act likely to cause a breach of the peace, 18 A.L.J. 137. A mere bombast will not justify an order under this section, 9 M.L.T. 271=12 Cr. L.J. 104. A Magistrate must keep out knowledge obtained outside record, and base his decision

entirely on the evidence in the case and must also find that the persons proceeded against are likely to commit a breach of the peace, 12 A.L.J. 1246. Evidence as to acts committed in the past may be brought forward to show that while the conditions remain unchanged similar acts may be committed in the future, 1 C.L.J. 616.

TO DO ANY WRONGFUL ACT.—The expression "wrongful act" was inserted in the 1882 Code. It is now expressly declared that the act which may probably occasion a breach of the peace must be some *wrongful act*. The expression means an act forbidden by the penal statutes of India or declared to be penal and wrongful by such statutes, 21 Cr. L.J. 488—86 Ind. Cas. 437. The mere fact that a person from whom security is demanded has been previously convicted of offences against property will not justify proceedings being taken under this section. There must be evidence that he has done some wrongful act indicating an intention to lapse to his former course of life, 10 B. 174; 12 C. 520. Lawful act done in a lawful manner cannot be the basis of proceedings under this section even when they are likely to induce others to commit a breach of the peace, Cow killing by a Mahomedan is not illegal. But it may induce Hindus to break the peace; unless any such act amounts to a public nuisance or is obnoxious to the rules and regulations lawfully promulgated, this section cannot apply, 30 A. 181. Thus when a person who is rightfully entitled to land, wrongfully kept out of possession granted leases of it and the lessees tried to take possession peaceably and not accompanied by force or violence, it does not itself justify an order under this section, 25 C. 798; 7 Cr. L.J. 504; 16 A.L.J. 1279, similarly when the accused used his influence to boycott complainant, 7 C.W.N. 32, 3 C.W.N. 463 or when an accused after joining the congregation services in a mosque not set apart for any particular section, in the *bona fide* performance of his devotion calls 'Amen' in a loud tone so as to lead other worshippers to break the peace, 13 A. 419 (F.B.); 9 A. 452; 7 A. 461 (F.B.); 12 A. 494 (F.B.). But where persons performing a religious ceremony on lands in their occupation but not set apart for that purpose with the deliberate intention of triumphing over, insulting and wounding the religious feelings of their neighbours they were held to have committed wrongful acts within this section, 33 A. 775. The blowing of a conch in a public place for one's personal amusement, or with any other lawful and innocent motive and without any intention of thereby annoying or hurting the religious feelings of any other persons is not a wrongful act within this section. The blowing of a conch in connection with ceremonial acts of worship, in accordance with established usage in a place fixed for the occasional or periodical performance of such ceremonies or worship, will not as a rule be wrongful act, even though there may be persons within hearing of the sound who find their religious feelings hurt in consequence, 33 A. 775 at 777. A wrongful act means a definite wrongful act which may occasion a breach of peace. An act however wrongful would not justify action unless it is shown that if it is committed it would in all reasonable probability lead to a disturbance, 7 C.W.N. 32; 6 Bom. L.R. 862; 9 A. 452. See also 34 C. 935 and 12 C.W.N. 708 where it was held that the provisions of this section should not be used to curtail private right of property and the party exercising a legal right should always be protected. See also 1881 A.W.N. 87; 3 C.W.N. 463. A person bound over is entitled to have right enforced through a Civil Court, 1 Lah. 210.

IN MANNER HEREINAFTER PROVIDED.—It has been held times without number that the Magistrate should hold an independent enquiry and should not act on the mere readiness of the accused person to furnish security, 24 A.L.J. 317—27 Cr. L.J. 370—92 Ind. Cas. 882, where 37 A. 30; 54 Ind. Cas. 411 and 784 are followed. He must first make an order under S. 112 *infra* and call upon the person to show cause and if the order calling upon accused is vague, the proceedings are illegal, 41 M. 246; 25 Cr. L.J. 89; 47 M.L.J. 689—(1923) M.W.N. 57—26 Cr. L.J. 873—86 Ind. Cas. 49. The power to take action under this section is discretionary and there is no irregularity in the procedure of Magistrate calling for a report from a Subordinate Magistrate before acting in manner hereinafter provided, *i.e.*; by S. 113, *infra*. Weir II, 51; such report of subordinate Magistrate is credible information authorizing the Magistrate to proceed under this section, 2 M.H.C.R. 240; 31 C. 380, but if unsupported by other evidence it cannot form the proper basis for a final order under S. 113, *infra*, 6 B.H.C.R. (Cr. Ca.) 5 B.H.C.R. (Cr. Ca.) 105. A notice issued with reference to S. 110 (*e infra*) cannot be held

to be sufficient as a preliminary to making an order under this section; the omission to issue a fresh notice is a non-compliance with the express provision of the law contained in this section rendering the subsequent proceedings null and void. 30 M. 282.

REQUIRE SUCH PERSON TO SHOW CAUSE.—Notice should be given to the person against whom the order is to be made and should specify the particular conduct on his part which is complained of. When such notice was given, and the ground of complaint specified in the notice was found by the Magistrate to be unsustainable the Magistrate could not pass an order on a different ground. 21 W.R. (Cr.) 6. No person can be bound down under this section without any evidence being recorded as to the likelihood of a breach of the peace taking place even though he may consent to be bound over, 35 C. 674, 34 M. 139; 21 Cr. L.J. 176 and 59; 25 Cr. L.J. 710—81 Ind. Cas. 198; 37 A. 30. But where after due inquiry and notice, a free consent amounting to a plea of guilty has been given the Court may act on such consent and pass an order under this section. 46 A. 109. See 30 M. 330, where it was held that an order made on the statement of the accused's wakil without formal evidence being recorded was bad. See also 12 A.L.J. 124 and 23 Cr. L.J. 175—65 Ind. Cas. 639; 25 Cr. L.J. 750. The expression any person within the local limits means any person within the local limits at the time the Magistrate takes action. To give jurisdiction to a Magistrate it is not necessary that the person should be residing within the local limits. A contrary view would defeat the object of the section, viz, to prevent crime, as it would be impossible to deal with wandering gangs of criminals with no fixed residence or with habitual thieves or with desperate characters of foreign territories who infest British India, 36 M. 36; 14 A.L.J. 1074. 14 Bom. L.R. 889; *contra* 27 C. 993. There is no legal prohibition in trying a number of persons together under this section but it is highly unfair and unjust to proceed against them jointly unless they apparently form a gang; ordinarily the case of each person should be considered separately, 21 A.L.J. 841—23 Cr. L.J. 741—69 Ind. Cas. 620.

SCOPE OF SUB-SECTION (2).—This clause does not authorize a Magistrate to bind over a person not residing within the limits of his district, were it otherwise, a Magistrate in one district may take recognizance from a person in any other part of British India in which this Code is in force and *vice versa*. Moreover, a person summoned into one district from another, might be subjected to unnecessary expense and inconvenience in obtaining sureties from the District in which he resides, to say nothing of the cost of witnesses he might wish to bring thence, to show that the information given to the Magistrate was incorrect or untrue and that he was not liable to be called upon for recognizance, 6 A. 26 (F.B.); 23 B. 32; 14 Bom. L.R. 889; 14 A. 39. The proper course for a Magistrate to pursue, when he believes that some persons resident beyond the limits of his district are likely to commit a breach of the peace within his district, is to cause the information of the fact to be given to the Magistrate within whose district such persons reside and to produce evidence in support of his view, in order that proceeding may be taken against them in a Court having jurisdiction, 11 C. 737; but in 23 Cr. L.J. 398 it was held that the Magistrate has jurisdiction if breach of the peace is apprehended within the local limits of his jurisdiction from a person residing outside the local limits but such a power should be exercised very carefully, 12 C. 133. See also 31 C. 350 and 13 C.W.N. 580. If during the temporary residence of an accused he commits acts likely to cause a breach of the peace, a Magistrate has jurisdiction, 24 C 343; 31 C 419.

Exception is made in the case of the Chief Presidency Magistrate and the District Magistrate who could take proceedings against a person outside their jurisdiction instigating a breach of the peace within their jurisdiction. The object of this clause is merely to restrict the initiation of proceedings against persons residing outside a district and not to restrict the power of the District Magistrate to transfer such proceedings to a subordinate Magistrate after initiation, 31 C 350; 25 A. 151; 22 C. 898; 27 C.L.J. 314. But even at the direction of a District Magistrate, a subordinate Magistrate has no jurisdiction to draw up proceedings under this section against one who resides outside the local limits; in such a case the District Magistrate must initiate proceedings, 13 C.W.N. 580. S. 361, *infra* applies to an inquiry under this section and the person proceeded against is entitled to a *de novo* inquiry on the transfer of the Magistrate, 33 M. 311.

But a District Magistrate has no power to make over the initiation of proceedings in a case under this section to a Magistrate who has no local jurisdiction in the matter and the latter Magistrate acquires no jurisdiction by the transfer to him, and his proceeding will be void. A District Magistrate cannot be said to take cognizance of a case under this section, in which he had not issued notice to the person proceeded against, and he has no power under S. 192, *infra*, to transfer such a case to another Magistrate. A District Magistrate is not entitled to initiate proceedings under this section upon facts and information which have already been subject of inquiry under the section, or in connection with charges under the Penal Code brought against the person proceeded against and have ended in a discharge. 41 M. 246.

POWER OF MAGISTRATE NOT EMPOWERED UNDER SUB-SECTION (1).—The power to proceed under sub-S. (3) ought to be used with great caution; unlike sub-S. (1) where we find the expression "is informed..." we find here "*has reason to believe*," See S. 26, I. P. C.

SUB SECTION (3).—Where a Magistrate is not himself competent to take action under this section but has to forward the case to a Magistrate empowered to act, under this section, he can if there is an immediate likelihood of a breach of the peace send the accused under arrest and the Magistrate to whom the accused is sent may in his discretion keep him under arrest under sub-S (4). See S. 590 (c) which enacts that if a Magistrate not being empowered to demand security to keep the peace his proceedings are void.

SCOPE OF SUB SECTION (4).—See the amendment of the last portion of this sub-section. A Magistrate has now power only to detain in custody pending further action by him under this Chapter. In 31 M. 315 (F.B.) it was held that where an accused person is sent before the District Magistrate by any other Magistrate under sub-S. (3) so as to bring the case under this sub-section, such District Magistrate's order detaining him in custody was one made without jurisdiction. The sub-section can only be put into operation when a Magistrate is not empowered to act under sub-S. (1) is led to believe that a person is likely to cause a breach of the peace, etc., and he cannot by any other means prevent it. Then he has power to arrest and send him to the Magistrate empowered to act under this section, 24 Cr. L.J. 825—73 Ind. Cas. 857 where 31 M. 315 and 32 C. 80 are followed. This sub-section is not controlled by S. 496, *infra*, but it makes an exception to the general rule contained in S. 496, which enacts that bail should be given in all bailable offences. 36 M. 315. The new proviso to S. 496 makes this clear. See 38 M. 473. Reading this sub-section and sub-S. (3) of S. 114 with S. 496 *infra* it is clear that an accused person is entitled to be released on bail for his appearance unless detention in custody pending the inquiry is the only way to prevent immediate breach of the peace. See 1 C.L.R. 130; 6 A. 132; 14 A. 45; 32 C. 80.

APPEAL AND REVISION. —An appeal is now provided for in cases of security to keep the peace as well as in cases of good behaviour by S. 406 *infra*. Although the person is not convicted of an offence, but only bound over under this section, the appellate Court, when hearing an appeal under S. 406 *infra*, is competent to order a retrial as the order for retrial in such a case is an incidental order which the appellate Court is empowered to make under S. 429, *supra*, 48 A. 501. Under S. 125, *infra* a Chief Presidency Magistrate or a District Magistrate, may for sufficient reasons to be recorded in writing, cancel a bond taken under this section by any Magistrate in his district not superior to his Court. *No Letters Patent Appeals* under S. 15 of the Letters Patent from an order passed in revision, as the proceedings under this section are proceedings in a "*Criminal trial*" within the meaning of the Letters Patent, 27 M. 310; 28 M.L.J. 307. A proceeding under this section does not terminate in an acquittal or discharge of the accused, 36 M. 315 following, 33 M. 85 and 27 C. 682. The High Court ordinarily will not interfere in the preliminary stage of the proceedings with the discretion of the Magistrates taking action under the preventive sections such as this section and S. 110, *infra*. But where the materials on which the order is based are clearly insufficient to support it, it will interfere. 38 C.L.J. 193; 17 C.W.N. 238—16 C.L.J. 487; 23 Cr.L.J. 741; 41 M. 246.

FURTHER INQUIRY.—Under this section if a Magistrate responsible for the peace of his division is not satisfied with the advisability of taking proceedings under this section his discretion is not open to interference by a superior Court, 25 Cr. L.J. 1149—81 Ind. Cas. 973; 24 Cr. L.J. 825—74 Ind. Cas. 837; 11 C.W.N. 121 and 415. Where a Magistrate refuses to take proceedings under this section, a Session Judge has no jurisdiction to set aside the order and direct the Magistrate to draw up proceedings under this section, 25 Cr. L.J. 679—81 Ind. Cas. 167, see also 46 A. 235 where it was held that proceedings under this section are not included within the provisions of S. 436, *infra*, and so cannot be revised by a District Magistrate, and the proper procedure for him is to report the result of his examination of the record to the High Court, see also 2 Rangoon 30. The change in the wording of S. 436, *infra* makes this position quite clear. "Any accused person" has been changed into "any person accused of any offence" and this removes the doubt, if any which existed before and no further inquiry can now be made. In 33 M. 88 it was held after a full consideration of the various provisions of the Code that a person proceeded against under this section is not an accused person and the order under S. 119, *infra* is not an order of discharge within the meaning of S. 436, *infra*, see 27 C. 652. In 36 A. 382 it was held that a person against whom information has been laid under this section is not a "person accused of any offence" within S. 4 (o), *supra* and no order for compensation under S. 250, *infra* could be passed against the person who petitioned the Magistrate under this section, but the District Magistrate may examine the record of the proceedings and if he finds that an improper order has been passed he may submit the case to the High Court for the exercise of its revisional power, 35 A. 108, see also 44 A. 681; S. 250 does not apply to cases where proceedings under this section are instituted at the instance of private persons and in which the accused are discharged, 20 A.L.J. 624, following 7 A.L.J. 743 and 15 A. 365; see also 36 A. 382; 25 B. 43.

108. Whenever a Chief Presidency or District Magistrate, or a Presidency Magistrate, or Magistrate of the first class specially empowered by the Local Government in this behalf, has information that there is within the limits of his jurisdiction any person who, within or without such limits, either orally or in writing or *in any other manner intentionally* disseminates or attempts to disseminate, or in anywise abets the dissemination of—

Security for good behaviour from persons disseminating seditious matter.

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

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

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

such Magistrate *if in his opinion there is sufficient ground for proceeding* may (in 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 to fix.

No proceedings shall be taken under this section against the editor, proprietor, printer or publisher of any publication registered under, *and edited and printed and published* in conformity with, the rules laid down

in the Press and Registration of Books Act, 1867, *with reference to any matter contained in such publication* except by the order or under the authority of the Governor General in Council or the Local Government or some officer empowered by the Governor General in Council in this behalf.

SCOPE OF THE SECTION.—The object of taking security is *prevention* and not the punishment of offences, 2 A. 838, 3 M. 238; 36 M. 98 at 97; 10 B. 174; 4 C.W.N. 531; 6 Bom. L.R. 34; 27 C. 781. The object is not to punish a person who is suspected for past unproved offences but to prevent him from committing offences and to afford him an opportunity of reforming himself, 25 Cr. L.J. 1228=82 Ind. Cas. 153. The provisions of this chapter are aimed against those who are a danger to the public by reason of the commission, by them of certain offences against the State. The test under this section is whether the person proceeded against has been disseminating seditious matter and whether there is any fear of a repetition of such an offence. In each case it is a question of fact which must be determined with reference to the antecedents of the person and other surrounding circumstances. A printer must be proved to have had knowledge of the matter but a publisher's knowledge is presumed, 25 Cr. L.J. 160; 11 Bom. L.R. 743; see also 11 C.W.N. 1050; 12 Cr. L.J. 248. It is not sufficient to show that the language used was highly offensive to a community. It must be shown that the accused intended to provoke feelings of enmity or hatred although it is unnecessary that he should have succeeded in carrying through his intention, 12 Cr. L.J. 248=10 Ind. Cas. 789. Proceedings under this section for the prevention of offences under S. 124A or S. 153A may be taken without any such special sanction required by S. 196, *infra*, except in respect of proceedings against the editor or proprietor of any publication specified in the last para of this section. The test under this section is whether the person proceeded against has been disseminating seditious matter and whether there is a fear of a repetition of the offence. In each case it is a question of fact which must be determined with reference to the antecedents of the person and other surrounding circumstances, 11 Bom. L.R. 743.

ORALLY OR IN WRITING OR IN ANY OTHER MANNER.—"It has been found that the matters covered by S. 108 have been disseminated either orally or in writing or by gramophone records, and the amendment meets this contingency."—*St. of Obj. and Reasons.*

SUB-SECTION (b).—To justify an order under this clause one has only to find that there are words in the leaflet or in the matter complained of which are likely to provoke feelings of enmity and hatred, and there is no necessity for finding an intention if one finds such words present unlike a trial for an offence under S. 153A, I.P.C., 43 C. 591, but in 43 C.L.J. 172 the rule laid down in 43 C. 591 was held to be inadmissible.

SUB-SECTION (c).—The criminal intimidation or defamation must be concerning a Judge. The term "Judge" has the meaning assigned to it by the Indian Penal Code. See last para of S. 4, *supra*; it 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 who is one of a body of persons empowered by law to give such judgment, S. 19, I.P.C.

WITH REFERENCE TO ANY MATTER CONTAINED IN SUCH PUBLICATION.—This is newly added. "This amendment is merely designed to make the intention of the Legislature clearer as regards the proceedings which require sanction prior to their institution"—*St. of Objects and Reasons.* The mere fact that this section is applicable to a particular case will not necessarily make S. 110, *infra* inapplicable, 23 C.W.N. 193.

MAY REQUIRE SUCH PERSON TO SHOW CAUSE.—When a person is called upon to show cause why he should not be required to give security for good behaviour he must be ready with his evidence when he appears in obedience to the notice. This is the meaning of the expression "to show cause" in law. If he has been unable to bring the evidence with

him on account of the shortness of the notice or other reasonable cause, it is his duty when he appears, to apply at once for summonses to the witnesses he proposes to call, 9 Bom. L.R. 1335 at 1335-37; 6 A. 214; 23 W.R. (Cr.) 9. The procedure applicable to cases under this section is that prescribed for warrant-cases except that a charge need not be framed, and this is clear from S. 117 (2). The prosecution has to establish the truth of the information and the person against whom an order requiring security for good behaviour is sought, is entitled to take the position that the prosecution should prove affirmatively the authorship of the pamphlet, 47 B. 328 at 333.

Security for good behaviour from vagrants and suspected persons.

109. Whenever a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class receives information—

(a) that any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to committing any offence, or

(b) that there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself,

such Magistrate may, in 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 to fix.

SCOPE OF THE SECTION.—This section makes provision for taking security from persons lurking within the local limits of the Magistrate's jurisdiction who have no ostensible means of subsistence or cannot give a satisfactory account of themselves. They need not be suspected of any particular offence. The object is to enable Magistrates to take action against suspicious strangers lurking within their jurisdiction, 39 C. 456 at 462; 53 C. 245. The statutory provisions of this section are often turned into an engine of oppression upon old convicts who are thrown helpless upon the world with none to take them into their company or help them to turn out an honest penny for a living. The fact that a man does not work or has been previously convicted for bad livelihood will not justify a Magistrate without being satisfied from the evidence that since his release he had no ostensible means of livelihood, to demand security for good behaviour, 41 C.L.J. 142=26 Cr. L.J. 832=86 Ind. Cas. 665, where 5 C.W.N. 28 is followed. An attempt to avoid a police patrol does not bring the person within the ambit of this section, he being a shop-keeper and resident of the place, 27 Cr. L.J. 573=34 Ind. Cas. 141; [1926] Pat. 290. This section refers to a continuous act and therefore does not apply to a case where there is a momentary effort at concealment to avoid detection or arrest, nor can it apply to a case of a person brought under arrest, for it cannot be said of such a person that he is taking precautions to conceal his presence, 22 C.W.N. 163 at 165, but see [1926] Pat. 290 which takes a different view. The object of the order for furnishing security for good behaviour is the prevention of crime and not to secure imprisonment of the person concerned, 22 Bom. L.R. 190; 16 Bom. L.R. 138=1 C.L.J. 616. See 5 Cr. L.J. 377 where it was held that the object of this Chapter is not to get every suspected person confined in jail and thus save trouble to the police, but it is only when the ordinary means of detection and prevention of crime and for ensuring good behaviour have been adopted and have failed, resort should be had to the special means provided here. It is notorious that accusations under this section are constantly made with the object of blackening an enemy's character and of satisfying feelings of spite and hatred and the Magistrates cannot be too cautious in making sure that the provisions intended for securing the peace of the community are not utilised for wreaking private vengeance under the aegis of a crown prosecution, 38 C. 156 at 169. Security cannot be demanded both

under this section and S. 110 (*infra*, 38 M. 555; 6 M.L.T. 158—10 Cr. L.J. 243—3 Ind. Cas. 77; 11 Cr. L.J. 50—5 Ind. Cas, 186.

RECEIVES INFORMATION.—Magistrates are competent to act under this section when they have credible information that a person has no ostensible means of livelihood or is unable to give a satisfactory account of himself, 31 C. 557; 26 M. 124; 6 A.L.J. 283.

TAKING PRECAUTIONS TO CONCEAL HIS PRESENCE, ETC.—The object of the concealment must be for committing some offence. Mere concealment with a view to avoid observation is no offence at all. A person cannot be called upon to furnish security for an alleged concealment in his father's house unconnected with any intention to commit an offence nor any previous concealment outside the jurisdiction of the Magistrate who initiates proceedings under this section, 39 C. 456; [1926] Pat. 280. The greatest criminal in the world is not liable to be questioned as to his presence in his own house, 39 C. 456 at 462; 23 C.W.N. 163, action cannot be taken under this section against a person who on being questioned by the police gives a false name and then corrects it. In such a case there is nothing to show that he was taking precautions to conceal his presence, 21 A.L.J. 847. There must be some definite attempt at concealment by taking precautions with that object in view whether it be by disguise or otherwise indicating a desire to hide the fact of his presence within the local limits, [1926] Pat. 290. Where a person gives a false name and secretly delivers letters inciting the commission of a crime or demanding money, he can be dealt with under this section, 15 Cr. L.J. 255—23 Ind. Cas. 207. The provisions of cl. (a) must be read together. See in this connection S. 55 (1) (a) *supra*.

HAS NO OSTENSIBLE MEANS OF SUBSISTENCE.—The law requires that before a person is called upon to furnish security it should be proved that he has no *ostensible means* of subsistence. The mere fact that a person does not work coupled with an admission of a previous conviction for bad livelihood will not justify a Magistrate demanding security under this section, 5 C.W.N. 28; merely to be penniless or out of work is not an offence. Many an honest man may find himself in either predicament and in a country where there are workless people but no work houses and casual labourers but no casual wards, if it were the law that persons are exposed to proceedings under cl. (b) of the section merely because they cannot give a satisfactory account of the manner in which they are eking out a precarious existence, the Magistrate's hands would be full indeed and much injustice might be done to innocent persons, 33 C. 346; 41 C.L.J. 142. If a person is unable to prove the source of his livelihood he ought not to be ordered to execute a bond unless there is reasonable ground for suspecting that he is sustaining himself by some dishonest means, for such an order can only be made where it is necessary for keeping the peace or maintaining good behaviour, 43 C.L.J. 202 at 205; old convicts whether they are lawfully engaged or otherwise naturally shun the police and this of itself does not show that the person where he was found was there for some unlawful purpose. Having no home is the condition of a very large number of perfectly honest persons and it is extremely difficult to prove that a person works as a cooly. The floating population mostly of the cooly class have no place of abode and they spend the nights in verandhas and door ways and eat where they can. For such people to prove to the satisfaction of the Court that they have work is well nigh impossible. They may be working quite honestly but it is very difficult if not impossible to prove it. To call upon such persons to give security is to perpetuate a farce and no one is going to stand surety for a homeless cooly. The logical result of demanding security will be that such persons will be spending their lives in jail for various terms of imprisonment for failing to give security, 41 C.L.J. 142; 26 Cr. L.J. 842—86 Ind. Cas. 666; [1926] Pat. 290. The fact that a person belongs to a wandering tribe is not a sufficient reason for demanding security from him, *Welt* II. 53, but in 6 A.L.J. 253—9 Cr. L.J. 827—2 Ind. Cas. 219 it was held that the language of cl. (b) was very wide and that a Magistrate who demanded security from one who belonged to a gang frequenting *melas* and carried on a *ring game* was acting legally upon the evidence before him, 40 C. 702. Again a young man out of employment living with his father, a man of means and able to support his son, does not come within the phrase 'person without ostensible means of subsistence' as the object of cl. (b) is to enable Magistrate to take action against suspicious strangers lurking within his jurisdiction, 39 C.

455; 22 Cr. L.J. 749—64 Ind. Cas. 141, See 17 C.W.N. 883 where it was held that a person earning his livelihood by *ring game* cannot be dealt with under this section. See also 18 A.L.J. 331; 17 A.L.J. 332. Mere proof of want of ostensible means of subsistence is not by itself sufficient to bring the case under this section. The Magistrate is further bound to consider whether the order is really necessary to secure good behaviour which is entirely within the Magistrate's judicial discretion. Ratanlal 728.

WHO CANNOT GIVE A SATISFACTORY ACCOUNT OF HIMSELF.—The expressions "who has no ostensible means of subsistence" and "who cannot give a satisfactory account of himself" are widely different from each other. In practice, they are very often taken as meaning one and the same thing and this leads to a misapplication of the provisions of the section. The expression 'give a satisfactory account of himself' does not mean that the person should satisfy how he spends his time but it means that he has no satisfactory account for his presence within the Magistrate's jurisdiction. It means that if a person is present within such limits or is present at a place within such limits to which he does not belong and there are circumstances justifying the suspicion that he is there not for an innocent purpose, he has got to explain his presence, 41 C.L.J. 142—26 Cr.L.J. 832—86 Ind. Cas. 688, but see [1926] Pat. 290 which dissents from this view. This does not refer to a person who spends his time or at least his leisure moments in an unsatisfactory manner, 41 C.L.J. 142—26 Cr. L.J. 832—86 Ind. Cas. 688; 33 C. 315. A municipal employee whose occupation and place of residence are known but who according to the Magistrate prowls about at night, associates with bad characters, arms himself with a *tathi* cannot be dealt with under this section, 8 A.L.J. 1097—12 Cr. L.J. 536—12 Ind. Cas. 304. When a person was found away from his house in the house of a dangerous political conspirator, an order requiring such person to give an account of himself was justified, 13 Cr. L.J. 239—14 Ind. Cas. 431, but the prosecution must satisfy the Magistrate that suspicion against the person proceeded against attaches to him because of his failure to give a satisfactory explanation when called upon to account for his presence in the place where he is found, *e.g.* if he fails to account for his being discovered in the company of person living a dishonest criminal life or detected in some place where he has no legal right to be. The poor, the outcast and the old offender must somewhere live and move and have their being, and, a person who during the morning hours was passing the time at a particular locality to all outward appearance innocently and in a manner void of suspicion cannot be brought within the ambit of cl. (b) of this section and S. 118, *infra* merely because he was unable to prove that he was working for his living, 53 C. 345. See [1926] Pat. 290. This clause covers suspected persons who are classed in Europe as rogues and persons of any class who cannot give any satisfactory account of themselves. 13 Cr. L.J. 239—14 Ind. Cas. 431.

THERE IS WITHIN HIS LIMITS A PERSON.—To give jurisdiction to a Magistrate to proceed under this section it is not necessary that the person proceeded against should be residing within the local limits of Magistrate's jurisdiction, 36 M. 96; Weir, II, 53. The meaning of the expression '*any person within the local limits*' is any person who is within the local limits of the Magistrate's jurisdiction at the time of taking action, 36 M. 96; when a person was put up before the Magistrate for action under cl. (b) of this section but the Magistrate discharged the accused holding that the arrest was not legal and the accused was not properly brought before the Court, held, setting aside the order, that how the accused was brought before the Magistrate was immaterial and the Court was bound to proceed with the case, 31 C. 597. See also 35 B. 225; 26 M. 124.

TO EXECUTE A BOND WITH SURETIES.—Under this section and S. 110 *infra* surety is *not optional*, as in the cases falling under Ss. 106, 107 and 108 *supra* where the bond may be with or without sureties but it is *indispensable*. In the case of a *minor* the bond may be executed only by his sureties S. 118 *infra*. The amount of the bond should not be excessive and a fair chance of complying with the required conditions of the security should be afforded, Weir II, 52; 16 B. 372; 23 A. 80. Restrictions of caste and residence of surety is illegal, 1 Bom. L.R. 820. So also the condition that surety should be an immediate neighbour of the person bound over. 17 Cr. L.J. 95. The sufficiency of surety should

be considered from a general view of his stability and property he owns and not merely from the point of view of his moveables, 17 Cr. L.J. 97. Government Promissory-notes cannot be accepted in addition to or in lieu of bond under this section. See S. 513 *infra*. In fixing the amount under this and S. 110 *infra*, the Magistrate should consider the station in life of the accused and should not go beyond a sum of which there is a fair probability of his being able to find surety, 4 M.H.C. R. Appx. xlvi. See also the proviso to S. 118 *infra*. When once a surety offered has been accepted by the Magistrate he has no power subsequently to enhance the security bond, though he might be of opinion that such surety is an unfit person, 1 C.W. N. 304; 2 Cr. L.J. 278. A person should not be called upon to enter into a bond both under Ss. 109 and 110, 38 M. 555. But a bond so taken is not void, 27 Cr. L.J. 326—92 Ind. Cas. 732; See 36 C. 862 where it was held that the object of requiring a surety bond is not to insure the recovery of the amount of the bond from the principal but to serve as an additional security for his keeping the peace or being of good behaviour, and therefore double payment both from the principal and the surety may be demanded. The provisions of S. 517 apply to proceedings under this section although there may be no proof that any offence had been committed with reference to that property, 34 C. 317; 20 Cr. L.J. 125. As to form of bond See form No 11 of Sch. V.

110. Whenever a Presidency Magistrate, District Magistrate, or Sub-divisional Magistrate or a Magistrate of the first class specially empowered in this behalf by the Local Government receives information that any person within the local limits of his jurisdiction—

Security for good
behaviour from
habitual offenders.

- (a) is by habit a robber, house-breaker, thief, or forger, or
- (b) is by habit a receiver of stolen property knowing the same to have been stolen, or
- (c) habitually protects or harbours thieves or aids in the concealment or disposal of stolen property, or
- (d) habitually commits, or attempts to commit, or abets the commission of, the offence of kidnapping, abduction, extortion, cheating or mischief, or any offence-punishable under Chapter XII of the Indian Penal Code, or under section 489A, section 489B, section 489C or section 489D of that Code, or
- (e) habitually commits, or attempts to commit, or abets the commission of, offences involving a breach of the peace, or
- (f) is so desperate and dangerous as to render his being at large without security hazardous to the community,

such Magistrate may, in 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 three years, as the Magistrate thinks fit to fix.

AMENDMENT.— In sub-section (a) habitual forgers are included. and in sub-section (d) all offences under Chap. XII, I.P.C., kidnapping, abduction and offences under Ss. 489A, 489B, 489C, 489D. are also included.

SCOPE OF THE SECTION.—This section provides six categories of cases within one or more of which the offender's case must come in order that a penalty may be imposed in accordance with this section. On general principles when a man is sought to be proceeded against under this section, it must be made clear under which of the sub-sections he is

charged. It is not enough to assert that he is a man of criminal tendencies or that he is suspected of having committed certain crimes. The prosecution must charge that the accused habitually commits one of the offences mentioned in sub-sections (a) to (d) or that he habitually commits, or attempts or abets the commission of offences involving a breach of the peace, Sub-Sec. (e) or that he is so desperate and dangerous as to render his being at large without security hazardous to the community, Sub-Sec. (f). It must be specifically stated under which of these categories the accused's case is alleged to fall and the omission to do so causes obviously hardship to him as he received no notice of the precise case he has to meet. It is not enough to charge a person generally of having committed an offence, under this section without specifically stating under which of the sub-sections the case is alleged to fall, 26 Cr. L.J. 1377-89 Ind. Cas. 813. The powers under this section are to be exercised very sparingly and only in those cases where the evidence is very clear and precise, 23 Cr. L.J. 507-68 Ind. Cas. 43; 38 C. 156. The object of the section is *preventive* and not *punitive*, 16 Bom. L.R. 138-18 Cr. L.J. 268-23 Ind. Cas. 476. Any attempt to use it for punishing for past offences is wrong and not sanctioned by law, and this section should be invoked only in cases where positive evidence of the commission of crime is available against the person proceed against, 3 M. 238, 37 C. 781; 31 C. 380; 17 C.W.N. 238; 13 C.W.N. 318; 20 C.L.J. 30; 7 A. 67 at 72; 42 A. 563; *Wair* 11, 862; 10 B. 174; 6 Bom.L.R. 34; 16 Cr. L.J. 100-27 Ind. Cas. 148; 14 Cr. L.J. 8; 12 Cr. L.J. 328. The Legislature does not provide by means of this section a means of punishment, 23 Cr. L.J. 507-68 Ind. Cas. 43. The intention of the law is not that the person called upon to furnish security should be sent to jail but that, if possible he should be kept out of jail, 16 Bom. L.R. 138-21 Cr. L.J. 377; 22 Bom. L.R. 190. The object of the law as to security for good behaviour is not to fill the jails with bad characters, but to bring reasonable pressure to bear on such persons to respect the law, 4 Cr. L. Rev, 144. The statutory provisions of this section were enacted for protecting society from habitual offenders and was never intended to be applied to coerce landlords to adopt efficient management of their estates, 17 C.W.N. 238-16 C.L.J. 487-14 Cr. L.J. 5-18 Ind. Cas. 149. This section is inapplicable to a landlord whose tenants are of bad character and who through his tenants commits acts of extortion, the proper course is to prosecute for specific acts of oppression and not to proceed under this section, 27 C. 791; 8 C.L.J. 711. The object of the section is not to obtain money for the Crown by forfeiture of the bonds taken, but is only to secure good behaviour, 20 A. 208. The provisions of the section ought not to be employed to punish past offences but only to be used for future good behaviour; where a person is proceeded against for a substantive offence and has given bail to the satisfaction of the Magistrate, he cannot be proceeded against simultaneously under this section, 1 C.L.R. 268 at 271; 7 A. 67 at 72; 40 B. 174. Where the information received shows a likelihood of a breach of the peace, it is illegal to demand security under this section, 6 A. 132. This section aims at protection to the public against repetition of crimes in which *the safety to property* is menaced and not the *security of persons* alone is jeopardised, 2 A. 838 at 837. Mere proof of bad character will not justify an order under this section, 9 M.L.T. 246-11 Cr. L.J. 638-8 Ind. Cas. 320. Powers under this section are to be exercised with great caution and discrimination. They are not to be applied too freely and to persons whose cases are not within the spirit of the provisions of this section, 4 N.W.P H.C.R. 117; 6 A. 214; 14 A. 15. This section is not intended to afford means to the Police to detain a suspected person in custody till they are liable to work out a case against him. A Magistrate should not detain a man in custody unless he has the necessary information to pass an order in writing as required by S. 112 *infra*, 10 A.L.J. 351-13 Cr. L.J. 627-17 Ind. Cas. 871. When an accused has been discharged or acquitted of the offences of which he was suspected, it is always necessary to make it clear that proceedings were not taken as a means of indirectly punishing a man who the Police was convinced was guilty, 6 A.L.J. 487-9 Cr. L.J. 528-2 Ind. Cas. 225. Mere suspicion is not sufficient to bind down a person to be of good behaviour, 75 Ind. Cas. 723. There must be some independent evidence of the charge against the accused under cl. (a), (d) and (f) of this section and when the evidence given is vague, general and of hearsay character and not legally admissible for purposes of proving the charges, the order under this section is bad in law, 26 Cr. L.J. 739-86 Ind. Cas. 274. Immediately after the acquittal of a person of an offence under S. 411, I.P.C. an order under this

section ought not to be passed against him unless a very strong case is made out and the High Court in revision cancelled the order so passed. 27 Cr. L.J. 190-91 Ind. Cas. 1006. Security cannot be demanded both under S. 109 and this section. 38 M. 585; 6 M.L.T. 188-10 Cr. L.J. 243=3 Ind. Cas. 77; 11 Cr. L.J. 80=3 Ind. Cas. 166. Ordinarily under this section every person has to be tried separately for the offence enumerated herein and a joint trial is only permissible when one or more persons have been associated together for committing offences specified herein. 23 Cr. L.J. 100=65 Ind. Cas. 484; 8 L.W. 481; 43 M. 450. It is essential to prove what each accused has done and definite evidence must be adduced against each accused. 35 C. 929; 8 C.W.N. 180; 10 Cr. L.J. 591 and specific finding should be recorded against each accused. 37 C. 91; 6 A. 214. See the subject fully dealt with at p. 123. Security cannot be taken on evidence of general repute unless it is proved to be universal, 16 Cr. L.J. 106=27 Ind. Cas. 154.

WITHIN THE LOCAL LIMITS OF HIS JURISDICTION.—The words are not equivalent to residing within local limits. It is sufficient to give the Magistrate jurisdiction if the evil habits of the accused are practised and evil reputation acquired within the local limits of his jurisdiction, 19 C.W.N. 1022; 46 C. 215; 30 A. 89. The expression '*any person within the local limits of his jurisdiction*' are obviously not intended to apply to persons undergoing imprisonment and consequently the Magistrate has no power to commence proceedings under this section. Persons to be proceeded against must be residing within the local limits of the Magistrate's jurisdiction and must be found to answer to one of the descriptions given in (a) to (f). When a person resides outside such limits, a Magistrate cannot issue a warrant under this section against him. The reputation a man has must necessarily be the reputation in the neighbourhood of his residence and not at some place far away from his home. 27 C. 993. Occasional residence is enough to confer jurisdiction under this section, 31 C. 419. It was held in 20 A.L.J. 49=23 Cr. L.J. 96 that permanent residence within the locality is not essential to give jurisdiction to a Magistrate. It is enough if the person practises his career as thief, housebreaker etc. within such jurisdiction, see also 43 C. 153; 23 C.W.N. 193; 20 Cr. L.J. 133; 27 C. 993; 35 M. 96; 39 A. 139. The Magistrate who is in executive charge of the local area, is the best person to Judge whether there is any likelihood of a breach of the peace within the local limits of his jurisdiction and whether it is necessary or desirable that preventive proceedings should be taken, and the Legislature has purposely left it to the discretion of such a Magistrate to say whether proceedings ought to be taken or not. 41 M. 245; 1918 M.W.N. 751. The expression '*any person within local limits*' is advisedly used to exclude the necessity of proving anything approaching a permanent residence and leave it in the power of Magistracy to deal with most dangerous criminals who wander from place to place and who have no well-known residence, 9 Bom. L.R. 244. When an inquiry was held at a place outside the local limits of the Magistrate's jurisdiction, it was held the proceedings were void and passed without jurisdiction, 3 C.L.J. 195.

WHENEYER A MAGISTRATE RECEIVES INFORMATION.—This information is the foundation of the whole proceeding and there is no limit to the nature or source of information on which a Magistrate might initiate proceedings under this section. 27 A. 172; nor is a Magistrate bound to inform the person proceeded against, the source of his information or the nature of the information. The information may to some extent be of a hearsay and general description, 6 A. 132. The information which a Magistrate inquiring into a case under this section already possesses concerning a person cannot be used as substantive evidence, but it may form a check which the trial Court may legitimately use in order to test the nature of the evidence which it has to deal and to negative, e.g., a suggestion that the police investigation had been unfair, 45 A. 749 distinguishing in 21 A.L.J. 613. All that the Magistrate is bound to state is, the substance of the information, 29 C. 392; but he is not bound to give a list of witnesses in support of the proceedings, 35 C. 243. A Magistrate who initiates proceedings on his own personal knowledge is not competent to inquire into the truth of the information under S. 117 *infra*, 29 C. 392. The person who gives information is not liable to be dealt with under S. 260 *infra*.

BY HABIT A ROBBER, ETC.—This section does not provide any person being called upon to furnish security for being by habit a dacoit and belonging to a gang of dacoits. It is not for the Courts to find out the motive for the omission by the Legislature but if it were necessary it is this. Being a member of a gang of dacoits is a definite offence under S. 400, I.P.C., and it was for that reason that under the preventive sections, action could not be taken for having committed a specific offence. Instead of proceeding for the specific offence it cannot be permitted to indirectly punish persons by proceeding against them under the preventive section. It was urged that if a person can be called upon to furnish security being a habitual robber, there is no reason why a man should not be bound over for being by habit a dacoit. A man may be by habit a robber and so long as he is not charged with a definite act of robbery he may be bound over under the preventive section. But as soon as it is said that he along with four others or more, habitually commits robbery, he becomes at once a member of a gang of dacoits and thereby commits a definite and specific offence under S. 400 I.P.C. This section therefore deliberately omitted dacoity out of its purview, 23 A.L.J. 18—28 Cr. L. J. 745—86 Ind. Cas. 282. But see 47 A. 733 where 23 A.L.J. 18 is distinguished. The words "habit" and "habitually" are not used in the narrow sense, meaning "inclined by nature" but must be taken as meaning persistence in doing an act, a fact which is capable of proof by adducing evidence of the commission of a number of similar acts, "Habitually" must be taken to mean 'repeatedly' or 'persistently,' 25 Cr. L.J. 60—75 Ind. Cas. 764. Habit is to be proved by an aggregate of facts, 6 M.H.C.R. 120. Persons are said to commit habitual extortion only when they are in the habit of committing as individual members of the community and not when certain acts amounting to extortion are committed by them as mere agents of a zamindar, because the moment they cease to be the agents they become divested of their capacity and are not likely to commit extortion as individual members of the community. The proper course therefore is to prosecute the perpetrators of these extortions and not to proceed under this section, which is intended to *prevent crime* and *not to punish for offences*, 27 C. 781. Vague and general information that a man is a habitual offender is not sufficient evidence on which an accused person might be bound over under this section, 4 A.L.J. 616. To sustain an order under this section the evidence should be of such a nature as would lead to a reasonable and definite ground for coming to the conclusion that the persons are habitual offenders, 8 C.W.N. 843. When the witnesses are examined as to general character, their evidence is not of much value as to the habits of the person concerned, unless they support their opinion by specific instances, but it is not absolutely necessary that unless specific instances are given the evidence could not be acted upon to base an order under this section, 6 Bom. L.R. 34. Where the evidence against certain persons consisted in that of certain respectable witnesses none of whom knew the accused personally but only stated what they heard from others whose names they could not give, no order under this section could be passed on such evidence, 29 C. 779. The term "habit" must be distinguished from the term "repute" which refers to the common belief of the respectable inhabitant of the locality, where the person resides. But habit apparently requires a more specific evidence of bad character. Under S. 117 (8) the fact that a person is a habitual offender may be proved by evidence of general repute. Mere evidence of suspicion against the accused is not sufficient, 75 Ind. Cas. 723. There must be independent evidence to have the charge against the accused under cls. (a) (d) and (f) and where the evidence given is vague, general, and of hearsay character and not legally admissible for purpose of proving the charges, the order under the section is bad in law, 28 Cr. L.J. 738—85 Ind. Cas. 274. Evidence going to show that a substantive offence has been committed or which might form the basis of a charge of a substantive offence is not necessarily to be included in proceedings under this section and can form the basis of an order under S. 112 *infra* and a finding under S. 118, *infra*. Previous acquittals on the evidence on two occasions will not enable the accused to have the evidence excluded but it is a question of the value of the acquittals and may be put in evidence for what they may be worth, 47 A. 733 where 23 A.L.J. 18 is distinguished.

HABITUALLY PROTECTS OR HARBOURS.—The acts which amount to harbouring must be done with the intention of screening the offender from legal punishment or to prevent him from being apprehended. If a person from mere motives of humanity and without any

intention of enabling the fugitive to escape from justice gave food to a starving man or gave medical aid to one who was wounded, knowing his character, he commits no criminal act. The expression "protecting" or "harbouring" seems to contemplate cases where assistance is rendered to screen an offender from legal punishment, etc., but does not refer to acts done with motives of humanity. The clause is designed to meet cases of professional receivers, etc. who protect thieves from discovery and prevent their arrest and help them in disposing of stolen property, 11 Cr. L.J. 480—7 Ind. Cas. 462.

COMMITTS OFFENCES INVOLVING A BREACH OF THE PEACE.—These words "offences involving a breach of the peace" mean offences in which a breach of the peace is an ingredient and not offences provoking or likely to lead to a breach of the peace, 30 C. 366, followed in 38 C. 156. Therefore a person who behaves indecently and immodestly towards women and who is of immoral habits, tries to seduce women, cannot be bound over under clause (e) of this section, 30 C. 366; see also 25 C. 628; 28 M. 469; 29 M. 190. A zamindar who employs latheals to threaten his tenants and uses forces in unyoking their bullocks, and burn their houses for compelling them to pay enhanced rents brought himself within the mischief of this clause, 31 C. 419 approved in 38 C. 156. But indecent overtures to boys passing by the shop of a person cannot come within this clause, 16 Cr. L.J. 582—30 Ind. Cas. 134. The words "involving a breach of the peace" occur in S. 106 (1) *supra* and gave rise to a number of rulings pointing out the difficulty in construing these words. See under S. 106 (1) *supra* at p. 105.

DESPERATE AND DANGEROUS AS TO BE HAZARDOUS TO THE COMMUNITY.— "A man of desperate and dangerous character" under cl. (f) means a man who has a reckless disregard of the safety of the persons or the property of his neighbours; and under that clause evidence of general repute is not admissible. Evidence of general repute is also excluded by Ss. 112 and 117 *infra* and a finding that a man is of so desperate and dangerous a character must be based on evidence of facts. It is not sufficient to do so by some vague and general evidence that some one was robbed or assaulted and people say that the accused was responsible for it, 3 Cr. L.J. 280; 5 C.W.N. 249; 11 C.W.N. 789. When a person is charged under cl. (f) only, evidence of general repute is inadmissible, 34 M. 253; 25 A. 273; 11 C.W.N. 789; 13 C.W.N. 244; 29 C. 779; where the evidence produced against a person amounts to no more than that he is a nuisance to his neighbours, refuses to pay his debts, abuses people who sell goods to him and makes indecent overtures to school-boys who passed by his shop, it was held, these will not justify an order under clause (f) of this section, 16 Cr. L.J. 582—30 Ind. Cas. 134. Evidence of repute must be evidence given by respectable persons of the neighbourhood acquainted with the accused. Mere evidence of suspicion that the accused did certain acts is not generally of value, 29 Ind. Cas. 525. The burden of proving an accused's bad character is on the prosecution, and therefore when the evidence on both sides is of an indifferent and interested character, the prosecution must fail. Cases should be decided on evidence taken in Court and not on the personal knowledge of the Magistrate, 27 C. 781; 11 A.L.J. 461—13 Cr. L.J. 407—20 Ind. Cas. 231.

REQUIRE SUCH PERSON TO SHOW CAUSE.—It has been held times without number that under S. 107, *supra*, Magistrate should hold an independent inquiry and should not act on the mere readiness of the accused to furnish security. In principle there is no distinction between proceedings under S. 107 and under this section. In either case it is the duty of the Magistrate to hold an inquiry and not to bind down a person merely because he agrees to furnish security, 24 A.L.J. 317—27 Cr. L.J. 370—32 Ind. Cas. 832. See also 37 A. 30; 34 M. 139; 35 C. 674; 25 Cr. L.J. 710—81 Ind. Cas. 198; 54 Ind. Cas. 411 and 784; 23 Cr. L.J. 175—63 Ind. Cas. 638; 30 M. 330. But see 46 A. 109, where it was held that where after due inquiry and notice a free consent amounting to a plea of guilty has been given, the Court may act on such consent and pass an order. Before an order is passed the accused should be given an opportunity of entering on his defence and he should be clearly informed of the accusation he has to meet, 11 C. 13. It is incumbent on the Magistrate under S. 112, *infra* to make an order setting forth the substance of information etc., mentioned in this section; mere information to an accused that he is a suspect is hardly sufficient, 32 A. 636. Under S. 117 (2), *infra* the Magistrate's inquiry must conform:

with the procedure prescribed in warrant cases and therefore S. 256, *infra* is applicable to these proceedings but the accused although he is entitled to cross-examine the prosecution witnesses, he has no right of further cross-examination of the witnesses before entering on his defence as in warrant cases, 35 C. 243. When fresh proceedings are taken after the expiration of the period of a bond for good behaviour previously taken, such proceedings must be confined to facts and circumstances alleged after release from last security, 19 C.W.N. 223.

TO EXECUTE A BOND WITH SURETIES.—There is no provision of law empowering a Magistrate to call upon a person to provide sureties for good behaviour without his giving his own bond at the same time, 27 A. 262. The object of requiring sureties for good behaviour is that sureties should have an interest in seeing that the person from whom security is taken does behave well and they should also be in a position to exercise their influence over the man, 1895 A.W.N. 140; 20 A. 203, but a Magistrate has no power to impose arbitrary conditions, 23 Cr. L.J. 395. But in 35 C. 400 it was held that the test is not whether the surety can supervise the person bound over but whether the surety is of sufficient substance to warrant his being accepted. See also 30 C.W.N. 791. The fact that the sureties are relatives of the accused far from being a disqualification is an additional qualification, provided they are in other respects suitable, 25 A. 131. When once a surety-bond is accepted it cannot be cancelled on the information that the surety is not a man of means, 29 C. 455. As to the form of bond see Sch. VI, No. 11. See S. 514, *infra* as to forfeiture of bond. When a person forfeits his bond by reason of his having been convicted for an offence involving a breach of the peace, he cannot be forthwith committed to prison for the unexpired portion of the term for which security was demanded but the amount of the forfeited bond might be exacted, 28 A. 629.

JOINT INQUIRY.—Ordinarily every person has to be tried separately under this section. A joint enquiry is only permissible when two or more persons have been associated together for the purpose of committing offences mentioned in Cls. (a) to (f) which are under inquiry, 13 C.W.N. 244=10 Cr. L.J. 460=4 Ind. Cas. 10, unless this circumstance is established a joint inquiry is illegal. [1923] Pat. 8; 45 A. 109; Weir II 32; 9 A. 452; 1881 A.W.N. 28; 13 Cr. L.J. 760=17 Ind. Cas. 73; 16 Cr. L.J. 136=27 Ind. Cas. 200. See sub-S. (5) of S. 117 *infra*. Although sub-S. (4) permits joint inquiry against several suspects associated together it is the duty of the Magistrate to consider the case of each suspect individually on its own merits and come to a separate finding with regard to each of them, 25 Cr. L.J. 1877=83 Ind. Cas. 337. It is not permissible to take proceedings under this section against several persons jointly unless such persons are confederates or partisans or against whom all the evidence is equally applicable, 45 A. 109; 8 L.W. 461; 10 L.W. 267= (1919) M.W.N. 639=20 Cr. L.J. 763. Where proceedings were taken against two persons not only for their conduct coming within cls. (d) and (e) of this section, but also under cl. (f) for the reason that they were so desperate and dangerous as to render their being at large without security hazardous to the community and both the persons proceeded against were tried jointly and evidence relating exclusively to the nefarious acts of each of them was let in, in addition to the evidence regarding the events in which it was alleged that they were associated together and the Magistrate passed an order against both, on a consideration of the entire evidence thus introduced into the record against both, it was held that the joint trial was bad and prejudiced them. Without laying down any rule or consulting any section, common sense and common justice dictates, that proceedings against a person for *badmashī* should be confined to himself alone unless the case is that he has a confederate or a partner to whom all the evidence is equally applicable, 45 A. 109 at 111, followed in 47 M.L.J. 689; 25 Cr. L.J. 378=89 Ind. Cas. 910. But whereby holding such inquiry no prejudice has resulted and the lower Court had excluded from consideration evidence which did not apply directly to the case of each accused such joint enquiry was held to be not illegal, 26 Cr. L.J. 114=85 Ind. Cas. 282 where 45 A. 109 is distinguished. Persons belonging to two contending factions should not be legally dealt with and bound over in one proceeding. Such persons cannot be said to be associated together in the matter under inquiry within the meaning of S. 117 *infra*. A joint inquiry is therefore bad and vitiates the entire proceeding, 9 Cr. L.J. 560=3 Ind. Cas. 240 where 11 C.W.N. 472; 51 Cr. L.J. 197 and 81 Mad. 276 are followed.

TRANSFER.—A case under this section can be transferred by a District Magistrate as under S. 192, *infra* he is entitled to transfer any case cognizable by a Criminal Court. The words 'any case' in S. 192 include a case under this section. Even if the Magistrate has no such power to transfer but does so erroneously and in good faith S. 599 (f) declares his proceedings will not be void. 35 C. 243 ; 24 Cr. L.J. 31=71 Ind. Cas. 79, but it has been held that when a transfer is made to the file of a first Class Magistrate who has ordinarily, jurisdiction throughout a district but not specially empowered under this section, he cannot exercise jurisdiction under this section, 22 C. 898. It has been doubted whether S. 192 or S. 526 would apply to proceedings under Ch. VIII & Ch. XII of the Code. The decisions in 31 C. 350 ; 26 M. 188 remove the doubt but 25 B. 179 took a different view. It was held in 16 A. 9 ; 30 A. 47 ; 19 A. 291 that proceedings under this section cannot be transferred to any Court outside the district within which proceedings have been instituted but see the later rulings in, 32 A. 832 ; 12 A.L.J. 736 which hold that proceedings can be transferred by the High Court. See 36 A. 239 as to grounds sufficient for a transfer. Proceedings taken under this section should be disposed of by the Magistrate who initiated the same. He cannot after recording evidence send up the case to the District Magistrate without passing final orders and the District Magistrate has no jurisdiction to dispose of the case so sent up, 13 Bom. L.R. 713=13 Cr. L.J. 748=17 Ind. Cas. 80.

APPEAL AND REVISION.—An appeal lies to the High Court from final orders passed by a Presidency Magistrate, and from all other Magistrates the appeal lies to the Sessions Court, but, Local Government is empowered to notify that in any District appeal from Magistrates shall lie to the District Magistrate and not to Court of Session. S. 406 *infra*. If a Subordinate Magistrate refers case to the Sessions Judge under S. 128 (3) *infra* then the final order being that of the Sessions Judge, no appeal lay to the District Magistrate. Orders passed by a District Magistrate under this section can be revised by the High Court on the same grounds on which revisional powers are exercised in non-appealable sentences and orders. The High Court is not a Court of appeal in proceedings under this section and the responsibility of administering that section does not rest with it. The High Court will not weigh evidence, but will only see that the Courts below have approached the question in a fair way and when the lower Courts have not approached the case from proper standpoint, it will interfere in revision, 13 A.L.J. 1038=16 Cr. L.J. 808=31 Ind. Cas. 821. The High Court is not a Court of Criminal appeal in cases under this section and its duty is not to weigh the evidence given on behalf of one side or other but only to see whether the Court below has approached the case in a fair way having regard to the interest not only of the prosecution but also the accused. 25 Cr. L.J. 1283=89 Ind. Cas. 147 ; 13 Cr. L.J. 9=13 Ind. Cas. 102 ; 13 A.L.J. 1036=16 Cr. L.J. 803=31 Ind. Cas. 821. In 6 A.L.J. 487 it was held that the High Court will not interfere in revision on the merits with an order under this section, provided the appellate Court under S. 406, *infra* has really considered the evidence on record. The High Court ordinarily does not interfere in the preliminary stage with the discretion of Magistrates taking action under this section, but where the materials on which the order is based are clearly insufficient to support the order it does interfere, 33 C.L.J. 188 ; 17 C.W.N. 238=16 C.L.J. 487. See also 41 M. 236. No Letters Patent Appeal lies against the order of a single Judge of the High Court as proceedings under this Chapter are criminal trials, 39 M. 539.

FURTHER INQUIRY.—Before the amendment of S. 436 it was held that, a District Magistrate is competent to direct a further inquiry into the case when a first-class Magistrate discharges an accused against whom proceedings were taken under Chap. VIII, as such person is an accused person within S. 436, *infra*, 21 A. 107 ; 18 B. 661 ; 24 A. 148 ; 27 C. 662 ; and S. 436 was not intended for having a review of the proceedings under this section, merely because the District Magistrate took a different view of the evidence from that taken by the trying Magistrate especially when no further evidence is available. 44 A. 691. The change in S. 436, *infra* is very significant. The words "any accused person" has been altered into "any person accused of an offence" and certainly a person proceeded against under this section cannot be said to be a person accused of an offence and the information against him will not amount to a complaint within the meaning of S. 4 (1) (h) *supra*, 25 Cr. L.J. 89=76 Ind.

Case, 25. Consequently if a Magistrate responsible for the peace of his division is not satisfied with the advisability of taking proceedings under this section his discretion is not open to interference by a superior Court, 25 Cr. L.J. 1159—81 Ind. Cas. 973; 2 Rang. 30; 24 Cr. L.J. 825—74 Ind. Cas. 857. The recent amendment removes the doubt if any which existed before and no further enquiry can be made now. An order under S. 118 by an Additional District Magistrate in a proceeding under this section is appealable to the District Magistrate, 48 C. 874. When proceedings were set aside on appeal by the District Magistrate he has no power to order further inquiry in proceedings under this section, 83 C. 8; 16 M.L.J. 79. See however the decision in 33 M. 85, where it was held that no order for further inquiry could be made if the case resulted in a discharge under S. 119 *infra*, see also 36 M. 315. See S. 530, cl. (d) which declares that if a Magistrate not empowered acts under this section his proceedings are void.

111. *Repealed by Act XII of 1923, S. 8.*

112. When a Magistrate acting under section 107, section 108, section 109 or section 110 deems it necessary to require any person to show cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

OBJECT OF THE SECTION.—This section provides that notice should be given to the accused as to the case he has to meet. The party proceeded against should have due notice of the facts on which the Magistrate proposed to proceed against him. The notice should very effectually show under which of the sub-clauses of S. 109 or S. 110 the case falls, so that the accused may know more clearly what is the case he has to meet. Merely telling an accused person that he is a suspected thief is not a compliance with the imperative provisions of this section, 42 A. 646. If this is not made clear, the final order is liable to be set aside, 30 M. 282; 11 C. 13. The order under this section stands in the place of a charge in the trial of a warrant-case and it is the intention of the Code that an accused person should have at his own house the fullest information as to the reasons why his liberty is liable to be endangered, 13 A. 48; 6 A. 26; but a Magistrate is not bound to disclose the source of his information on which he is acting, 27 A. 172. The parties must be in a position to bring their evidence to rebut the truth of the information, 6 A. 214; 11 C. 13. But omission to set forth the substance of the information received may not necessarily vitiate the proceedings if as a matter of fact the accused had clear notice of the case against him and ample reason and opportunity to let in evidence, 23 Cr. L.J. 42—84 Ind. Cas. 668.

DEEMS IT NECESSARY.—The Magistrate is bound to state before issuing process that in his opinion a breach of the peace is likely to take place, 6 A. 26 at 30.

SHALL MAKE AN ORDER IN WRITING.—The provisions of this section are imperative, not merely directory. If a Magistrate before taking action under S. 107, *supra* omits to issue a notice in writing as required by this section, his omission was a non-compliance with an express provision of law rendering his subsequent proceedings void, 30 M. 282; See also 47 M.L.J. 689. But a different view was taken in 1891 A.Y.N. 40; 15 W.R. (Cr.) 43; see also 11 Bom. L.R. 740—10 Cr. L.J. 375—3 Ind. Cas. 774. The order is only a preliminary notice, 30 M. 282, and is not in the nature of a rule nisi implying that the burden of proving innocence is on the person proceeded against. The onus lies always on the prosecution to establish circumstances justifying the action taken, 9 A. 452; 12 W.R. (Cr.) 60; 4 B.L.R. 48 (F.B.); 3 Bom. L.R. 269. The preliminary order must state the amount of the bond to be executed and the term for which

the bond is to be in force, 2 Rang. 521. Omission to state the amount of the bond to be executed is only an irregularity, 8 C. 721.

REQUIRE HIM TO SHOW CAUSE—The object of serving the preliminary order on the person proceeded against is to acquaint him with the details of the order itself and to enable him to defend himself against the allegations upon which the order was made. The preliminary order must state the amount of the bond to be executed and the time for which it is to be in force, 2 Rang. 521. If the person proceeded against was absent and the preliminary order was not served on him it is a sufficient compliance with law, if the order is read out to him in Court when he appears, 25 Cr. L.J. 131-76 Ind. Cas. 228. The object being to enable the accused to prepare his defence and to summon his witnesses before the hearing commences the defects in the notice cannot be remedied by explanations given by the prosecuting inspector at the commencement of the trial, 47 M.L.J. 689. The issue of a preliminary order is not a formal matter. It is a judicial act to be exercised after due consideration of the materials placed before the Magistrate. Where the notice issued was very meagre and did not contain sufficient details regarding the charges, brought against the persons proceeded against the whole proceedings are vitiated, 47 M.L.J. 689; (1925) M.W.N. 57-26 Cr. L.J. 673-86 Ind. Cas. 49; 12 A.L.J. 336; 27 Cr. L.J. 318-92 Ind. Cas. 702. The notice must show under which sub-section the person is sought to be proceeded against. A mere statement that he is one of criminal tendencies or is suspected of having committed crimes is insufficient and vitiates proceedings, 26 Cr. L.J. 1377-89 Ind. Cas. 513. "When a person is called upon to show cause why he should not be required to give security for good behaviour, he must be ready with his evidence when he appears in obedience to the notice. That is the meaning of the expression 'to show cause.' If he is unable to bring the evidence with him on account of the shortness of the notice or other reasonable cause, it is his duty when he appears, to apply at once for summonses to the witnesses he proposes to call, 9 Bom. L.R. 1385. 'Showing cause' is not merely filing a written statement or making a verbal one but the supporting of that statement by such evidence as the party may be able to produce, 23 W.R. (Cr.) 9 at 11. Accused should be given ample opportunity of obtaining legal assistance before evidence is adduced for the prosecution, 42 A. 646. He must have time to bring his witnesses, 41 C. 808. A notice to show cause why security should not be taken for keeping the peace cannot from the basis of an order passed for security for good behaviour or *vice versa*, 25 C. 798; 30 M. 282.

AMOUNT OF THE BOND TO BE EXECUTED.—The amount should not be excessive, 16 B. 372 and the Magistrate is not entitled to demand a larger amount than that specified in the notice to show cause. The order under this section must be such that if a suspect has a *bona fide* intention to be of good behaviour it will not be impossible for him to find sureties and the order should also be clear in its provisions. It is not unreasonable to stipulate that the surety should be at least of equal standing to the accused, 16 Cr. L.J. 100.

NUMBER, CHARACTER AND CLASS OF SURETIES REQUIRED.—Arbitrary conditions as to sureties are not warranted by law. The condition that sureties should be respectable land-holders, 4 M.H.C.R. (App.) 46, that the sureties should not be from the accused's village and must be of a particular class, 1 Bom. L.R. 520, is equivalent to saying that he must go to jail; where a Magistrate required sureties being persons of respectability and substance not related to the accused and residing within one mile of his house and as a matter of fact no person of respectability resided within a mile, it was held that to impose such arbitrary conditions was tantamount to saying that the accused shall not furnish any security at all but must go to jail, 22 W.R. (Cr.) 37. A condition that a surety should be willing to pledge his landed estates and immovable properties is, in majority of cases compelling a man to do that which he will never be able to do, and tantamount to a sentence of imprisonment, 7 N.W.H.C.R. 249. There seems to be some conflict of decisions as to whether sureties should be persons who will be able to supervise and control the accused and whether a surety offered, who is unable to control the principal should be accepted or not. The Allahabad High Court in 20 A. 208; 21 A. 471; 8 A.L.J. 785; 10 A.L.J. 384, took the views that a surety who is unfit to control the behaviour of the accused being a non-resident of the

village ought not to be accepted. But the Calcutta High Court in 24 C. 155 ; 4 C.W.N. 797 ; 6 C.W.N. 593 ; 37 C. 446 and 91 took a different view. In the later decision of the Calcutta High Court in 13 C.W.N. 80, the correctness of the decisions in 4 C.W.N. 797 ; 6 C.W.N. 593, are doubted. See also 41 C. 784.

THE TERM FOR WHICH IT IS TO BE IN FORCE.—An order requiring a person to give security for a longer term than that specified in the notice issued under this section is illegal, 26 M. 471 ; see 6 A. 214 as to the principles which should guide Courts in fixing the term. The term for which security is taken should cease with the necessity, e.g. taking security, when disturbance is apprehended at a fair which is to last only for a fortnight.

113. If the person in respect of whom such order is made is present in Court, it shall be read over to him, or, if he so desires, the substance thereof shall be explained to him.

Procedure in respect of person present in Court.

IS PRESENT IN COURT.—Mere presence is sufficient. The question whether he was brought there legally or illegally or was under arrest or not is quite immaterial, 12 Cr. L.J. 533—12 Ind. Cas. 301 ; 6 N.W. P.H.C.R. 386 ; 2 B.L.R. (Appx.) 28 ; 35 B. 225 ; 81 C. 537 ; 25 M. 124.

ISSUE A WARRANT.—A warrant cannot be legally issued under this section unless the person proceeded against be actually and physically present in the district, the object being to prevent commission of future offences ; this object can equally be served by a person voluntarily vanishing himself out of the district, 14 Bom. L.R. 839—13 Cr. L.J. 796—17 Ind. Cas. 540.

114. If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or, when such person is in custody, a warrant directing the officer in whose custody he is, to bring him before the Court :

Summons or warrant in case of person not so present.

Provided that whenever it appears to such Magistrate, upon the report of a police-officer or upon other information (the substance of which report or information shall be recorded by the Magistrate), that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest.

REQUIRING HIM TO APPEAR.—Reasonable time should be given to the person summoned to meet the charge against him and to have his evidence adduced, 41 C. 806 ; 6 A. 214.

For forms of summons, see Sch. V, No. 12, *infra*.

PROVISO TO THE SECTION.—The proviso contains two stringent elements obviously directed against any ill-considered precipitancy on the part of the Magistrate. (1) A Magistrate must be of opinion that the only way to prevent a breach of the peace is to commit the person to custody (2) the Magistrate must record the substance of the police report or other information on which he is acting, 24 Cr. L.J. 829—74 Ind. Cas. 861. The words here "there is reason to fear the commission of a breach of the peace" seems to suggest that the proviso applies only to cases falling under S. 107, *supra*. The Calcutta High Court in 32 C. 80, doubted whether the proviso applied to the case where a Magistrate re-arrested a person who had already appeared before him and was admitted to bail. Even granting that the Magistrate

had power to re-arrest, the accused ought not to be remanded but must be released on bail except in the special circumstances referred to in cls. (3) and (4) of S. 107, *supra*; when the Magistrate has not followed the procedure prescribed by this proviso an order of committal to custody cannot be supported, 31 M. 315. The question whether the proviso applied to the case of a person who is present in Court, was left undecided in the above case; not only must the Magistrate have "reason to fear the commission of a breach of the peace" but that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, 6 A. 132 at 138; 14 A. 43. A warrant cannot legally be issued under this section unless the person proceeded against be actually and physically present in the district. The object being to prevent commission of future offences it is equally served by a person voluntarily banishing himself out of the district, 14 Bom. L.R. 889—13 Cr. L.J. 798—17 Ind. Cas. 540; but see 48 C. 215 which takes a different view.

REVISION.—The High Court has jurisdiction to revise orders passed under this section, 25 C. 233; 22 C. 131; 20 B. 843; 1891 A.W.N. 219; 11 Cr. L.J. 388—6 Ind. Cas. 628.

115. Every summons or warrant issued under section 114 shall be accompanied by a copy of the order made under section 112, and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under the same.

Copy of order under section 112 to accompany summons or warrant.

SHALL BE ACCOMPANIED BY A COPY OF THE ORDER UNDER S. 112.—The order in writing setting forth the substance of the information upon which the Magistrate professes to act should always, except in cases in which action has been taken under S. 55, *supra* accompany the summons issued under this section and in no case should a Magistrate acting under S. 112 issue a warrant of arrest except upon the clearest grounds for belief that unless he issues such warrant a breach of the peace is inevitable. It is the intention of the Code that any man called to meet the exceptional procedure laid down in this Chapter should at his own house have the fullest information, compatible with the circumstances of the case as to the reasons why his liberty is in danger of being interfered with. Only when a breach of the peace is imminent should the action taken under this Chapter be of a prompt and vigorous nature. To deprive any person of his liberty is a most serious step to take, and it is hardly too much to say that every step in the process should show extreme deliberation and care and if a person has to be arrested previous to enquiry he should be given the option of release upon proper bail. 14 A. 43 at 47. When a warrant was not accompanied by a copy of the order under S. 112, *infra* as required by this section the proceedings of the Magistrate was held illegal, Weir II 55; 17 M.L.J. 438, but see 11 Bom. L.R. 740 which takes a different view and holds that S. 537, *infra* cures the irregularity.

SUCH COPY SHALL BE DELIVERED.—See Ss. 70 and 71 as to the mode of service of summons. The serving officer is to certify to the delivery of the copy of the order.

116. The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace, and may permit him to appear by a pleader.

Power to dispense with personal attendance.

MAY DISPENSE WITH PERSONAL ATTENDANCE.—There is a marked distinction made in the Code between proceedings under S. 107, *supra* and those under S. 108 or 109 or 110 *supra*. Personal attendances can be dispensed with only in proceedings under the latter section to keep the peace, Weir II 54. When proceedings are taken against a person who is at a distance and there was no special ground making his personal attendance necessary.

It would be an unwise exercise of jurisdiction to require him to appear personally as the Magistrate has power to allow him to appear by a pleader. 12 C. 133 at 136.

117. (1) When an order under section 112 has been read or explained under section 113 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant issued under section 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

Inquiry as to truth of information.

(2) Such inquiry shall be made, as nearly as may be practicable where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons-cases; and where the order requires security for good behaviour in the manner hereinafter prescribed for conducting trials and recording evidence in warrant-cases, except that no charge need be framed.

(3) *Pending the completion of the inquiry under sub-section (1) the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing; direct the person in respect of whom the order under section 112 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded :*

Provided that—

(a) *no person against whom proceedings are not being taken under section 108, section 109, or section 110, shall be directed to execute a bond for maintaining good behaviour, and*

(b) *the conditions of such bond whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under section 112.*

(4) For the purposes of this section the fact that a person is an habitual offender or is so desperate or dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise.

(5) Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just.

AMENDMENT.—Ol. (3) is new. This clause enables a Magistrate in emergent cases to take *immediate* steps to preserve the public peace or for the public safety by taking security pending the detailed inquiry. *St. of Obs. and Reasons.*

SCOPE OF THE SECTION.—Proceedings under this Chapter are not trials but only inquiries and the person proceeded against is not an accused person as the expression is used and understood in the Code. A person proceeded against cannot be said to be accused of an offence and any information laid against him will not amount to a complaint within the meaning of S. 4 (1) (*h*) *supra*. The provisions of S. 342 *infra* cannot therefore apply to an inquiry under this section and the omission on the part of the Court to examine the person proceeded against will not vitiate the proceedings, 50 C. 985; but the provisions of S. 360 *infra* apply to an inquiry under this section, 52 C. 470 and 632.

THE MAGISTRATE SHALL PROCEED TO INQUIRE.—The power given under this section is no doubt for the purpose of suppression of crime. But once the proceedings come into Court this section provides that the inquiry should be a full *judicial inquiry*, evidence being taken in the presence of the accused and opportunity given for cross-examination of witnesses, 4 M.H.C.R. Appx. xxii; 18 W.R. (Cr.) 2.; 5 C.W.N. 249. The Magistrate is bound to compel the attendance of the defence witnesses unless he considers the application is made for purposes of vexation or delay or defeating the ends of justice and if he refuses, then he should record in writing the grounds of refusal as required by S. 257 *infra*, 23 B. 418. A proceeding under this section is an inquiry within the meaning of S. 517 and the Court is therefore empowered to pass an order with regard to property produced before it, 42 M. 9. The enquiry in cases requiring security to keep the peace shall be the same as in summons cases S. 355 *infra*. 26 Cr. L.J. 330=88 Ind. Cas. 46, and the inquiry in good behaviour cases as in warrant cases S. 356 *infra*. This section requires the Magistrate to satisfy himself as to the truth of the information before making an order for the execution of a bond and when no enquiry was made the order is bad in law, 34 M. 139. A report of a Subordinate Magistrate cannot be the basis of an order under this section, 6 B.H.C.R. (Cr. Ca.) 1; 5 B.H.C.R. (Cr. Ca.) 105, although such a report might be sufficient *information* upon which notice to show cause might be issued. Legal evidence must be recorded to found an order under this section, 8 B.H.C.R. (Cr. Ca.) 162. It is impossible to accept the proposition that evidence tending to show the commission of a substantive offence or which might form the basis of a charge of a substantive offence is necessarily to be excluded in proceedings under this section and cannot form the basis of an order under S. 112 *infra* and a finding under S. 118 *infra*. The fact that a person proceeded against under this section was acquitted in two cases put in evidence against him will not entitle him to have all the evidence excluded, of the incident which form the subject of his trial. It is entirely a question of value of acquittals which ought to be put in evidence for whatever value they may be worth, 47 A. 733. Evidence in previous case of rioting cannot form the basis of an order under this section. The Magistrate is bound to make an enquiry as to the truth of the information received and the order passed without such inquiry is bad in law, 37 A. 30.

TRUTH OF INFORMATION UPON WHICH ACTION IS TAKEN.—What constitutes the action referred to herein is (1) the making of the preliminary order under S. 112, (2) the reading over or explaining the substance of it under S. 113, (3) the issuing of a summons or warrant under S. 114. When a person stated he was a poor man and he had very little expectation of getting any benefit by fighting the case and therefore agreed to be bound down it was held that there was no evidence that he was about to break the peace; 85 C. 674; 20 M. 330; 7 M.L.T. 204=1910 M.W.N. 228=11 Cr. L.J. 393=6 Ind. Cas. 662. Where the person proceeded against admits the allegations in the preliminary order under S. 112 when read over to him the Magistrate cannot pass an order against him at once but should proceed to record evidence as in warrant cases. People proceeded against are often illiterate and ignorant and a mere admission is not conclusive proof, that they are persons to be bound over. The whole Chapter vests extraordinary powers in the police and Magistracy and to prevent its forming an instrument of intolerable oppression it must be worked with utmost discretion; 26 Cr. L.J. 1041=87 Ind. Cas. 961. The statement of the person proceeded against that he is of bad character and he had been to jail is not sufficient, 3 Bom. L.R. 289. It is for the prosecu-

tion to prove the case. The order to show cause is not in the nature of a rule nisi throwing the onus upon the person called upon to prove his innocence, 9 A. 482; 12 W.R. (Cr.) 80; 4 B.L.R. 46 (F.B.)

TAKE SUCH FURTHER EVIDENCE.—Such further evidence refers to evidence *ejusdem generis* with the evidence already recorded, *i.e.* the evidence as to the circumstances of the case and as to the position in life and means of the person proceeded against to fix the period of security and the amount of the bond.

SUB-SECTION (2):—Before making an order directing security for good behaviour the person proceeded against should be informed of the accusation which he has to meet and he should be given an opportunity to enter upon his defence, 11 C. 13; 6 A. 132. Under this sub-section the inquiry should as nearly as possible be in the manner prescribed for trial of summons cases in proceedings under S. 107 *supra*. 26 Cr. L.J. 430—85 Ind. Cas. 43, and that prescribed for warrant cases, in good behaviour cases, 12 Cr. L.J. 89—9 Ind. Cas. 438.

SUB-SECTION (3):—This sub-section empowers the Magistrate pending the completion of the inquiry under sub-sec. (1), if he considers immediate measures necessary for preventing a breach of the peace to direct the person proceeded against to execute a bond with or without sureties until the conclusion of the inquiry and may detain him also in custody until the execution of the bond or until the completion of the inquiry.

SUB-SECTION (4):—The mere record of previous convictions on account of which a person has undergone punishment does not satisfy the requirements of this section, 10 B. 174. Evidence of general repute means with reference to a man's character, evidence as to his general character founded on the general opinion of the neighbourhood where he lives. The evidence as to general disposition founded on opinion of particular witnesses on personal knowledge is also admissible. Generally repute need not be general opinion of the neighbours and need not be personal knowledge of neighbours generally, and general opinion need not be publicly expressed, 26 Cr. L.J. 1233—89 Ind. Cas. 147 where 6 Cr. L.J. 236 and 97 referred to. See also 6 Cr. L.J. 97 at 99; 12 A.L.J. 937—15 Cr. L.J. 705—26 Ind. Cas. 183.

EVIDENCE OF GENERAL REPUTE.—Victor Hugo says "In villages it is the custom to collect all petty details of a man's career and when they are put together the sum total constitutes his "reputation." Evidence of general repute is admissible only in cases of good behaviour falling under cl. (f) of S. 110 and this is made clear by the addition made to cl. (4) of this section of the words of cl. (f) of S. 110, *supra*. In all other cases including cases in which security for keeping the peace the order can be passed only after holding an inquiry and recording legal evidence, 25 A. 273; 29 C. 779; 5 C.W.N. 239. Under the provisions of S. 109 and this section, if a person is unable to prove the source of his livelihood he ought not to be ordered to execute a bond unless there is reasonable ground for suspecting that he is sustaining himself by some dishonest means, for such an order can only be made where, it is necessary for keeping the peace or maintaining good behaviour, 83 C. 315. Evidence need not be given to prove that the person proceeded against has been convicted of any of the offences mentioned, 3 M. 238. A wide discretion is given to the Magistrate as to the evidence which he may admit in proceedings under S. 110 *supra*, 1904 A.W.N. 110. In 6 Bom. L.R. 34 evidence of general repute, though hearsay, was held admissible in proceedings under this Chapter; but in 1 A. L.J. 611 and 618 it was held that a rumour of bad character is no evidence of general repute. "It is hardly necessary to say that evidence of rumour is merely hearsay, and hearsay evidence of particular fact. Evidence of repute is a totally different thing. A man's general reputation is the reputation which he bears in the place in which he lives amongst all the townsmen, and if it is proved that a man who lives in a particular place is looked upon by his fellow-townsmen, whether they happen to know him or not, as a man of good repute, that is strong evidence that he is a man of that character. On the other hand, if the state of things is, that the body of his fellow-townsmen who know him look upon him as a dangerous man and a man of bad habits, that is strong evidence that he is a man of bad character; but to say that there are rumours in a particular place among a certain class of people that a man has done particular acts, or has characteristics of a certain kind, those rumours are in them-

selves evidence under this section, is to say what the law does not justify us in saying, and consequently we think that the evidence of general repute is of little or no value," 23 C. 82f at 628. Where evidence of general repute has been given the fact that a person has been suspected in a large number of cases may be admissible as corroboration, 25 Cr.L.J. 486=77 Ind. Cas. 885, but evidence of instances in which a person was suspected will not certainly be evidence of general repute to demand security, 24 Cr.L.J. 608=73 Ind. Cas. 352; 25 Cr. L.J. 1283=89 Ind. Cas. 147; 2 Rang. 686.

OR OTHERWISE.—The legislature seems to have left to the Magistrate a vast amount of liberty in relation to the admission of evidence. According to the general rule of interpretation the words "or otherwise" must be read as meaning something *ejusdem generis* with the particular or particulars alleged above it. It seems difficult to interpret the word "otherwise" in the sense in which the law would ordinarily read it. Applying the *ejusdem generis* principle of interpretation the nearest approach to the particular general repute would be hearsay not amounting to general repute, 1904 A.W.N. 140.

SUB-SECTION (5)—Although this sub-section permits joint trial of persons associated together with regard to S. 110 (d) and (e), *supra* certainly it will not justify joint trial when S. 110 (f) is also charged as there cannot be a connection between the persons in regard to their characters so as to make them dangerous persons and thus render them hazardous to the community, 47 M.L.J. 689 at 695. The words associated together do not imply that the persons to whom they may be separately applied must have been acting in concert, but the persons associated in the matter of an inquiry must be persons shown to have been acting together in the various matters charged against them as grounds for binding them over; where there is no such association together, a joint inquiry is improper if not illegal and such an inquiry prejudices the accused, 1 C.L.J. 616, following 8 C.W.N. 180. Persons belonging to two contending factions cannot be dealt with in one enquiry as they cannot be said to be associated together in the matter under enquiry within the meaning of this section and consequently the whole proceeding is bad, 9 Cr. L.J. 560=2 Ind. Cas. 240; 11 C.W.N. 472; 31 M. 276. The expression "Associated together" apply to persons acting in concert whether that concert is due to mutual agreement amongst themselves or to the orders of a common master, 1 C.L.J. 616 at 623; 9 C.W.N. colxx. This clause was inserted to remove doubts as to legality of joint proceedings under Ss. 107 and 110, *supra*. The legality of a joint trial must depend on what is alleged for the prosecution and not on findings of fact arrived at subsequently. The dictum of the Privy Council in 25 M. 61 as to violation of an express provision of law being an illegality applies to cases where joint trials are held contrary to the provisions of law and there is no provision in the Code which directs separate inquiries under this section, 25 C.W.N. 331. The Magistrate has a discretion to proceed with the matter jointly or separately even where the association of the several accused is clearly established, 27 C. 781. There must be a separate finding with regard to each accused, when the trial is held jointly, 35 C. 929. Where parties have been in conflict with one another, they cannot be said to be associated together in the matter under inquiry within this clause, and a joint trial is illegal. The main principle applicable to joinder of charges and joint trial of accused may well be held applicable to inquiries under this chapter, 31 M. 276; 8 C.W.N. 180, 11 C.W.N. 472; [1923] Pat. 8; 16 Cr. L.J. 252=28 Ind. Cas. 108. Although there is no direct prohibition against trying a number of persons together yet such proceeding are improper and should be confined to one person alone unless the case be that each accused was a confederate or partner with the other persons to whom all the evidence would be equally applicable. Even then the case of each accused should be considered separately and individually, 45 A. 109; 25 Cr. L.J. 1377=83 Ind. Cas. 337; [1923] Pat. 8; 4 Pat. L.J. 7.

118. If, upon such inquiry, it is proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, with or without sureties, the Magistrate shall make an order accordingly:

Order to give security.

Provided—

first, that no person shall be ordered to give security of a nature different from, or of an amount larger than, or for a period longer than, that specified in the order made under section 112 :

secondly, that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive :

thirdly, that, when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties.

IF UPON INQUIRY IT IS PROVED.—An order under this section to execute a bond for keeping the peace or to be of good behaviour cannot be made without following the procedure laid down by Ss. 112 and 117, *supra*, Welr II, 56 ; 34 M. 139. Where a man called upon to furnish security appeared before the Magistrate and pleaded poverty and requested that a bond for a small amount should be taken from him and the Magistrate bound him down without recording any evidence and without recording a finding that he was likely to cause a breach of the peace the order was set aside, 33 C. 674 ; 34 M. 139. It is not sufficient that the Magistrate is morally satisfied but he should give reasons for his finding based on legal evidence that the accused should be bound over, 10 B. 174. When an accused person is called upon to produce a surety such surety must be accepted or if rejected, it must be rejected on tangible evidence recorded and considered by the Magistrate who ordered him to find security, 18 A.L.J. 324 ; 41 B. 383. The provisions of S. 122 make this clear. It is not competent to a Magistrate who has passed an order under this section to delegate to another the duty of inquiring into the fitness of a surety tendered by the person against whom the order is made. He should make the inquiry himself. A Magistrate cannot insist that respectable gentlemen residing in the same or neighbouring village in which the accused lives should be given as sureties and such a demand is quite unwarranted as long as the sureties offered could exercise their proper influence over the person bound over, 8 A.L.J. 785—12 Cr. L.J. 472—11 Ind. Cas. 1008.

MAGISTRATE SHALL MAKE AN ORDER.—The Code requires that the Magistrate who initiated proceedings should pass the final order himself and he has no power to send up the case to the District Magistrate and the District Magistrate has no jurisdiction to dispose of the case, 14 Bom. L.R. 713 at 714.

PROVISO (1).—It is illegal to require a bond for good behaviour when the notice issued was to show cause why a bond for keeping the peace should not be taken, 25 C. 798. A Magistrate cannot make an order for a longer period than that mentioned in the notice issued. under S. 112, *supra*, 26 M. 471 ; 1906 A.W.N. 276 ; where heavier security is thought necessary fresh summons should be issued, 9 B.L.R. Appx. 44—18 W.R. (Cr.) 61 ; 28 W. R. (Cr.) 60. But after the expiry of the period of the first order if a likelihood of a breach of the public peace still exists then further security could be demanded on fresh proceedings being taken, 4 C.W.N. 12, but sufficient *locus penitentiae* must be allowed to the person before fresh proceedings are started, 1906 A.W.N. 80 ; 31 C. 783.

AMOUNT OF BOND SHALL NOT BE EXCESSIVE.—The character and reputation of a suspect are not the sole considerations on which the amount of security should be determined and fixed. It should not be excessive or prohibitive and it should be fixed considering the station in life of the accused, 12 Cr L.J. 110—9 Ind. Cas. 651 following 16 B. 372. Where a Magistrate made an order that a person should pledge all his proprietary right in land worth Rs. 200, the order was declared illegal, 7 N.W.P.H.C.R. 249. For cases of excessive security see 2 C. 110 and 384 ; 1 C.L.R. 48. Fair chance of complying with the order should be allowed to the accused by fixing the amount of security considering the station in life of the person concerned. 3 M.H.C.B. Appx. xlii followed in 2 C. 384. The Magistrate should look to the means of the party concerned and not to that of his master, 22 W.R. (Cr.) 74.

PROVISO (3).—The reason for proviso (3) is the incapacity of a minor to contract, and the bond may in such a case be executed by sureties only. 6 Cr. L.J. 123.

APPEAL.—Now an appeal lies in cases where security is demanded for keeping the peace also. See the amendment of S. 406, *infra*. The order of a Sessions Judge under S. 406 discharging a person under security under this section is not an original or appellate order of acquittal within S. 417 *infra* and the Local Government has no right of appeal against such an order, but may move the High Court in revision, 27 Cr. L.J. 626-94 Ind. Cas. 402 following 21 A. 107; 24 A. 148; 36 A. 147. An appeal will also lie when the order under this section is passed by a District Magistrate to the Court of Session; when a first class Magistrate sends up a case to the Sessions Judge under S. 123, *infra*, no appeal lies to the District Magistrate. An appeal lay against an order under this section made by an Additional District Magistrate to the District Magistrate, 48 C. 374; but this is no longer law, See S. 406 *infra*. No appeal lies under cl. 41 of the Calcutta Letters Patent to His Majesty in Council from an order of the High Court on the appellate side under this section, 18 C.L.J. 119.

119. If, on an inquiry under section 117, it is not proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, the Magistrate shall make an entry on the record to that effect, and, if such person is in custody only for the purposes of the inquiry, shall release him, or, if such person is not in custody, shall discharge him.

Discharge of
person informed
against.

SHALL DISCHARGE HIM.—'Discharge,' under this section has been used in a non-technical sense and merely means permission to depart when a person from whom security is demanded, by evidence adduced by him satisfies the trying Magistrate that he ought not to be put under security. The Code does not contemplate a further inquiry by a superior Magistrate into the matter. 33 M. 85 but see 35 B. 401. It is no bar to fresh proceedings being taken upon fresh information received, 27 C. 662. In 24 A. 148 it was held that it was competent to a District Magistrate to institute fresh proceedings against a discharged person on the self-same record before the 1st Class Magistrate who inquired into the matter under S. 117, *supra*. There were conflicting decisions as to whether further inquiry could be ordered under S. 436, *infra* in the case of a person discharged under this section. But the words newly introduced in S. 436 *infra* "accused of an offence," make the point beyond all doubt and no further inquiry can be ordered by the superior Court. See notes under S. 110, *supra*, further enquiry at p. 124. The decisions in 36 A. 147; 35 B. 401 took the view that S. 436 applied, while 33 C. 8; 33 M. 85 took a different view, see also 44 A. 691. S. 250, *infra* does not apply to cases of discharge under this section and no compensation could be awarded even though the information furnished to the Magistrate might be vexatious, 15 A. 355.

C.—Proceedings in all cases subsequent to Order to furnish Security.

120. (1) If any person, in respect of whom an order requiring security is made under section 106 or section 118, is, at the time such order is made, sentenced to, or undergoing a sentence of, imprisonment, the period for which such security is required shall commence on the expiration of such sentence.

Commencement of
period for which
security is required.

(2) In other cases such period shall commence on the date of such order unless the Magistrate, for sufficient reason, fixes a later date.

COMMENCEMENT OF PERIOD FOR WHICH SECURITY IS REQUIRED.—The period for which security is required commences from the date of the order, unless the Magistrate for sufficient reasons fixes a later date. The party must execute his bond with or without surety at once, or he is committed to prison in default. The power to fix a later date was given only recently, 37 M. 125 at 143. A Magistrate has power under this section to postpone the date from which the security bond should take effect, that is, give the accused time within which to produce it. Until it is seen when the accused could give the security, or an order would have to be passed referring the case for the final orders of the Sessions Judge, it cannot be said that the proceedings in the Magistrate's Court had finally terminated so as to put an end to the liability of the sureties responsible for the accused's attendance. 24 A.L.J. 327. Security cannot be asked until the period of imprisonment which the accused is undergoing ends. The order under S. 123 *infra* should not be passed until the expiry of the term of imprisonment; 4 Bom. L.R. 924; 4 N.W.P.H. C.R. 154. An order that the period of imprisonment imposed on an accused under S. 119, *supra* was to run concurrently with the sentence which the accused was actually at the time undergoing in another case is illegal and opposed to the terms of this section, 16 Cr. L.J. 272; 6 Cr. L. Rev. 437-23 Ind. Cas. 160. See also S. 123 (1), *infra*.

SUB SECTION (2).—It is somewhat difficult to ascertain of precisely the intention of the Legislature in enacting this sub-section, 27 Cr. L. J. 863-96 Ind. Cas. 113. This clause authorizes a Magistrate to give time to the person bound over to find sureties. It is not the object of this clause to enable the Magistrate to postpone the operation of the second order he passes, while the first order is still in force, otherwise, a Magistrate by making several orders for security each for a period less than one year might bind over a person for an aggregate period over one year without submitting the case to the Sessions Court as required by S. 123 (2), *infra*. Such a course will be obviously illegal, 4 C.W.N. 121. S. 123 provides that security must be given on or before the date on which the period of such security commences. See 27 Cr. L. J. 865-96 Ind. Cas. 113. For form bond see form No. 42 Sch. V. The terms of the security bond given in the form are wide enough to include the successor of the Court in which the case originally was. Any other view of the law would produce most inconvenient results. 24 A.L.J. 327.

121. The bond to be executed by any such person shall bind him to keep the peace or to be of good behaviour, as the case may be, and in the latter case the commission or attempt to commit, or the abetment of, any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond.

SCOPE OF THE SECTION.—The conditions under which security bonds are taken under this chapter are given here. The word 'commission' in this section does not necessarily imply a conviction although a conviction is ordinarily considered necessary to establish that an offence has been committed. At the same time there is no authority for the extreme view that the commission of an offence cannot be proved otherwise than by a conviction, e.g. flight of a person accused of an offence from British India will raise a strong presumption of his participation in the offence. In such a case the bond is liable to be forfeited provided evidence is produced to show that prior to his absconding he committed an offence in British India and during the period of the bond, 24 Cr. L.J. 888-73 Ind. Cas. 332. This section deals with two kinds of bonds, one for keeping the peace and the other for good behaviour. A distinction is drawn between the two kinds of bonds. A bond to keep the peace cannot be enforced on conviction for any offence other than an offence involving a breach of the peace. For example, a conviction for theft or extortion will not justify the forfeiture of such a bond, 13 W.R. (Cr.) 63; 19 W.R. (Cr.) 43, but in the case of a bond for good behaviour it is expressly provided that the commission or attempt to commit or abetment of any offence, punishable with

imprisonment, wherever it may be committed, is a breach of the bond, 11 Cr. L.J. 252; 5 Ind. Cas. 827; 16 Cr. L.J. 519=29 Ind. Cas. 821. See S. 514 *infra* as to the procedure on forfeiture of bond. A bond under S. 110 *infra* can be forfeited on a conviction under S. 323, I.P.C.; 4 Lah. 462.

SHALL BIND HIM TO KEEP THE PEACE.—All that is necessary to show before calling upon the executant of the bond to show cause why the penalty should not be levied, is that some act was done which was likely in its consequence to provoke a breach of the peace and it is not material to consider whether the person bound did act himself with his own hand, or, made use of other persons to do it. 2 M. 169 at 173.

WHEREVER IT MAY BE COMMITTED.—Breach of the bond need not necessarily be confined to the district in which the accused was bound over. The word used is “*wherever*.” If A executes a bond to keep the peace towards B in one district and subsequently A is convicted of having assaulted B in another district, A would forfeit the bond and the Magistrate who took the bond could proceed against him under this section, although the breach did not take place in his district, 2 B.L.R. (Ap. Cr.) 11. The commission of an offence in a native state *e.g.*, receipt of stolen property may also work a forfeiture, 11 Cr. L.J. 635=8 Ind. Cas. 383. An accused person ought to be afforded an opportunity to show cause before a bond is forfeited, 4 C. 865. There must be actual proof of the commission of an offence and not a suspicion, Weir II, 57, and the offence justifying an order of forfeiture should correspond to the particular kind of offence mentioned in S. 110, 28 A. 629; and in the case of a surety, evidence must be taken in the presence of the surety before the bond is forfeited, 25 C. 440; and fresh security cannot be taken without fresh proceedings, 7 M.L.T. 80.

IS A BREACH OF THE BOND.—When convicting a person for an offence involving a forfeiture for keeping the peace, a Magistrate knowing, that the person convicted has by his conduct forfeited the bond, does not make an order for forfeiture under this section, he must be taken to have declined to take action in respect of the particular breach and he cannot afterwards re-consider and add to his order a direction forfeiting the bond. 1 Cr. L.J. 1100; 1 C.L.R. 134; 3 C.L.R. 406; 16 Cr. L.J. 194.

122. (1) A Magistrate may refuse to accept any surety offered, or may reject any surety previously accepted by him or his predecessor under this Chapter on the ground that such surety is an unfit person for the purposes of the bond:

Power to reject sureties.

Provided that, before so refusing to accept or rejecting any such surety, he shall either himself hold an inquiry on oath into the fitness of the surety, or cause such inquiry to be held and a report to be made thereon by a Magistrate subordinate to him.

(2) *Such Magistrate shall, before holding inquiry, give reasonable notice to the surety and to the person by whom the surety was offered and shall in making the inquiry record the substance of the evidence adduced before him.*

(3) *If the Magistrate is satisfied, after considering the evidence so adduced either before him or before a Magistrate deputed under subsection (1), and the report of such Magistrate (if any) that the surety is an unfit person for the purposes of the bond, he shall make an order refusing to accept or rejecting, as the case may be, such surety and recording his reasons for so doing:*

Provided that, before making an order rejecting any surety, who has previously been accepted, the Magistrate shall issue his summons, or warrant, as he thinks fit, and cause the person for whom the surety is bound to appear or to be brought before him.

AMENDMENT.—This section has been redrafted. The inquiry as to fitness of surety is to be on oath and the Magistrate is bound to record the substance of the evidence. A right of appeal is also provided, see Ss. 406A and 514A newly added.

THE MAGISTRATE MAY REFUSE.—This section confers a wide discretionary power on a Magistrate to refuse sureties offered; when a surety is offered the Magistrate is required to consider the matter judicially and to state his reasons for not accepting the surety, 22 Bom. L.R. 190. The proceedings in which the Magistrate comes to this determination are judicial proceedings, and the question whether a person is fit to be a surety or not is left to the Magistrate's unfettered discretion, 44 C. 737; 37 C. 446; 13 C.W.N. 80; 12 A.L.J. 1004—16 Cr. L.J. 754—28 Ind. Cas. 646; 23 Ind. Cas. 746; 44 B. 385. He must hold an independent inquiry before accepting or refusing a surety and then exercise his discretion. He cannot refuse a surety merely relying on a police report; 12 A.L.J. 1004—16 Cr. L.J. 754—26 Ind. Cas. 646; 13 Cr. L.J. 760—17 Ind. Cas. 72. See also 24 C. 155. The amended section gives very wide powers to the Magistrate for rejecting sureties. A Magistrate before rejecting a surety is bound to take evidence on oath and inquire into the fitness of the surety or cause an inquiry to be made by a Subordinate Magistrate and to report to him. The Magistrate is bound to give notice to the parties and record the substance of the evidence adduced before him. Inability of surety to control the person bound over to keep the peace is a good ground for rejecting the surety, 41 C. 764; 25 Cr. L.J. 796—81 Ind. Cas. 316; 15 Cr. L.J. 378—27 Ind. Cas. 746; 27 Ind. Cas. 148. When a Magistrate refused the surety offered, without recording any reasons, the High Court set aside his order and directed the sureties to be accepted, 10 C.W.N. 1027; 18 A.L.J. 324; 27 A. 293; 44 B. 385.

REFUSES ON THE GROUND THAT THE SURETY IS UNFIT.—The ground for refusal to accept the surety tendered must be valid and reasonable, 22 W.R. (Cr.) 37; 41 C. 764; 44 C. 737. Mere conjectures and surmises are not sufficient. The fact that the surety offered was once convicted does not of itself disqualify him for ever to be a surety, 26 A. 189; the fact that the sureties tendered are relations of the accused, far from being a disqualification, is a circumstance which would be an additional qualification, 25 A. 131. The unfitness is not limited to pecuniary unfitness, 13 C.W.N. 80—8 Cr. L.J. 388—4 Ind. Cas. 860, but when the sureties were brothers of the accused, who could not control the accused sufficiently to ensure to his future good behaviour they were rightly rejected, 41 C. 764; 44 C. 137; mere solvency of surety is not invariably sufficient to ensure good conduct of the person bound over. Surety must be in a position to keep the person under personal supervision and control, 24 Cr. L.J. 795—74 Ind. Cas. 539. A surety executing a bond undertakes to guarantee the good conduct of the person for whom he stands surety, and the test of his fitness is his ability to perform his contract of guarantee, and to enforce the good conduct of his principal. This is clear from the expression "*character and class of the sureties required*" in S. 112 *supra*. In addition to solvency, the Magistrate is to consider the character of the surety, and of his ability to influence the conduct of the person bound over, 8 Cr. L.J. 116. The Magistrate may record evidence on oath to test the fitness of sureties, 26 A. 371; he can now call upon another officer subordinate to him to report and act upon such report. The decisions in 33 C. 1024; 25 A. 272; 27 A. 293 are no longer law. When sureties are offered it is the duty of the Court to accept them, unless the Court itself is satisfied that they are not proper persons. An inquiry under this section is a judicial inquiry, 42 C. 706, and a Magistrate cannot import his personal knowledge. 15 Cr. L.J. 378—23 Ind. Cas. 748 but a Magistrate is justified in using and applying his knowledge of his division when acting under this section and he must record his reasons for rejecting sureties offered, 11 Cr. L.J. 198—4 Ind. Cas. 1183; 14 C.W.N. 709—11 Cr. L.J. 243—6 Ind. Cas. 124. The Magistrate has a wide

discretion in accepting or rejecting sureties and he must hold an independent inquiry and should not act on a mere police report, 12 A.L.J. 1003=16 Cr. L.J. 754=26 Ind. Cas. 616; 13 Cr. L.J. 760=17 Ind. Cas. 72; 3 C.L.J. 875; 20 A.L.J. 760; 11 Cr. L.J. 497=7 Ind. Cas. 592 28 Cr. L.J. 459; 41 B. 385; 15 Cr. L.J. 727=26 Ind. Cas. 175. The unfitness referred to herein though it may not include the idea of pecuniary unfitness is more concerned with the idea of moral unfitness, 13 C.W.N. 80=8 Cr. L.J. 388=4 Ind. Cas. 560.

123. (1) If any person ordered to give security under section 106 or section 118 does not give such security on or before the date on which the period for which such security is to be given commences, he shall, except in the case next hereinafter mentioned, be committed to prison, or if he is already in prison, be detained in prison until such period expires, or until within such period he gives the security to the Court or Magistrate who made the order requiring it.

Imprisonment in default of security.

(2) When such person has been ordered by a Magistrate to give security for a period exceeding one year, such Magistrate shall, if such person does not give such security as aforesaid, issue a warrant directing him to be detained in prison pending the orders of the Sessions Judge or, if such Magistrate is a Presidency Magistrate, pending the orders of the High Court; and the proceedings shall be laid, as soon as conveniently may be, before such Court.

Proceedings when to be laid before High Court or Court of Session.

(3) Such Court, after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, may pass such order on the case as it thinks fit:

Provided that the period (if any) for which any person is imprisoned for failure to give security shall not exceed three years.

(3A) *If security has been required in the course of the same proceedings from two or more persons in respect of any one of whom the proceedings are referred to the Sessions Judge or the High Court under sub-section (2), such reference shall also include the case of any other of such persons who has been ordered to give security, and the provisions of sub-sections (2) and (3) shall, in that event, apply to the case of such other person also, except that the period (if any) for which he may be imprisoned shall not exceed the period for which he was ordered to give security,*

(3B) *A Sessions Judge may in his discretion transfer any proceedings laid before him under sub-section (2) or sub-section (3A) to an Additional Sessions Judge or Assistant Sessions Judge and upon such transfer, such Additional Sessions Judge or Assistant Sessions Judge may exercise the powers of a Sessions Judge under this section in respect of such proceedings.*

(4) If the security is tendered to the officer in charge of the jail, he shall forthwith refer the matter to the Court or Magistrate who made the order, and shall await the orders of such Court or Magistrate.

Kind of imprison- (5) Imprisonment for failure to give security
ment. for keeping the peace shall be simple.

(6) Imprisonment for failure to give security for good behaviour shall, where the proceedings have been taken under section 108 be simple and, where the proceedings have been taken under *section 109 or section 110, be rigorous or simple as the Court or Magistrate in each case directs.

AMENDMENT.—Sub-Ss. (3A) and (3-B) have been newly added, by which when security is demanded from two or more persons some or one of whom only is ordered to give security for more than one year, all the persons should be dealt with by the Sessions Judge and not the one or some who are asked to furnish security for more than one year; sub-S. (3B) also gives the Sessions Judge power to transfer proceedings to Additional and Assistant Sessions Judges. In sub-S. (6) an important amendment was made by Act X of 1926, S. 2. Imprisonment for failure to give security for good behaviour under S. 108, *supra* only, shall be simple and not that under S. 109 *supra*. Where proceedings are under S. 109 or S. 110 imprisonment shall be rigorous or simple as the court may in each case direct.

SCOPE OF SECTION.—This section has reference to the class of cases where default is made in furnishing the security required under S. 118, *supra*. If the security demanded is furnished, this section has no application, and no reference to the Sessions Judge is necessary even though the period for which security is demanded might exceed one year, 23 C. 521. Sub-S. (1) applies to security demanded under all the provisions of Chapter VIII, but sub-S. (2) would not apply to cases falling under Ss. 107, 108 and 109, *supra* as the period for which security could be demanded under these sections can in no event exceed one year, and reference to the Sessions Court or High Court is necessary only when such a period exceeds one year. The committal to prison, or a detention in prison for failing to furnish security under Chapter VIII is not a sentence of imprisonment and therefore S. 397 will not authorise a Magistrate to direct a subsequent sentence to take effect after the expiry of a previous detention or committal to prison under the section, 23 Cr. L.J. 285—66 Ind. Cas. 191. The new proviso to S. 397 permits such a course, and the decision is no authority now.

ON OR BEFORE THE DATE.—Security is to be given on or before the date fixed. Once an order has been passed under S. 118, *supra* a Magistrate has no discretion under this section but is bound to commit the person to prison forthwith. If for any reason the person proceeded against has not had a reasonable opportunity to furnish security on or before the date, the only legal method of giving him time is to invoke the aid of sub-sec. (2) of S. 120. Actual failure to furnish security should be proved and no order can be passed under this section in anticipation of default, Ratanlal 398, 408 and 511.

SUB-SECTION (2).—Proceedings when referred to the Sessions Judge under this sub-section are not before him for mere confirmation of the Magistrate's order. It is before him for further inquiry for the purpose of determining under sub-Sec. (3) whether the accused ought to be detained at all in custody as a preventive measure, and, if so, for what period, 7 Cr. L. J. 412. When a case is referred to the Sessions Judge it becomes his duty to pass such order as he thinks fit under sub-sec. (3). A mere finding by the Sessions Judge that in the interests of the community at large security for good behaviour should be demanded from the accused is not sufficient; he is bound to find a special ground on which the order is passed having special reference to S. 110 *supra*, 27 C. 556. It was held in 12 C.W.N. 463 that sub-sec. (3)

* Amended by Act X of 1926, S. 2.

contemplated a decision by the Judge on the merits of the order demanding security for good behaviour, but it does not authorise him to consider the sufficiency of the security offered. On a reference to the Sessions Judge he is bound to give notice to the accused, 27 C. 656 and to hear his pleader, 23 C. 498; 27 C. 662; 21 A. 107; 16 B. 661; 25 A. 375; 35 B. 271; 11 Cr. L.J. 725=8 Ind. Cas. 879. Although notice is not specially provided for by this section yet on general principles it is advisable to do so as it involves the liberty of the subject. 23 C. 498; 4 C.W.N. 797. A Sessions Judge is not competent to delegate to a Magistrate the question of the adequacy of the security furnished which must be determined by himself alone, 12 Cr. L.J. 410. A Sessions Judge has power to transfer a case referred to him under this sub-section to an Assistant Sessions Judge for disposal, 50 C. 229. An order passed directing a person to give security for a period of more than one year, and on failure, to be imprisoned for two years is *prima facie* bad, and such an illegality cannot be cured by the District Magistrate reducing the period to one year, and the period of imprisonment in default also to one year, as the provisions of this sub-section are imperative, Weir II, 57; 7 Cr. L.J. 412. A person undergoing imprisonment under this section for failure to furnish security to be of good behaviour is not undergoing a sentence of imprisonment within the meaning of S. 397 *infra*, so that the term of imprisonment for an offence cannot be made to commence on the expiration of the period for which he has been committed to prison, 27 M. 523. Such a person is merely committed to prison, and not sentenced, 4 M.H.C.R. Appx. xlv; but see 30 A. 334 (F.B.). A Magistrate has no power to sentence a person failing to furnish security to solitary confinement, 36 A. 496, where it was held that the words "committed to prison" in sub-sec. (1) mean a sentence of imprisonment, and do not merely mean "committed to custody." The words "detained in prison" occurring in sub-sec. (2) have also a similar meaning. But in 31 M. 515 it was held following 27 M. 523 and Weir II, 552 and not following 30 A. 334 (F.B.) that any person committed to prison under this section is not undergoing a sentence of imprisonment; it is not for the commission of any offence that he is committed to prison under this section, and S. 397 *infra*, therefore, does not apply. See also 37 B. 178; 33 C. 1036; 23 Cr. L.J. 255. The new amendment in S. 397 *infra*, namely second proviso, makes the point clear and follows the Allahabad view in 30 A. 334 (F.B.).

SUB-SECTION (3).—The words of this clause are wide enough to give discretionary power to the Sessions Judge or High Court as the case may be to deal with the case on the merits and pass such orders as the circumstances of the case might require, 35 B. 271. This sub-section empowers Sessions Judges when good behaviour cases are laid before them to require the Magistrate to furnish them with further information or evidence if they think it necessary but they are not empowered to direct a rehearing of the case. 23 Cr. L.J. 1112=51 Ind. Cas. 936.

SUB-SECTION (3A)—This is new and enacted with the object of avoiding conflict of opinion between the District Magistrate and the Sessions Judge in any particular case where one accused may appeal to the District Magistrate and the case of another accused jointly inquired into may be referred to the Sessions Judge.

SUB-SECTION (4).—This clause deprives Superintendents of Jails of the power they possessed formerly to release persons if the security demanded was tendered to their satisfaction. This power was found to be inconsistent with the provisions of S. 122 *supra*, and therefore taken away.

SUB-SECTION (5).—Under this sub-section imprisonment for failure to give security for keeping the peace shall be simple, 28 Cr. L.J. 430=85 Ind. Cas. 46.

SUB-SECTION (6)—By Act X of 1936, S. 2, an important amendment was made in this sub-section by omitting good behaviour cases falling under S. 109 *supra* from the category of cases where only simple imprisonment is awarded, and made to come under the category of cases falling under S. 110 *supra* namely simple or rigorous as the Court or Magistrate in each case directs. The result is, that political offenders are now classed along with habitual offenders.

APPEAL.—S. 406 *infra* gives a right of appeal in good behaviour cases to the Sessions Court unless the Local Government notifies that in any district such appeal shall not lie to the Sessions Court. If a first-class Magistrate demanded security for good behaviour for a period exceeding one year and the accused furnished security, the proceedings are not to be submitted to the Sessions Judge, and he has a right of appeal to the Sessions Judge; but if he fails to furnish the security the records must be submitted to the Sessions Judge, and the order passed by him, whatever its nature be, is the order passed by the Sessions Court, and no appeal lies to the High Court in such a case, as the order is not a conviction in a trial held by a Sessions Judge. In a case where the District Magistrate passes the order under this section an appeal lies to the Sessions Court under S. 406. If a Sessions Judge refuses to confirm the order of a District Magistrate under this section, the District Magistrate cannot refer the matter to the High Court under S. 498 *infra*, but his proper remedy is to ask the Public Prosecutor to move the High Court to revise the order of the Sessions Judge, 23 C. 249.

124. (1) Whenever the District Magistrate or a Chief Presidency Magistrate is of opinion that any person imprisoned for failing to give security under this Chapter may be released without hazard to the community or to any other person, he may order such person to be discharged.

Power to release persons imprisoned for failing to give security.

(2) Whenever any person has been imprisoned for failing to give security under this Chapter, the Chief Presidency or District Magistrate may (unless the order has been made by some Court superior to his own) make an order reducing the amount of the security or the number of sureties or the time for which security has been required.

(3) *An order under sub-section (1) may direct the discharge of such person either without conditions or upon any conditions which such person accepts :*

Provided that any condition imposed shall cease to be operative when the period for which such person was ordered to give security has expired.

(4) *The Local Government may prescribe the conditions upon which a conditional discharge may be made.*

(5) *If any condition upon which any such person has been discharged is, in the opinion of the District Magistrate or Chief Presidency Magistrate by whom the order of discharge was made or of his successor, not fulfilled, he may cancel the same.*

(6) *When a conditional order of discharge has been cancelled under sub-section (5), such person may be arrested by any police officer without warrant, and shall thereupon be produced before the District Magistrate or Chief Presidency Magistrate.*

Unless such person then gives security in accordance with the terms of the original order for the unexpired portion of the term for which he was in the first instance committed or ordered to be detained (such portion

being deemed to be a period equal to the period between the date of the breach of the conditions of discharge and the date on which, except for such conditional discharge, he would have been entitled to release), the District Magistrate or Chief Presidency Magistrate may remand such person to prison to undergo such unexpired portion.

A person remanded to prison under this sub-section shall, subject to the provisions of section 122, be released at any time on giving security in accordance with the terms of the original order for unexpired portion aforesaid to the Court or Magistrate by whom such order was made, or to its or his successor.

AMENDMENT.—Sub-Sections. (3), (4), (5) and (6) are new.

SCOPE OF THE SECTION.—The powers of a District Magistrate under this section are distinct from the powers he exercises under S. 406, *infra* as an appellate Court in case he is empowered by the Local Government to hear appeals. The District Magistrate is responsible for the peace of his district, and it rests with him entirely to release a person if, in his opinion, it could be done without hazard to the community, 1893 A.W.N. 183 ; 1805 A.W.N. 143 ; 2 Cr. L.J. 335. A Chief Presidency Magistrate also may exercise such a power. If a Subordinate Magistrate is of opinion that a person may be discharged he should make a report to the District Magistrate. Ratanlal 588 and an order under this section by any Magistrate other than those mentioned herein is void, S. 530 (e), *infra*.

SUB-SECTION (1).—The words " whether by the order of such Magistrate or that of his predecessor or by some Subordinate Magistrate " have been omitted by the new amendment.

SUB-SECTION (2).—A Chief Presidency Magistrate or District Magistrate has power only to reduce the amount of the security or the number of sureties or the time for which security has been taken, but as this sub-section stands he has no power to alter the condition as to the character and class of the sureties required.

SUB-SECTION (3).—This is new ; the District Magistrate or Chief Presidency Magistrate has absolute power now to release with or without condition a person imprisoned for failure to give security without the intervention of the Court of Session or the High Court.

SUB-SECTION (4).—This is new. Power is given to the Local Government to prescribe conditions upon which a conditional discharge may be made.

SUB-SECTION (5).—This is also new and empowers the Magistrate to cancel the discharge made on condition not being fulfilled,

SUB-SECTION (6).—This is also new and empowers the Magistrate to commit the person to jail to undergo the unexpired term, unless security is furnished as per original order for the unexpired period.

125. The Chief Presidency or District Magistrate may at any time for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace or for good behaviour executed under this Chapter by order of any Court in his district not superior to his Court.

Power of District Magistrate to cancel any bond for keeping the peace or good behaviour.

SCOPE OF THE SECTION.—The words of the section are very wide. This section applies only to cases where a bond has actually been executed, and if the person has been imprisoned for default of the execution of the bond, S. 194 would apply to such a case, 35 A. 103; 32 C. 948. The District Magistrate may at any time cancel a bond for reasons which appear to him in the exercise of a sound judicial discretion to be sufficient. If the District Magistrate in the exercise of a judicial discretion is of opinion that a bond in the particular case ought never to have been required, he is entitled to cancel such a bond. The words "at any time" occurring in the section also support this view, 37 M. 125 (F.B.); 84 C. 1 (F.B.); see also 7 Cr. L.J. 343; 2 Cr. L.J. 507; 18 Cr. L.J. 143. But it was held in 44 A. 614 that the only ground on which a District Magistrate could cancel a bond under this section is that something has supervened since the passing of the order, which satisfies him that there was no longer any necessity for keeping the person under bond, and not merely because he holds a different view of the evidence justifying the passing of the order. This was the view taken by *Sundara Iyer, J.*, in 37 M. 125. An application under this section is not an appeal and does not give power to the District Magistrate to review an order passed by the lower Court on the ground that it was improperly passed, 24 Cr. L.J. 203—71 Ind. Cas. 668 where 35 A. 103, 39 A. 466; 41 A. 651, 44 A. 614, are referred to; 24 Cr. L.J. 616—73 Ind. Cas. 503. The nature of the jurisdiction vested in the District Magistrate under this section whether it is *original*, *appellate* or *revisional* is not very clear. Whether the jurisdiction is to be considered *original* or *revisional* depends on the circumstances which evoke the exercise of jurisdiction. If the petitioner alleges circumstances which have taken place since the execution of the bond, and its continuance is no longer necessary; the jurisdiction involved for cancellation is clearly *original*, but if he alleged that the order was made for insufficient reason and asks for the cancellation of the bond, then it is *revisional*, 37 M. 125 at 129. It was held in 23 Cr. L.J. 281—66 Ind. Cas. 425, that a District Magistrate was not an appellate or revisional authority when called on to cancel a bond under this section and he has no power to vacate the lower Court's order as *ultra vires* or to quash proceedings, see also 37 C. 72; 34 C. 1 and 32 C. 948; 19 Cr. L.J. 236—[1922] Pat. 333. This section does not provide for setting aside the order but only for the cancellation of the bond, 22 Cr. L.J. 393. The omission was perhaps due to a desire for simplicity of language as the section was intended to cover two classes of cases, 37 M. 125 at 130.

AT ANY TIME.—The words mean "however early or however late," 37 M. 125 at 145.

FOR SUFFICIENT REASONS CANCEL.—"If we give the words 'for sufficient reasons' in the above section their natural meaning, then it would seem that the District Magistrate may set aside the order if he thinks that the evidence did not support the conclusion arrived at by a Subordinate Magistrate. That the evidence adduced does not warrant the conclusion is surely a sufficient cause for interference. If anything had happened after the date of the passing of the order which made the continuance of the bond unnecessary, that also would be a sufficient reason," 37 M. 125 at 140; 16 Cr. L.J. 555—29 Ind. Cas. 827; 33 A. 103. The District Magistrate under this section is entitled to interfere on grounds other than those disclosed in the evidence before the Magistrate who passed the order. This section confers a larger power than those of an appellate or revisional Court, 37 M. 125 at 141. This section does not confer upon a District Magistrate either an appellate or revisional jurisdiction but confers only an original jurisdiction, 15 Cr. L.J. 721—25 Ind. Cas. 169. Under this section the District Magistrate or Chief Presidency Magistrate has power to cancel a bond if in his opinion the Court ordering the execution of the bond ought never to have so ordered; but a District Magistrate cannot cancel a security bond accepted by a Subordinate Magistrate and order that the person proceeded against should be imprisoned till he executes a *fresh bond* with fit and proper sureties, 29 C. 455; 33 A. 624; 2 Cr. L.J. 507 and 278. Cancellation of the bond will discharge the accused, as well as his surety from all liability, and when there is no likelihood of a breach of the peace or the commission of an offence likely to cause a breach or when a bond has been wrongly taken, the District Magistrate will ordinarily cancel the bond, 1905 A.W.N. 143. Under this section, the District Magistrate is not empowered to remand a case for further inquiry and fresh evidence, as S. 429, *infra*, has no application.

20 Cr. L. J. 221 ; 33 C. 8 ; cancellation of bond by Magistrate not empowered is void under S. 590 (f), *infra*

IN HIS DISTRICT.—See S. 20 as to the jurisdiction and local limits of a Presidency Magistrate. His district will be the Presidency town.

126. (1) Any surety for the peaceable conduct or good behaviour of another person may at any time apply to a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class to cancel any bond executed under this Chapter within the local limits of his jurisdiction.

(2) On such application being made, the Magistrate shall issue his summons or warrant, as he thinks fit, requiring the person for whom such surety is bound to appear or to be brought before him.

SCOPE OF THE SECTION.—This section deals with cases where a surety intimates to the Court his wish to withdraw and to have his bond cancelled. He may do so at any time without any reasons for his action ; no man can be compelled to continue as a surety against his will and the Magistrate is bound to cancel the bond and issue summons or warrant to the person for whom such surety is bound to appear to be brought before him. A surety may be discharged in one of three ways (1) By death of the principal. (2) By operation of law. (3) By act of parties. Where a person on bail commits suicide the surety is discharged, 16 C.W.N. 550—13 Cr. L.J. 592—15 Ind. Cas. 1008 ; 37 M. 155.

THE SURETY MAY APPLY.—When an application is made by a surety under this section, the Magistrate has no option but to cancel the bond. But he must issue summons or warrant to the principal and when he appears or is brought before him, then only he is empowered to cancel the bond. There is no such thing as hearing the application on the merits. The presentation of the application itself under S. 502, *infra* imposes upon the Magistrate this duty of issuing a warrant for the arrest of the accused. Therefore when surety after once presenting an application fails to appear in person or by pleader, such failure cannot deprive him of his right to treat the bond as cancelled. When once an application has been presented and received there is no option left to the Magistrate but to act under S. 502, *infra*, 9 Bom. L.R. 1285. The principal, if he is unable to give fresh surety, will be committed to prison under S. 123 (1), *supra*. In case imprisonment exceeds one year the Magistrate is bound to refer the case to the Sessions Judge, 12 Cr. L.J. 410—11 Ind. Cas. 594. An order passed under this section is really an order under S. 118, *supra* and as such is appealable under S. 406, *infra*.

126A. *When a person for whose appearance a warrant or summons has been issued under the proviso to sub-section (3), of section 122 or under section 126, sub-section (2), appears or is brought before him, the Magistrates shall cancel the bond executed by such person and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same description as the original security. Every such order shall, for the purposes of sections 121, 122, 123 and 124, be deemed to be an order made under section 106 or section 118, as the case may be.*

Security of unexpired period of bond. This section was originally sub-sec. (3) to S. 126. The words in italics are newly added. This section deals with an order passed on an application by a surety for his discharge provides *inter alia* that the order shall for purposes of Ss. 121 to 124 be deemed to be an order under S. 118 *supra* but it makes no mention of S. 120 *supra*, 27 Cr. L.J. 565—95 Ind. Cas. 118 ; it prescribes the procedure to be adopted on the appearance of the person

called upon to furnish security in Court, the surety having already applied to have his bond cancelled. Orders under this section come within S. 118, *supra*, and are therefore appealable under S. 406, *infra*. Fresh security for the unexpired term of the bond must be of the same description as the original security.

CHAPTER IX.

UNLAWFUL ASSEMBLIES.

127. (1) Any Magistrate or officer in charge of a police-station may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

Assembly to disperse on command of Magistrate or police-officer.

(2) This section applies also to the police in the town of Calcutta.

ANY OFFICER IN CHARGE OF A POLICE STATION.—An order to disperse may be passed by an officer superior in rank to an officer in charge of a police-station. See S. 551, *infra*.

UNLAWFUL ASSEMBLY.—For definition, see S. 141, I.P.C. Where the object of three persons was to draw a crowd and their action was such as was calculated to draw a crowd of fifty or sixty persons likely to cause a disturbance of the public peace, it was held that the gathering constituted an unlawful assembly, 7 B. 42.

ANY ASSEMBLY OF FIVE OR MORE PERSONS.—The words used are “any assembly.” An assembly which is perfectly innocent and lawful, of five or more persons may be commanded to be dispersed under this section if the assembly is likely to cause a disturbance of the public peace.

LIKELY TO CAUSE A DISTURBANCE OF THE PUBLIC PEACE.—Whether a disturbance of the peace is likely to be caused, must of necessity be very much a matter of opinion and the police-officer to whose discretion the law leaves the duty of dispersing assemblies must of course act upon his own opinion one way or the other, and if his opinion is relevant, the grounds on which it is based are relevant also. In a case of this kind the opinions of policemen who know the people of the locality is obviously valuable and the Magistrate himself must look to the surrounding circumstances and form his own conclusions whether the acts committed were reasonably likely to lead to a breach of the peace, 7 B. 42 at 50.

128. If, upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Magistrate or officer in charge of a police-station, whether within or without the presidency-towns, may proceed to disperse such assembly by force, and may require the assistance of any male person, not being an officer or soldier in Her Majesty’s Army or a volunteer enrolled under the Indian Volunteers Act, 1869, and acting as such, for the purpose of dispersing such assembly, and, if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law.

Use of civil force to disperse.

IF SUCH ASSEMBLY DOES NOT DISPERSE.—The members of an assembly who fail to disperse when commanded to do so, are liable under S. 151, I.P.C. See S. 145, I.P.C., which makes any person who joins or continues in an unlawful assembly commanded to disperse and fails to do so liable. Where the object of three persons was to draw a crowd and their action was such as was calculated to draw a crowd of 50 or 60 persons likely to cause a disturbance of the public peace it was held that the gathering constituted an unlawful assembly within the meaning of S. 151, I.P.C., and a refusal to disperse after being lawfully commanded to do so rendered the members liable to a conviction under S. 151, I.P.C., 7 B. 42.

DISPERSE SUCH ASSEMBLY BY FORCE.—This section refers only to the use of civil force to disperse an unlawful assembly and S. 129 *infra* refers to use of military force.

OFFICER, SOLDIER OR VOLUNTEER ACTING AS SUCH.—It is only when an officer, soldier, etc., was acting as such officer, soldier, etc., that is, on actual duty who may not be required to assist a Magistrate or Police-officer in dispersing an unlawful assembly.

The degree of force to be used must be proportionate to the circumstances of each particular case, 21 M. 249.

129. If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Magistrate of the highest rank who is present may cause it to be dispersed by military force.

Use of military force.

130. (1) When a Magistrate determines to disperse any such assembly by military force, he may require any commissioned or non-commissioned officer in command of any soldiers in Her Majesty's Army or of any volunteers enrolled under the Indian Volunteers Act, 1869, to disperse such assembly by military force, and to arrest and confine such persons forming part of it as the Magistrate may direct, or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law.

Duty of officer commanding troops required by Magistrate to disperse assembly.

(2) Every such officer shall obey such requisition in such manner as he thinks fit, but in so doing he shall use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.

A police-officer in charge of *patrol* beat duty holding the rank below an S.H.O. has no power to disperse an unlawful assembly by force, 50 C. 318.

131. When the public security is manifestly endangered by any such assembly, and when no Magistrate can be communicated with, any commissioned officer of Her Majesty's Army may disperse such assembly by military force, and may arrest and confine any persons forming part of it, in order to disperse such assembly or that they may be punished according to law; but if, while he is acting under this section, it becomes practicable for him to communicate with a

Power of commissioned military officers to disperse assembly.

Magistrate, he shall do so and shall thenceforward obey the instructions of the Magistrate as to whether he shall or shall not continue such action.

132. No prosecution against any person for any act purporting to be done under this chapter shall be instituted in any Criminal Court, except with the sanction of the Local Government; and—

(a) no Magistrate or police-officer acting under this chapter in good faith,

(b) no officer acting under section 131 in good faith,

(c) no person doing any act in good faith, in compliance with a requisition under section 128 or section 130, and

(d) no inferior officer, or soldier, or volunteer, doing any act in obedience to any order which he was bound to obey,

shall be deemed to have thereby committed an offence :

Provided that no such prosecution shall be instituted in any Criminal Court against any Officer or Soldier of His Majesty's Army except with the sanction of the Governor-General in Council.

NO PROSECUTION SHALL BE INSTITUTED EXCEPT WITH THE SANCTION, ETC.—The words ' Local Government ' for ' the Governor-General in Council ' and the proviso were added by the Devolution Act XXXVIII of 1920. The sanction required by this section for a prosecution against any person for any act purporting to be done under Ch. IX is that of the Local Government or of the Governor-General in Council, and want of such sanction cannot be cured by S. 537 *infra*, 31 M. 80, where 29 M. 149 is followed and 22 C. 176 not followed. No sanction is necessary to prosecute a police-officer in charge of patrol duty who is below the rank of an S.H.O., as such an officer has no power to disperse an unlawful assembly by force, 50 C. 318.

ANY ACT PURPORTING TO BE DONE UNDER THIS CHAPTER;—A Police officer below the rank of an S.H.O. has no power to act under this chapter. The protection enures only to acts purporting to be done under this Chapter and not otherwise, 25 Cr.L.J. 467 —77 Ind. Cas. 487.

GOOD FAITH.—Nothing is said to be done in good faith which is done without due care and attention. S. 52, I.P.C. General Clauses Act X of 1897, S. 8 (20) defines good faith as follows: ' A thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not ' but having regard to S. 4 (2) *supra*, the definition of the Penal Code is to be adopted for construing the words of the Code. The words ' in good faith ' occurring in cls. (a) to (c) is omitted in cl. (d), so that disobedience to order is sufficient justification in the case of persons mentioned in cl. (d), so long as the order is one they are bound to obey. Cl. (d) is not applicable to police-officers. A police-officer is not protected simply because he obeyed the orders of his superior officer. The degree of force depends on the nature of such assembly. Force must always be moderated and proportioned to the circumstances of the case. The taking of a life may be justified only by the necessity of protecting person or property against violence or crime or by the necessity of dispersing a crowd which is dangerous unless dispersed. When a police-officer without believing that it was necessary for public security to disperse an assembly by firing on them fired in the air without warning and killed one of the crowd, it was held that he was not acting in good faith and his act was not protected simply because he obeyed the orders of his superior, 21 M. 249. When the defence of the police officers was, they were acting in pursuance of the provisions of Ss. 127 and 128 *supra* and therefore sanction was necessary for the prosecution, in a trial by

Jury, the Judge should direct the jury that they should consider the provisions of Ss. 127 and 128 and determine whether the police-officers were so acting. 25 C.W.N. 623—33 C.L.J. 310.

PROVISO.—This proviso was added by Act XXXVIII of 1920 (Devolution Act), Sch. I.

CHAPTER X.

PUBLIC NUISANCES.

133. (1) Whenever a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class considers, on receiving a police-report or other information and on taking such evidence (if any) as he thinks fit,

Conditional order
for removal of nuisance.

that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public, or from any public place, or

that *the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated, or*

that the construction of any building, or the disposal of any substance, as likely to occasion conflagration or explosion, should be prevented or stopped, or

that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence *the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary, or*

that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public, or

that any dangerous animal should be destroyed, confined or otherwise disposed of,

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order,

to remove such obstruction or nuisance; or

to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation; or

to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

to prevent or stop the erection of, or to remove, repair or support, such building, tent or structure; or

to remove or support such tree; or

to alter the disposal of such substance; or

to fence such tank, well or excavation, as the case may be; or

to destroy, confine or dispose of such dangerous animal in the manner provided in the said order: or, if he objects so to do,

to appear before himself or some other Magistrate of the first or second class, at a time and place to be fixed by the order, and move to have the order set aside or modified in the manner hereinafter provided.

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

Explanation.—A 'public place' includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes.

AMENDMENT.—The section has been redrafted and many a doubt which existed before has been cleared; the term building is made to include "tent, structure or tree" and the words "that any dangerous animal should be destroyed or disposed of" have been added and power to order destruction, confinement or disposal of animals is also given; power is also given to prohibit or regulate trade or keeping of goods, etc.

SCOPE OF THE SECTION.—This section is primarily intended to be exercised in cases where there is no question that the right claimed was one vested in the public, 45 A. 616 at 666; 49 C. 782. This section contemplates only an inquiry as to the existence or non-existence of the obstruction complained of, and not an inquiry into a disputed question of title, and where a *bona fide* claim or private right is raised the Magistrate has no power to make an order under this section but should leave the matter for the determination of the Civil Court, 18 C.W.N. 1148—19 C.L.J. 631; 18 C.W.N. 1086; 28 A. 98; 11 C. 8. Whether there is a *bona fide* dispute as to the public nature of the subject-matter, the question should be left to a civil Court for adjudication, but whether there is a *bona fide* question is for the Magistrate to decide, 24 Cr. L.J. 690—73 Ind. Cas. 802. Whenever there is in fact a *bona fide* claim of right in a case in which a person is required to remove a nuisance the Magistrate's jurisdiction is ousted and he has no power to make an order under this section, 1 C.L.J. 434. See also 25 Cr. L.J. 1030—81 Ind. Cas. 904. This section only relates to an existing state of affairs and to the possibility of future results, 1 Lah. 163; 20 Cr. L.J. 482; 1901 A.W.N. 26; 21 W.R. (Cr.) 10. A general order or proclamation prohibiting a nuisance cannot be issued under this section as under S. 144 (3), *infra*. Before this section can be applied there must be a finding that the obstruction in question is situated in a way which may be lawfully used by the public or on any public place, 12 A.L.J. 1021. A permissive way may be obstructed at pleasure by the owner or tenant of the land over which it runs, 13 C. 275 at 278. This section is limited to injuries arising or likely to arise to members of an unascertained mass of the public. When a person against whom a notice is issued under this section appears and objects to the order, the inquiry must proceed as in a summons case, 20 A.L.J. 692. The persons who require protection are persons living or carrying on business in the neighbourhood or passing by. It would be straining the meaning of the words to hold that the section applies to persons living actually in the alleged dangerous building or in the servant's house in the

compound belonging to it. This section does not therefore empower a Magistrate to order an owner of a house standing apart from the public in its own compound to repair, 20 A. 501. The words 'when empowered by the Local Government in this behalf' are now omitted by the new amendment. All First Class Magistrates in the place of those specially empowered have been now authorized to take action when necessary. This section is not intended to be employed to avoid the necessity of filing a civil suit in regard to a construction which had been in existence for several years, 27 Cr. L.J. 27-24 Ind. Cas. 59.

DISTRICT MAGISTRATE, SUB-DIVISIONAL MAGISTRATE OR MAGISTRATE OF THE FIRST CLASS :—Only these Magistrates, and not a Presidency Magistrate, are entitled to act under this chapter. A Presidency Magistrate can only deal with nuisances under the Local Acts.

ANY UNLAWFUL OBSTRUCTION SHOULD BE REMOVED FROM ANY WAY, ETC., WHICH IN HIS OPINION.—Obstruction to private paths and drains can only be dealt with by Civil Courts, 2 W.R. (Cr.) 36; 5 W.R. (Cr.) 58. The words '*in his opinion*' have been *newly added*. This is to empower Magistrates to issue a conditional order under this section when in his opinion the way, river or channel which is the subject of unlawful obstruction or nuisances may be lawfully used by the public. The amendment is designed to meet the difficulty which arises when the defence set up that the way, river, etc., is private property of the objector, and that no public right exists. *St. of Objs. and Reas.* This section deals with an obstruction to a way, river or channel which is or may be lawfully used by the public, and the obstruction must be to a public use, 23 B. 988. The duty of determining whether the site of the obstruction is a public place or way is cast by the section on the Magistrate in the first instance and under no circumstances can it be left to the jury and unless the Magistrate finds that the place or way is public he has no jurisdiction to proceed with the investigation, 3 Lah. 224. The word channel is not defined in the Code but it is quite wide enough to include a water course in the centre of a catchment area for rainwater which takes the water falling in that area to a public *urani*, 22 L.W. 470. Under this section power is given only for the removal of an obstruction and there is no provision for the reconstruction of a bund which has been once removed, 25 Cr. L.J. 517-85 Ind. Cas. 537. Building a cattle-tough on Government waste land touching a public road was held to be an unlawful obstruction. The motive with which a public highway is obstructed is absolutely irrelevant and it does not matter when as a matter of fact the structure causes practical inconvenience or not, because the land in which it is built though not at the time necessary for continuous use of the public, may be required for such use when there is increased traffic or for any other similar reason, 23 A. 159; 14 C.W.N. 534; when the encroachment complained of is admittedly on a public way, however *bona fide* the claim may be, the Magistrate's jurisdiction is not ousted, 6 C.W.N. 838; 32 C. 920. A common nuisance cannot be excused on the ground that it affords some convenience or advantage to the person guilty of it. 34 A. 833.

LAWFULLY USED BY THE PUBLIC.—Before an order can be made ordering the removal of an obstruction to a way or public place, there must be a finding that the obstruction in question is on a way which may be *lawfully used by the public or in a public place*, 12 A.L.J. 1023-15 Cr. L.J. 723-25 Ind. Cas. 172; 10 Cr. L.J. 219-3 Ind. Cas. 7. There is no warrant for the view that Railway land is necessarily a public place, with regard to which action under this section can be taken. There must be a finding that the land encroached upon is in a way which is, or may lawfully be used by the public. 24 Cr. L.J. 855-74 Ind. Cas. 1037. In 36 A. 209 it was held that when a person whose field was on a lower level, raised the level of his field to such an extent as to cause damage to the neighbour's land, no action could be taken under this section against him, as the field or even if a channel, was not such as had been or could be lawfully used by the public. This ruling is based upon the fact that the field over which the water used to flow was not a public field and hence this section could not be applied to it. Their Lordships were apparently prepared to concede that the field over which the water flowed could be described in a wide sense as a channel. 22 L.W. 471 at 470. See 10 C.L.J. 483.

THE CONDUCT OF ANY TRADE OR OCCUPATION INJURIOUS TO HEALTH, ETC.—“It was held that the section dealt with only trades or occupations which are in themselves injurious, but by the new amendment the *conduct of any trade*, etc., the provision as to various trades or occupations have been amplified in order to provide for cases in which it is the manner in which the trade or occupation is conducted which may be injurious to the health or physical comfort of the community.”—*St. of Objs. and Reas.* An order against some persons inoculating their children upon an outbreak of small-pox is not covered by this section as those persons cannot be said to be carrying on a trade or engaged in an occupation. 15 Cr. L.J. 283—28 Ind. Cas. 205. Though a *burning ghat* may not be a nuisance under this clause, if it is in such an offensive state as to be a source of injury or annoyance to the people of the vicinity, a Magistrate will have jurisdiction to act under this section, 28 C. 428; 19 M. 484; noise injurious to the physical comfort of the community is a nuisance within this section, 32 C L J. 42—21 Cr. L.J. 669. This section authorises action being taken if any trade in question is injurious to the physical comfort of the community. But at the same time it is necessary to take into account all the circumstances to see that interference with public comfort is considered, and a considerable section of the public is not affected injuriously, general equitable principles not being lost sight of, 12 Cr. L.J. 146—9 Ind. Cas. 891.

HEALTH OR PHYSICAL COMFORT.—That is, as distinguished from religious or sentimental gratification such as arising from carrying *tatoots* along a certain public road. See 2 B. 497.

MAY MAKE A CONDITIONAL ORDER.—The conditional order under this section must be such that the person against whom it is directed can learn from its terms what it is they are to do for the purpose of complying with it. When it is too vague and indefinite, the final order made under S. 137, *infra* was set aside by the High Court holding that it was unnecessary to send back the case for retrial, as under S. 137, *infra* it could decide only on the reasonableness or propriety of the conditional order and was not competent to go behind it. 11 G.L.J. 114—11 Cr. L. J. 213—5 Ind. Cas. 722.

REQUIRING THE PERSON.—The word “person” according to S. 11 I.P.C. includes a Company or association or a body of persons, incorporated or not. A Magistrate cannot proceed to pass an order for the removal of a nuisance under this section without calling on the party to show cause why the order should not be passed against him and without hearing his objections if any, even if they are filed after the time fixed originally but before he takes up the case.

PERSONS LIVING OR CARRYING ON BUSINESS IN THE NEIGHBOURHOOD.—By these words are meant not the persons who in the exercise of their private rights may use a building supposed to be in a dangerous condition, but unascertained members of the public whose ordinary avocations may take them to the neighbourhood of such building, 20 A. 801.

BUILDING, TENT OR STRUCTURE LIKELY TO FALL, ETC.—The term “building” is made now to include tent or other structures. To justify an order, there must be proof that the building is in a dangerous state at present. Dangerous trees also are included now.

ANY DANGEROUS ANIMAL SHOULD BE DESTROYED, ETC.—This is newly introduced and provision is here made for the destruction or disposal of dangerous animals.

REMOVE SUCH OBSTRUCTION OR NUISANCE:—The order under this section should be confined to a direction to remove the nuisance complained of. It must be left to the person to choose the most effective way of removing it. If a tank is a nuisance it may be removed by filling it up or by excavating it to greater depth. He should be allowed the opportunity of using his discretion as to the mode in which he would remove the nuisance 10 W.R. Cr. 81. A final order directing a person to remove such portion of a platform as might be obstructing a public highway being vague and indefinite, such an order was held bad, 28 A.L.J. 43.

TANK, WELL OR EXCAVATION SHOULD BE FENCED IN.—Under this section the Magistrate cannot order the *filling* of an excavation; he could order only that the excavation be *fenced in*, 22 B. 714. Where a tank is used as a reservoir for water, the Magistrate may order it to be *fenced in* to prevent accidents, but where the tank is proved to be injurious to the health and comfort of the community, he may treat it as a public nuisance and order it to be *filled up*; to fence in, such an excavation and to stop there, would be to make a dead letter of this section, and to take away from the community the relief which the law gives them, 10 W. R. (Cr.) 27.

WITHIN A TIME TO BE FIXED IN THE ORDER.—Every conditional order must fix a time within which the person is required to remove the obstruction, etc., when the time fixed in the order is allowed to expire without obeying the order or appearing to show cause against it, the liability to punishment attaches irrespective of S. 140, *infra*, 31 M. 280,

TO APPEAR AT THE TIME AND PLACE TO BE FIXED BY THE ORDER.—The order must appoint a time within which and a place where, the person to whom it is directed to appear and move to have the conditional order set aside or modified, 9 C. 637. It must be addressed to a particular person or persons. It cannot be addressed to the public at large as in the case of orders under S. 144 (3) *infra*. The Magistrate is bound to hear the objections and to take evidence tendered under S. 137, *infra*, 20 A.L.J. 692 and 657; 8 C.L.R. 431; 11 B. 375. He is also bound to compel the attendance of witnesses when required by a party, 8 C.W.N. 548. Where from the conditional order the person against whom it is made could not learn what he is to do for the purpose of complying with it, it being vague and indefinite such an order is bad and the High Court while setting aside the order declined to send back the case for re-hearing as it thought that no useful purpose could possibly be served by such a course. 11 C.L.J. 114=11 Cr. L.J. 243=5 Ind. Cas. 722.

NO ORDER DULY MADE SHALL BE CALLED IN QUESTION IN ANY CIVIL COURT.—It is not competent to a Civil Court to set aside an order *duly made* under this section on the ground that it was made without jurisdiction as the subject-matter in dispute was private land and not a thoroughfare or public place. But the Civil Court irrespective of the order made under this section may try the question whether the land in question is private property or not as between parties to such suit and those who claim under them, 6 C. 291; 2 B. 457; 3 B.L.R. 295; 3 B.L.R. 24 (F.B.). To such a suit it is unnecessary to make the Secretary of State a party, 15 C. 460 (F.B.); But in 17 B. 293 it was held that a party aggrieved by an order under this section may sue for a declaration of title against Government who is interested in denying plaintiff's title to the land; see 6 B. 670, where it was held that the party dissatisfied with the Magistrate's order cannot sue the Magistrate, but must sue the Secretary of State, see also 18 Cr. L.J. 259. This clause provides that no order duly made shall be called in question in any Civil Court and therefore it is necessary that the provisions of this section should be sparingly used and if the party against whom an order is contemplated raises the question that the land is his private land he should stay hands and refer the party to a Civil Court, 18 C.W.N. 1086.

REVISION.—In 48 C. 534 it was held that it was not the practice of the High Court to entertain an application in revision against an order made by a Magistrate unless the party aggrieved has first moved the Sessions Judge under Ss. 435 and 438, *infra*, see also 80 C. 423. The High Court cannot set aside an order under this section except on an error of law or an excess of jurisdiction. The Magistrate's proceedings being judicial proceedings, it is open to the High Court to revise the order on a point of law, 9 B.H.C.R. 160; 7 B.L.R. 349; 9 B.L.R. 417.

The High Court will not interfere in revision when a Magistrate dropped proceedings, 1 C.L.R. 486; 8 C. 863. A Magistrate clearly has jurisdiction to exercise his discretion by declining to decide when the public right is strongly disputed and sending the party to a Civil Court, 45 A. 656 at 668. Orders under this chapter are orders in a criminal trial. No Letters Patent Appeal lies therefrom. The fact that the person proceeded against is a competent witness on his behalf does not make it the less a Criminal trial, 39 M. 637.

FURTHER INQUIRY.—When a Magistrate dropped proceedings under this section the District Magistrate or Sessions Judge has no power to order further inquiry under S. 496, *infra*, 24 C. 395. The proper course is to refer the matter to the High Court, 25 C. 425 ; 26 Cr. L. J. 1251—85 Ind. Cas. 995.

COSTS.—There is no provision in this chapter for the payment of costs by any party to a proceeding under this section, 26 Cr. L.J. 517—85 Ind. Cas. 337.

134. (1) The order shall, if practicable, be served on the person against whom it is made in manner herein provided for service of a summons.

Service or notification of order.

(2) If such order cannot be so served, it shall be notified by proclamation published in such manner as the Local Government may by rule direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person.

SCOPE OF THE SECTION.—The terms of this section are directory and an omission to follow strictly such direction though it is an irregularity does not invalidate the order ; where it is shown that the order passed has been actually known to the person affected by it. Such omission does not prevent the case coming within S. 188, I.P.C. 16 C. 9 ; 12 M. 475 ; 5 W.R. (Cr.) 4.

ORDER SHALL IF PRACTICABLE BE SERVED ON THE PERSON.—The order herein referred to is the conditional order under S. 112, *supra* and such conditional order is to be served on the person individually and an opportunity given to him to show cause against such order. It is only when service is not practicable, that resort is to be had to notification by proclamation, 8 A. 99. In order to ascertain the manner in which the order may be served it is necessary to refer to the provisions of Ss. 69 to 71 *supra*. It is plain that the procedure provided by S. 71, *supra* cannot be made use of unless service in the manner provided by Ss. 67 and 70, *supra* cannot be effected by due diligence. A conditional order under this section is not legally served when it is not proved that the order was served in the manner provided for service of summons. First it should be proved that service could not be effected personally under S. 69 *supra* and then it could not be effected in the manner provided by S. 70, *supra* and it is only after that, service by affixture should be resorted to under S. 71, *supra*, 43 C.L.J. 113.

IN MANNER HEREIN PROVIDED FOR SERVICE OF SUMMONS.—See Ss. 69 to 73 as to manner of service. Service on an agent is sufficient, 30 A. 267. Omission to follow strictly the direction as to service of order on the person proceeded against is only an irregularity which can be cured under S. 537, *infra*.

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

Person to whom order is addressed to obey.

(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 either show cause against the same, or apply to the Magistrate by whom it was made to appoint a jury to try whether the same is reasonable and proper.

or show cause or claim jury.

SCOPE OF THE SECTION.—This section gives the person against whom a conditional order is made (1) to perform the act directed within the specified time, (2) appear to show cause against the same, (3) apply to the Magistrate to appoint a jury to try whether the same is reasonable and proper, 43 M. 318 at 318. If he appears to show cause, the procedure laid

down in S. 137, *infra* is to be followed. He can hear the case on cause shown and may record evidence as in summons-cases and may either drop proceedings or make the original order absolute. But if he claims a jury, the Magistrate is to proceed under S. 138, *infra*. Both Ss. 137 and 138 are imperative in their terms and the Magistrate has no discretion in the matter. The party cannot both show cause against the order and at the same time claim a jury, 13 C.W.N. 367—10 Cr. L.J. 494—4 Ind. Cas. 72; 1900 A.W.N. 204.

AND IN THE MANNER SPECIFIED.—The words 'and in the manner' are new. If the person appears the Magistrate is bound subject to S. 139 A *infra* to take evidence as required by S. 137, *infra*, 1 Bom. L.R. 783; see also 25 Cr. L.J. 266—76 Ind. Cas. 826.

APPLY FOR THE APPOINTMENT OF A JURY TO TRY.—Reference to a jury is entirely optional with the person against whom an order is made, but if he applies for a jury he is bound by their verdict, 14 C. 60. When an application is made for the appointment of a jury the Magistrate cannot decide the matter by a local inquiry, 2 C.L.R. 518; Weir, II, 63. When the jury return their verdict, the plea of obstruction under a *bona fide* claim of right cannot be raised, 22 A. 267; 1900 A.W.N. 80. Similarly when the party appears to show cause and does not object that it is not a public way, he cannot afterwards raise such an objection as to the Magistrate's jurisdiction in rejecting the plea as not *bona fide*, 15 C. 364. An application for the appointment of a jury must be made to the Magistrate who passed the order under S. 133, *supra* and it would seem that he alone is entitled to deal with the case, 9 W. 201; 25 C. 278; 43 M. 316. The jury is to be appointed to consider whether the measures directed by the Magistrate are *reasonable and proper*, 30 A. 364, and the Magistrate has no jurisdiction to refer the case to a jury unless he finds that the way alleged to be obstructed is one which is or may be lawfully used by the public; it was held in 31 C. 979 that the Magistrate is not entitled to refer to the jury and ask them to *decide whether there was a public right of way*, see Weir II, 64 and 14 C.W.N. 544. The new S. 139A makes this clear.

136. If such person does not perform such act or appear and show cause or apply for the appointment of a jury as required by section 135, 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.

Consequence of his failing to do so.

SCOPE OF THE SECTION.—The provisions of this section are stringent, because the intention is to create facilities for conditional orders which Magistrates are authorized to pass under this Chapter in order to prevent danger to the public, becoming final without needless delay and thereby promptly to ensure public safety, 12 M. 473 at 478; before proceeding criminally for a breach of the order it must be shown that the order clearly and unequivocally prohibits the thing said to have been done. If the order is ambiguous and capable of two interpretations, the one most favourable to the accused must be adopted, 16 C. 9 at 13.

APPEAR AND SHOW CAUSE.—The Magistrate is bound to take evidence and make some inquiry under S. 135 *infra*, 17 Bom. L.R. 783.

IN THAT BEHALF.—The words "*in that behalf*" mean for his failure to comply with the requirements of S. 135 *supra*, 12 M. 475.

ORDER SHALL BE MADE ABSOLUTE.—When once an order has been made absolute it is not competent to the party affected by it to go behind and question its validity in any way, 13 A. 577; 12 M. 475, 31 M. 280. These decisions were distinguished in 20 A. 501. A Court has inherent power to set aside an *ex parte* order, 19 Cr. L.J. 210—47 Ind. Cas. 790.

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

Procedure where he appears to show cause.

(2) If the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case.

(3) If the Magistrate is not so satisfied, the order shall be made absolute.

SHALL TAKE EVIDENCE AS IN SUMMONS-CASES.—The provisions of this section are clearly mandatory and no waiver on the part of the petitioners can confer on the Magistrate authority to act in a manner not prescribed by the Legislature, *vis.*, to pass an order without recording evidence, but merely basing it on information gathered at a local inquiry to which the parties consented, 10 C.L.J. 482—11 Cr. L.J. 1—3 Ind. Cas 436; where a Magistrate on receipt of a petition alleging an obstruction on a public highway asked certain *Panchas* to make a local investigation and on their reporting that a newly built shop encroached on the public highway directed the removal of the building relying on the report received by him, it was held that the Magistrate was bound to follow the procedure laid down in this chapter and determine on the evidence adduced whether there was any unlawful obstruction of a highway or public place and could not act outside such evidence relying solely on the report of the *Panchas*. 24 A.L.J. 162. This certainly cannot mean that the person showing cause is to start the proceedings and produce evidence to meet a case which he has never heard. He is not supposed to know the substance of the Police report made to the Magistrate or other information on which the Magistrate acted; he is entitled to hear the evidence, taken as in summons cases and cross-examine, and then he may produce his own evidence if so advised. When this has been done, but not before, the Magistrate can make the conditional order absolute if he finds sufficient reason for doing so." 31 A. 453 at 455, following 24 C. 395; 11 A.L.J. 931—15 Cr. L.J. 23—23 Ind. Cas. 167. It is clearly intended by the Legislature that the Court should by itself go into the evidence before making a preliminary order final and should give a judicial decision in the matter, 27 Cr. L.J. 864—95 Ind. Cas. 944. After the conditional order has been made, it is incumbent on the Magistrate to take evidence as in a summons case if the final order is to be made by him, 47 B. 89 at 91; 42 C. 702; 22 Cr. L.J. 232. Where a person against whom a conditional order under S. 133, *supra* has been made appears and shows cause, the Magistrate is bound to take evidence as in a summons case and he cannot make the order absolute under this section merely on the ground that no evidence was produced before him in support of the written statement filed denying any enforcement on the public way. The procedure prescribed, in S. 244, *supra*, *i.e.*, when the accused appears, the Magistrate is first to ask him to show cause, and if he does so, then the Magistrate is to hear the complainant's evidence first and then the evidence for the accused. The Magistrate should therefore in a case under this chapter hear the evidence in support of his order before calling upon the person on whom the conditional order is served for his defence, and such omission certainly prejudices the person proceeded against and the order under this section making absolute the conditional order is illegal, 47 A. 341. Where in a case of alleged obstruction to a public way the Magistrate made a conditional order but dropped proceedings when the person called upon to show cause raised the question of the Magistrate's jurisdiction to proceed with the inquiry as the matter had been previously inquired into, held it was the duty of the Magistrate to follow the procedure laid down in cl. (1) of the section, to take evidence and then consider whether the objection raised was a complete answer or whether the case should be referred to a Civil Court for determination, and there was no room for applying the doctrine of *res judicata*, 19 C.W.N. 332; 44 C. 61. The person proceeded against is not an accused person and he is a competent witness on his behalf, 9 C.W.N. 933. The Magistrate cannot act on his own opinion and cannot act solely on local inspection, 11 B. 375; Weir II, 62; 17 M.L.T. 142—16 Cr.L.J. 207—27 Ind. Cas. 787. When the person who was served with a notice under S. 133 *supra* appeared on the day fixed for hearing but failed to appear and produce evidence on the adjourned hearing, this will not justify the Magistrate in making it absolute without recording formal evidence, 2 Bom. L.R. 618. The person who is called upon to show cause has an undoubted right to call upon the Court to compel the attendance of his witnesses, 6 C.W.N. 548. A verbal order to remove an obstruction has not the effect of an order under this section and is not lawful and

disobedience of such an order is not punishable under the I.P.O., 15 Cr. L.J. 24. When the party appears to show cause, the Magistrate cannot send the case to another Magistrate even if the parties consent, and pass final order acting on the report sent, 47 B. 89; 21 C.W.N. 926; 20 A.L.J. 657.

SUB SECTION (2).—This sub-section is in accordance with the decision in 1 C.L.R. 486. If in a case relating to an obstruction to an alleged public thoroughfare the Magistrate finds that the way is not a public thoroughfare his jurisdiction to proceed ceases and he cannot direct the removal of obstruction under this section, 15 W.R. (Cr.) 67. Where the public nature of the way is disputed it is incumbent on the Magistrate after taking evidence to determine whether the claim is *bona fide* and if he finds it to be so, he is bound to stop further proceedings and refer the parties to establish their right in a Civil Court, 24 Cr. L.J. 853=74 Ind. Cas, 1017.

SUB-SECTION (3).—An order made absolute on materials not provided for by the section and in a manner contrary to the provisions of the section on consent of parties cannot possibly cure the illegality, 47 B. 89 at 92; 10 C.L.J. 432=11 Cr. L.J. 1=4 Ind. Cas, 436.

Procedure where
he claims jury.

138. (1) On receiving an application under section 135 to appoint a jury, the Magistrate shall

(a) forthwith appoint a jury consisting of an uneven number of persons not less than five, of whom the foreman and one-half of the remaining members shall be nominated by such Magistrate, and the other members by the applicant;

(b) summon such foreman and members to attend at such place and time as the Magistrate thinks fit; and

(c) fix a time within which they are to return their verdict.

(2) The time so fixed may, for good cause shown, be extended by the Magistrate.

THE MAGISTRATE SHALL FORTHWITH APPOINT A JURY.—The word "forthwith" must be construed in a reasonable way and it means that the Magistrate shall appoint a jury as soon as reasonably can, 4 Lab. 224. This section leaves no discretion to the Magistrate in the matter of appointing a jury when the petitioner applies for the same, Weir II 63. For form of the order constituting a jury see Sch. V, form No. 17, *infra*. The Magistrate to whom the application for the appointment of a jury is made cannot delegate his powers. The Magistrate referred to in this section is the Magistrate who made the conditional order under S. 133, *supra*. This is clear from the language of cl. (b) of S. 135, *supra*.

CONSTITUTION OF JURY.—The foreman and one-half of the remaining members shall be nominated by the Magistrate. When only the foreman was appointed by the Magistrate and the rest of the members by the parties, it was held there was no legally constituted jury, 16 W.R. (Cr.) 23. The Magistrate is to exercise an independent discretion in selecting the members of the jury and the persons selected should not be persons interested in upholding his conditional order, 21 W.R. (Cr.) 43; 23 C. 499; 28 C. 839; where a Magistrate appointed the complainant and his two witnesses as jurors, the High Court set aside the proceeding as there was no legally constituted jury, 22 W.R. (Cr.) 47. If one of the jurors declines to act the Magistrate should appoint another jury and commence the inquiry afresh. 11 C. 84. When on the failure of a jury to report, the petitioner applied for a fresh jury but the Magistrate rejecting the application proceeded under S. 141, *infra* and made his order absolute, it was held that the Magistrate acted illegally and did not exercise a proper discretion in refusing to appoint a fresh jury. 12 C.W.N. 1017. See also 44 A. 575.

FIX A TIME WITHIN WHICH TO RETURN THE VERDICT.—A Magistrate cannot receive and enforce the award of the jury delivered long after the day fixed for the purpose. Such an award being invalid it was the duty of the Magistrate to take up the case himself, enquire into it and decide it. 7 B.L.R. (Appx.) 87—16 W.R. (Cr.) 23.

TIME FIXED MAY, FOR GOOD CAUSE SHOWN, BE EXTENDED.—This provision was introduced to set at rest the conflict of rulings on the point. The time originally fixed may, for good cause shown, be extended by the Magistrate. He cannot delegate that power to the foreman of the jury, 13 A. 189 at 181.

139. (1). If the jury or a majority of the jurors find that the order of the Magistrate is reasonable and proper as originally made, or subject to a modification which the Magistrate accepts, the Magistrate shall make the order absolute, subject to such modification (if any).

Procedure where jury finds Magistrate's order to be reasonable.

(2) In other cases no further proceedings shall be taken under this Chapter.

A MAJORITY OF JURORS.—A juror should not blindly follow the opinion of his fellow-jurors. Where out of five jurors only two inspected the place and the third never visited it but based his opinion solely on what the other two told him, held that the finding of the so-called majority is not that of a legal majority, 28 W.R. (Cr.) 4. The majority contemplated is a majority arrived at after full deliberation among the jurors appointed. Where a minority of the jurors do not act the Magistrate cannot, proceed upon a report submitted by the majority, but he is competent to act under S. 141, *infra* and pass such orders as he may think fit, 13 C. 275. Where under the provisions of S. 139, *supra* five jurors were appointed and on account of illness of one of the jurors who failed to attend only four of them dealt with the case and made a report and relying on such report, the Magistrate made the conditional order absolute it was held that although the jury as a body can act by a majority that act must be by a majority out of the five who investigated the case and therefore the report submitted by four is not a legal one and the order cannot therefore be sustained, 11 Cr. L.J. 402—6 Ind. Cas. 777; a finding arrived at by a majority of the jurors cannot be rejected on the ground of inconsistency by the Magistrate when they found the order of the Magistrate to be reasonable and proper, 10 Cr. L.J. 210—3 Ind. Cas. 7. Where three out of the five jurors appointed under the last section refused to return any verdict at all, it was held that the Magistrate was not justified in stopping the proceedings entirely but should have appointed a fresh jury, 44 A. 875. See also 23 Cr. L.J. 276—66 Ind. Cas. 420.

FIND THE ORDER REASONABLE.—There is nothing in this chapter laying down any hard and fast rules to guide the procedure of the jury. It is common sense and justice that they should hear the parties and receive the evidence which they may produce and if the jury require any evidence it should be produced before them, 18 A. 188; 26 C. 869; 6 C.W.N. 888; but see 80 A. 383, which takes a different view. The jury in deciding whether the conditional order passed under this section is reasonable or not shall consider any objection raised as to the non-existence of a public right, 8 C. 875; 21 C. 979; 26 C. 889; 3 C.W.N. 345 and 10 C.W.N. 845. But the power is now taken away by enacting S. 139A under which the Magistrate is to find as a preliminary point the existence of a public right and the question will not go before the jury if the person fails to deny the right or fails to adduce evidence before the Magistrate after denying the existence of such a right.

THE MAGISTRATE SHALL MAKE ORDER ABSOLUTE.—The words "the Magistrate" in this section refer to the Magistrate to whom application has to be made under S. 135 (b) to empanel a jury and who under S. 133 does so, 43 M. 316 at 319.

139A. (1) *Where an order is made under section 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and, if he does so, the Magistrate shall, before proceeding under section 137 or section 138, inquire into the matter.*

Procedure where existence of public right is denied.

(2) *If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Civil Court; and, if he finds that there is no such evidence, he shall proceed as laid down in section 137 or section 138, as the case may require.*

(3) *A person who has, on being questioned by the Magistrate under sub-section (1), failed to deny the existence of a public right of the nature therein referred to, or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial, nor shall any question in respect of the existence of any such public right be inquired into by any jury appointed under section 138.*

This section is new and is in accordance with the decision in, 15 C. 554, which held that mere assertion of a claim of title made without reasonable ground or honest belief in it or honest intention to support it will not oust the criminal Court of its jurisdiction under Ss. 193 to 197, *supra*. See also the matter elaborately dealt with in, 49 C. 682 (F.B.) where it is held that the mere raising of a *bona fide* claim of title will not oust the Magistrate's jurisdiction. See also 8 C.W.N. 143; 45 A. 656 where 28 A. 98 is not followed. Under this section on the appearance of the party cited the Magistrate is bound to question him whether he denies the existence of the right in respect of the way, river or channel or place and if he does so the Magistrate before proceeding under S. 137 or S. 138, *supra* should inquire into the matter. The Magistrate could not refuse to inquire into the matter because the objection was not taken until a late stage of the case, 26 Cr. L.J. 1168=88 Ind. Cas. 528. The law before the amendment was that as soon as a party appeared before the Magistrate, his duty was to determine whether any public right existed. If the party denied the existence of the public right, the Magistrate is to determine whether the denial is *bona fide* or a mere pretence. Only when he finds it a mere pretence he can make the order absolute. If the denial is found to be *bona fide*, the Magistrate's jurisdiction is ousted. Thus the section requires (1) parties shall appear and deny the existence of public right (2) reliable evidence to be produced (3) such evidence shall be legal evidence to support the denial. If these conditions are satisfied the Magistrate's jurisdiction ceases and he has no jurisdiction to weigh the evidence and determine on which side the balance turns. This section has only given statutory effect to the view taken before the amendment. The section requires only *evidence* and not *proof*; and the only condition is that on the evidence before him the Magistrate has no reason to think it to be false. The intent of the section is that the Magistrate should neither encroach on the right of the Civil Court which can alone determine the right nor fail to exercise his own jurisdiction. The criterion is that the Magistrate should find evidence supporting the denial which he can presume to be reliable; that is necessary and sufficient to oust his jurisdiction, 4 Pat. 783. See also 25 Cr. L.J. 1080=81 Ind. Cas. 964; 27 Cr. L.J. 9=81 Ind. Cas. 41. The Magistrate is to inquire into the question of public right if such right is denied by the person summoned and the person is entitled to

adduce evidence to establish the right claimed by him. Where in a dispute relating to the closing of an old drain and the opening of a new one it was denied that the drain was a public one, the Magistrate instead of proceeding under this section, at once took evidence under S. 133 *supra* it was held that the procedure adopted was illegal, 23 A.L.J. 187-26 Cr. L.J. 873-86 Ind. Cas. 809, when on receipt of a notice under S. 133, *supra* requiring the removal of a building, the party denied encroachment on a public way, the Magistrate should not immediately proceed to take evidence under S. 137 *supra* without proceeding under this section and passing an order under S. 140, *infra*. 24 A.L.J. 38=27 Cr. L.J. 473-93 Ind. Cas. 697 where 28 A. 98 and 1900 A.W.N. 204, are referred to. If the Magistrate finds there is reliable evidence of the right set up, he is bound to stay proceedings till it is settled by a competent Civil Court. If the Magistrate finds that there is no reliable evidence he shall proceed under S. 137 or S. 138. If the person fails to deny the existence of public right or fails to adduce evidence in support of his case, he shall be precluded from reagitating the same question by claiming a jury under S. 138 to decide such right. It is the duty of the Magistrate before referring the matter to the jury to decide himself whether the way is a public one or not and it is only after deciding this question that any matter can be referred to the jury. If a private claim is asserted the Magistrate must himself inquire into such claim and if he finds the claim to be a *bona fide* question of title he must discontinue the proceedings. 4 Lah. 225 Where the public right is denied it is the duty of the Magistrate to inquire into the matter and come to a conclusion under this section and on the result of the inquiry will depend whether he is to stay proceedings or proceed under S. 137, *supra*. 30 C.W.N. 648=27 Cr. L.J. 878=98 Ind. Cas. 128.

140. (1) When an order has been made absolute under section 136, section 137 or section 139, the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that, in case of disobedience, he will be liable to the penalty provided by section 188 of the Indian Penal Code.

(2) If such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods or other property removed by his order, or by the distress and sale of any other moveable property of such person within or without the local limits of such Magistrate's jurisdiction. If such other property is without such limits, the order shall authorize its attachment and sale when endorsed by the Magistrate within the local limits of whose jurisdiction the property to be attached is found.

(3) No suit shall lie in respect of anything done in good faith under this section.

SUB-SECTION (1).—Inexcusable delay in carrying out a lawful order, no doubt, renders a person liable for his neglect, but when he has during the course of proceedings, endeavoured to correct his remissness, and very slight injury or inconvenience has resulted, it is certainly a grave error of judgment to sentence him to imprisonment, 10 C.L.R. 193 at 198. Under this section if a person fails to perform the act after the order is made absolute and notice served on him, he is liable under S. 188, I.P.C. But in an earlier stage also he can be made liable under S. 188 if he fails to perform the act or appear and show cause, or apply

for appointment of jury under S. 136. Thus there are two distinct liabilities, one under S. 136 *supra* and one under this section after the order has been made absolute.

A succeeding Magistrate has no power to go behind the order of his predecessor or to question its validity, 27 C.W.N. 439; nor can an accused when proceeded against for disobedience of the order go behind the order and show cause that the order ought not to have been made, 12 M. 475.

SUB-SECTION (2).—If a party fails to perform the act directed by the order, the Magistrate is empowered to cause it to be done and recover the costs by sale of the property or otherwise. If a Magistrate in carrying out the order into execution is compelled to have a tank, found to be a public nuisance excavated, the actual charge of excavation alone can be charged against the person against whom the order was made. The soil taken out should be placed at his disposal and the Magistrate cannot utilise the soil so taken out for some other purpose without the consent of the proprietor of the tank, 10 W.R. (Cr.) 51 at 52.

NO SUIT SHALL LIE FOR ANYTHING DONE IN GOOD FAITH.—Clause (3) of this section relates to suits for damages only, 15 C. 460 (F.B.) A Civil suit either to set aside the order of the Magistrate duly made or to restrain him from carrying out such order will not lie, 4 B.L.R. 24 (F.B.) 12 M. 475; 15 C. 460 (F.B.); A suit will lie against a private party who set the Magistrate in motion if it is shown that he was acting maliciously, 2 B.L.R. (Sh. N.) 15. This sub-section imposes a statutory bar to a civil suit in respect of anything done in good faith by a Magistrate. Where he orders a refund of money deposited by the parties with one of the jurors, it was held that the order was not *ultra vires* and could not be called in question in a civil court, 18 Cr. L.J. 305—38 Ind. Cas. 417, but a party is not precluded from suing to establish his right to the exclusive enjoyment of land the subject-matter of the magisterial order, 7 C.L.R. 433.

141. If the applicant, by neglect or otherwise, prevents the appointment of the jury, or if, from any cause the jury appointed do not return their verdict within the time fixed, or within such further time as the Magistrate may in his discretion allow, the Magistrate may pass such order as he thinks fit, and such order shall be executed in the manner provided by section 140.

Procedure on failure to appoint jury, or omission to return verdict.

IF FROM ANY CAUSE THE JURY DO NOT RETURN THEIR VERDICT, ETC.—The words "if from any cause" will include not only a case in which no verdict at all is returned, but also cases where there is a legal defect in the verdict, such as where some of the jurors have not acted at all, or acted not in accordance with law. Death of one of the jurors is a proper cause and if no verdict is returned in such a case a fresh jury may be appointed, 21 W.R. (Cr.) 54. See also 13 C. 275. When for any cause a fresh jury is appointed, the time within which the jury is to return the verdict must be fixed; when this is not done, the Magistrate cannot make his order absolute if there is delay in returning verdict by the new jury, 14 W.R. (Cr.) 63.

MAY PASS SUCH ORDER AS HE THINKS FIT.—When the jury appointed fails to return a verdict within the time allowed, the Magistrate may pass such orders as he thinks fit which shall be executed in the same manner as a final order under S. 140, *supra*. Thus the Magistrate when the jury fail to return a verdict was entitled to inspect the spot and to call for a report from the police to satisfy himself as to the correctness of his original order. When he finds on inspection and on the report that the new construction is an encroachment and constituted a public nuisance, he is entitled to make his final order absolute, 24 A.L.J. 165—27 Cr. L.J. 981—96 Ind. Cas. 645. See also 24 Cr. L.J. 532; 6 A.L.J. 685; 20 A.L.J. 657, but if on failure of a jury to do their duty under S. 138 no application is made to the Magistrate to proceed under S. 137 or to appoint another jury, the Magistrate may in such a case make the order absolute at once without recording evidence under S. 137 *supra*

13 C.W.N. 367; 24 Cr. L.J. 492. A Magistrate passing an order under this section cannot do so merely relying on a conviction of the person had under S. 283, I.P.O., in respect of the same matter, but must follow the procedure laid down in this Chapter, 3 C.L.J. 360.

142. (1) If a Magistrate making an order under section 133 considers that immediate measures should be taken to prevent imminent danger or injury of a serious kind to the public, he may, whether a jury is to be, or has been appointed or not, issue such an injunction to the person against whom the order was made, as is required to obviate or prevent such danger or injury pending the determination of the matter.

Injunction pending inquiry.

(2) In default of such person forthwith obeying such injunction, the Magistrate may himself use, or cause to be used, such means as he thinks fit to obviate such danger or to prevent such injury.

(3) No suit shall lie in respect of anything done in good faith by a Magistrate under this section.

MAY ISSUE AN INJUNCTION.—The foundation of the jurisdiction is the evidence of imminent danger calling for immediate measures and therefore this section does not authorize a Magistrate to issue an injunction when the danger has passed away; 1 W.R. (Cr.) 8. Unless there is imminent danger or fear of injury of a serious kind to the public, no injunction under this section is to be issued, 21 W.R. (Cr.) 85. For form of injunction, see Sch. V, Form No. 19, *infra*.

143. A District Magistrate, or Sub-Divisional Magistrate, or any other Magistrate empowered by the Local Government or the District Magistrate in this behalf, may order any person not to repeat or continue a public nuisance, as defined in the Indian Penal Code or any special or local law.

Magistrate may prohibit repetition or continuance of public nuisance.

SCOPE OF THE SECTION.—This section empowers the Magistrate to prevent the repetition or continuance of a public nuisance, while S. 144, *infra* relates to the prevention of a nuisance for the first time; when the original order itself is not lawful, a repetition or continuance of the act declared to be a public nuisance cannot be made the basis of a proceeding under this section, 19 M. 464; 28 M. 118; and the section is inapplicable to the class of cases designated "legalised" nuisances.

MAGISTRATE EMPOWERED.—If a Magistrate not being empowered in this behalf makes an order under this section, his proceedings are void, S. 580, cl. (h), *infra*.

MAY ORDER ANY PERSON.—The order should be an order addressed to a particular person and served on him personally and not by a proclamation addressed to the public in general, 8 A. 99; any infringement of the order is punishable under S. 291 I.P.C. See 6 C. 88; For form of order see Form No. 20, Sch. V.

NOT TO REPEAT OR CONTINUE A PUBLIC NUISANCE.—For definition of "public nuisance" see S. 268, I.P.O. If a Magistrate makes an order under this section, prohibiting persons entitled to use a place dedicated for the communal purpose of cremation, when they use the same in a manner either unusual or calculated to aggravate the inconvenience necessarily incidental to such act, it is not warranted by this section, 19 M. 464.

REVISION.—S. 435 (3) which had enacted that proceedings under this section are not proceedings within the meaning of that section is now repealed and therefore orders under this section are now open to revision under Ss. 435 and 439, *infra* by the High Court.

CHAPTER XI.

TEMPORARY ORDERS IN URGENT CASES OF NUISANCE OR APPREHENDED DANGER.

144. (1) In cases where, in the opinion of a District Magistrate, a Chief Presidency Magistrate, Sub-divisional Magistrate, or of any other Magistrate (*not being a Magistrate of the third class*) specially empowered by the Local Government or the Chief Presidency Magistrate or the District Magistrate to act under this section, *there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable,*

Power to issue order absolute at once in urgent cases of nuisance or apprehended danger.

such Magistrate may, by a written order stating the material facts of the case and served in manner provided by section 134, direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity or a riot, or an affray.

(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed *ex parte*.

(3) An order under this section may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place.

(4) Any Magistrate may, *either on his own motion or on the application of any person aggrieved*, rescind or alter any order made under this section by himself or any Magistrate subordinate to him, or by his predecessor in office.

(5) *Where such an application is received, the Magistrate shall afford to the applicant an early opportunity of appearing before him either in person or by pleader and showing cause against the order; and, if the Magistrate rejects the application wholly or in part, he shall record in writing his reasons for so doing.*

(7) No order under this section shall remain in force for more than two months from the making thereof; unless, in cases of danger to

human life, health or safety, or a likelihood of a riot or an affray, the Local Government, by notification in the official Gazette, otherwise directs.

AMENDMENT.—In sub-Section (1) the words "not being a Magistrate of the third class" are added depriving third-class Magistrate of the power to act under this section, and the words "there is sufficient ground for proceeding under this section" have been newly added in the same sub-section. In sub-Section (4) the words "either on his own motion or on the application of any person aggrieved" are added, thus empowering the Magistrate to act *suo motu*. Sub-Section (5) is new and makes it imperative to give the party an opportunity of appearing in person or by pleader to show cause against the order, and the Magistrate is bound to record reasons when rejecting the application.

SCOPE AND OBJECT OF THE SECTION.—This section appears in the Chapter which is headed "*Temporary orders in urgent cases of nuisances*" (and reading the whole chapter it is clear that it relates to interference or dealing of some kind with the land itself or with something erected or standing on it; and the section is directed to the prevention or direction by prompt order of some definite act on the part of an individual, so that injury or nuisance may not be caused, 19 C. 127 at 130. This section is ordinarily to be used in cases of urgency and should not be allowed to take the place of other more appropriate provisions of law, 38 C. 878. Both the heading of the Chapter and the language of the section show that the orders passed under this section are only of a temporary character. 27 C. 818; a Magistrate cannot issue an order the effect of which is a perpetual injunction, 8 C. 580; 24 M. 45. This section is of general application and is to be resorted to as a temporary measure, 2 Pat 94. In a matter that can be dealt with both under this section and S. 193, *supra*, the Magistrate is bound to proceed under S. 193 unless he thinks that *immediate prevention or speedy remedy is desirable*, Weir II, 53; 1 C.L.J. 216. The gravamen of the provisions of this section consists in providing a speedy remedy in cases of emergency and a Magistrate is justified in passing an *ex parte* order immediately on receiving a police report, if he is satisfied that immediate action is necessary, and the aggrieved party can move the Court for its rescission or alteration, 25 Cr. L.J. 433. This section is of general application and contains nothing which ousts the Magistrates jurisdiction in case of *bona fide* disputes as to possession of land, 2 Pat. 94 at 101. The power of suspending lawful rights is an extraordinary power which should be resorted to sparingly when other powers are insufficient. The authority of a Magistrate should be used in defence of rights rather than their suspension, in the repression of illegal, rather than in interference of lawful rights. 6 M. 203 (F.B.); 5 C. 132. Every person is ordinarily entitled to exercise all rights of ownership on his property. The Criminal Court gets jurisdiction to interfere with the lawful exercise of a person's right of ownership when such exercise in its ulterior consequences being directed primarily against the lawful right of another person's right of ownership is likely to cause a breach of the peace, 23 Cr. L.J. 164—71 Ind. Cas. 516. An order under this section cannot be passed in a matter dealt with under S. 193 *supra*, 8 W.R. (Cr.) 37. The terms of this section must be strictly complied with and a Magistrate cannot by means of an order under this section forbid *future* obstructions to a public high-way, 21 W.R. (Cr.) 10. A mere statement that an order is made under this section, if as a matter of fact the order is one not warranted by this section, does not make the order passed a valid order under this section, and consequently it is liable to be revised by the High Court, 19 C. 127 at 131. This section is not intended to restrict the liberty of an individual if there is no apprehension of a breach of the peace on account of any act to be done by him. The object of this section is to enable a Magistrate in case of emergency to make an order for the purpose of preventing an imminent breach of the peace. But it is not intended to relieve him of the duty of making a proper inquiry into the circumstances which make it likely that such breach of the peace will occur. If it is found that a person is doing an act which he is legally entitled to do, but his neighbour chooses to take offence thereat and to create a disturbance in consequence, it is the clear duty of the

Magistrate not to deprive the person exercising the legal right, but to restrain the other party from illegally interfering with the exercise of the legal right. [1924] Pat. 262=25 Cr. L.J. 1178=82 Ind. Cas. 42, following 5 C. 132. This section is a temporary measure which the Magistrate in his discretion may adopt for the immediate prevention amongst others of a disturbance of the public tranquillity or riot, or affray. 2 Patna 94 at 105; 38 M. 489; 25 Cr. L.J. 1229=88 Ind. Cas. 845. A Magistrate has no power to direct a party to dig a channel in his own land, 16 Cr. L.J. 291=23 Ind. Cas. 499. An order under this section should not be passed to prejudice a party and exclude him from the possession of property whether exclusive or joint. No Court by its proceedings can allow an advantage to one of the parties, [1922] Pat. 228, 231 and 345. This section cannot apply to a case where the object of the order appears to have been merely to prevent pecuniary loss to the opposite party. The proper remedy for the aggrieved party lies in the Civil Court and not under this section, 13 C.W.N. 188=11 Cr. L.J. 11=4 Ind. Cas. 577; where 8 C.W.N. 373 and 9 C. 103 are followed.

ANY MAGISTRATE SPECIALLY EMPOWERED.—Third-class Magistrates are now deprived of their power to pass orders under this section. The law in sanctioning the power under this section, is careful to provide that it shall be committed only to Magistrates whose discretion is presumably guaranteed by their responsible position or by selection, 8 M. 203. If any Magistrate not being empowered by law in this behalf issues an order under this section, his proceedings are void, S. 530 (i), *infra*.

IMMEDIATE PREVENTION OR SPEEDY REMEDY IS DESIRABLE.—Before a Magistrate takes action under this section he must be of opinion that immediate prevention or speedy remedy is desirable and when he has made up his mind that it is so, he may pass a written order stating the material facts in the order, so that the parties may know exactly whether they are bound to obey the order or to show cause against it by contesting its legality. When this is not done, the order is bad in law, 32 C. 935; 27 C. 918; 38 C. 876; 23 C.W.N. 145; 38 M. 489; 22 Bom. L.R. 157; but in 30 M. 548, it was held that the omission to state the grounds on which the Magistrate was satisfied was only an *irregularity not vitiating the proceedings* of the Magistrate. An order under this section can be passed in case of emergency, and when there is no emergency the order is one made without jurisdiction, 5 C. 7; 11 M.L.J. 122; 27 C. 918; 6 C.W.N. 406; 19 C.W.N. 248=13 Cr. L.J. 511=15 Ind. Cas. 655. Where the matter is likely to be decided shortly by the Civil Court and there is no apprehension of an immediate breach of the peace there is no necessity to take action under this section, 15 Cr. L.J. 291=23 Ind. Cas. 499. If no immediate prevention or speedy remedy is desirable, the Magistrate ought to proceed under S. 133, *supra*. The authority of the Magistrate under this section to suspend the rights recognised by law when such exercise may conflict with the rights of the public or tend to endanger public peace, is limited by the special ends it was designed to secure and is not destructive of the suspended rights, 6 M. 203. Where grave danger of breach of the peace is apprehended and the Magistrate cannot prevent it with the force at his command he has jurisdiction to pass a temporary order under this section. 15 Cr. L.J. 30=22 Ind. Cas. 174. If the Magistrate apprehends a breach of the peace he is entitled temporarily to restrain the exercise by any private individual of his lawful rights to prevent a breach of the peace. But when the order is made only to prevent loss to another party then the order is one passed without jurisdiction. The fact that carrying on a procession is a luxury and not a necessity is no ground for passing a temporary injunction under this section. 15 Cr. L.J. 30=22 Ind. Cas. 174.

WRITTEN ORDER STATING MATERIAL FACTS OF THE CASE.—The order ought to contain a clear statement of the facts upon which the order is based, to enable the party to know distinctly the grounds upon which the Magistrate has acted and to decide for himself whether he is to obey the order or resist it by standing a prosecution under S. 189, I.P.C. or

to show cause against the order. 1 B.L.R. (Ap. Cr.) 20=10 W.R. (Cr), 53; 2 C.W.N. 747. See Form No. 21 of Sch. V as to form of order.

TO ABSTAIN FROM A CERTAIN ACT.—When a person was directed “not to interfere with the management of a certain *Kovil*,” it was held that it was a direction “to abstain from a certain act” within the meaning of these words as used in this section, 24 M. 45 at 46; 3 M. 354 “Certain act” means “a definite act”. An order passed under this section prohibiting a person from collecting rents from the ryots in two villages no particular ryots being mentioned, it was held that such an order could not be properly made under this section, 16 C. 80; 9 C.W.N. 392. An order prohibiting a *melwaramdar* from exercising certain rights as *melwaramdar* is valid under this section. If such an order includes rights properly belonging to tenants, it would not be operative to prevent tenants from exercising acts properly belonging to them, unless the order is specific and definite and is addressed to them, 28 M.L.J. 132=(1914) M.W.N. 169=15 Cr. L.J. 145=22 Ind. Cas. 721. The order of a Magistrate directing that two rival sects of Mahomedans could each enter a mosque only at stated times was held to be one in substance, and effect, an order directing certain persons to abstain from certain acts within this section, 24 M. 262 at 265. In a dispute regarding prayers in a mosque there being an apprehension of a breach of the peace, the Magistrate drew up proceedings under this section and eventually passed an order that no member of either party would be allowed to read prayers in the mosque. *Held*: that the order was misconceived as it was not warranted by the provisions of the Code and the proper course was to ascertain which party was in the wrong, and to bind down that party to prevent a breach of the peace, 24 Cr. L.J. 154=71 Ind. Cas. 506.

In 2 M. 132 at 131—142 it was held that an order passed by the Magistrate directing that all music should cease when any procession is passing a certain place of worship was held to be *ultra vires*. “At times the rights of the several sects to the undisturbed exercise” “of their religious observances may come into conflict without any criminal intention.” “In such cases, mutual toleration is, and must be, the only and the proper rule.” “It has then to be determined how far the conflicting rights interfere with and” “necessarily modify each other. It is, on the one hand, a right recognized by law that an” “assembly lawfully engaged in the performance of religious worship or religious ceremonies” “shall not be disturbed. It is, on the other hand, a right recognized by law that persons” “may, for a lawful purpose whether civil or religious, use a common high-way by parading” “it attended by music, so that they do not obstruct the use of it by other persons. If” “persons passing in procession attended by music pass a place in which others are assembled” “and engaged in public worship which the music would tend to disturb, it is the duty of” “the persons composing the procession to refrain from such disturbance; but assemblies for” “purpose of worship are held scarcely in any place at all hours and generally at appointed” “hours, and therefore it is unnecessary that there should be a rule that persons should not” “at any time pass along a high road in the neighbourhood of a recognized place of worship” “if attended by music. If, indeed, the procession be of a religious character, the prohibi-” “tion of it may be as real an interference with the free exercise of religion as in allowing” “it to proceed past an assembly engaged in worship attended with such circumstances as to” “disturb that worship, and if no religious procession is to be allowed to pass a recognized” “place of worship, whether persons are or are not at the time there assembled and engag-” “ed in religious worship, the members of a numerous sect might close every” “high way to the processions of a sect to which they are opposed by erecting in the neigh-” “bourhood of each highway a place of worship. The law in the restrictions it imposes” “on processions of whatever character, does not go beyond the necessity, and a Magistrate” “has no general authority to declare the law on the subject and anticipate a breach of it by a” “prohibitory-order. For the preservation of the public peace he has a special authority—an” “authority limited to certain occasions. His first duty is to secure to every person the” “enjoyment of his right under the law and by measures of precaution to deter those who”

"seek to invade the rights of others; but if he apprehends that the lawful exercise of a" "right may lead to a civil tumult, and he doubts whether he has available a sufficient" "force to repress such tumult or to render it innocuous regard for the public welfare is" "allowed to override temporarily the private right and the Magistrate is authorized to" "interdict its exercise. The duration of this authority in the Magistrate is co-extensive" "with the emergency that justified the exercise of the authority." The principles laid down in the above decision were approved in 6 M. 203, where the duties of Magistrates in cases where the public peace is likely to be disturbed by one sect attempting to disturb another using the public streets are fully discussed. The same High Court in its Proceedings, dated 13th May, 1895, observed as follows:—"Primarily he (the Magistrate) must consult the public safety and the responsibility thrown on him is great, seeing that the Legislature has prohibited all interference with his order by a superior Court. At the same time it is incumbent on the Magistrate to interfere as little as possible with private rights and a custom which might be recognized as not unlawful under a Government that possessed a State religion might be unreasonable now that Government professes impartiality to all creeds. The Magistrate should endeavour to abstain from the appearance of showing favour to one sect at the expense of another, though, where a sufficient emergency arises private rights must necessarily yield to public security," see also 26 C.W.N. 904, where the order of the Magistrate was set aside as illegal when he prohibited the worshippers in a mosque from reading prayers therein and there was a dispute between the worshippers and *Pesh Imams* appointed by the *Mutwalli*. As to right to conduct religious processions in public streets see. 26 M. 376 at 382; 30 M. 185 (P.C.); 38 M. 489; 6 M. 203; 47 A. 152 (P.C.) Weir II. 74.

TO TAKE CERTAIN ORDER WITH CERTAIN PROPERTY IN HIS POSSESSION.—

These words are undoubtedly very wide and equally vague, but it must be assumed that the Legislature in using these words in the section did not intend to give a Magistrate such extraordinary powers as would enable him to order, under this section, a building that has fallen down on private grounds to be rebuilt by the owner of the yard, 17 A. 485. An order on the hereditary priests of a public temple visited periodically by a large concourse of pilgrims to widen and heighten the doorway with a view to prevent danger arising from over crowding and to improve the ventilation was held to be a legal order, 6 B.H.C.R. (Cr. Ca.) 36; see 2 C.W.N. 70, where it was held that the order passed by a Magistrate on certain prostitutes and the Zamindars under whom they held the land to remove their houses to the other side of a railway line within twenty-four hours on the ground that the visitors of the prostitutes had to cross the railway line and thereby their lives were endangered was not covered by the words *direct any person to abstain from certain act or to take certain order with certain property in his possession*". A Magistrate has no power under this section to pass an *irrevocable order* such as an order to cut down trees, 32 G. 154. The Magistrate has no power to direct a party to dig a channel under this section, 15 Cr. L.J. 291—23 Ind. Cas. 499. A general order prohibiting a person from holding a *hat* within an extensive area is illegal, 26 C.W.N. 663—33 G.L.J. 397. All that he has power to do is to compel the owner of property to take a certain order with it and cannot include an irrevocable order such as cutting down trees, 12 W.R. (Cr.) 72. A Magistrate has no power to make an order prohibiting the holding of a market for a definite period, 11 C.W.N. 223. Or to take possession of property in dispute into custody for two months, 12 C.W.N. 1044, followed in 3 L.W. 495. The heading of the chapter seems to show that "property" is only immovable property; therefore a Magistrate cannot make an order under this section as to the custody of a sum of money even though there is a dispute concerning it. 12 W.R. (Cr.) 38.

DANGER TO HUMAN LIFE.—Where a Magistrate directed certain prostitutes and the Zamindars under whom they were tenants to remove the houses occupied by the former from a particular site within 24 hours and to take up their quarters on the opposite side of a Railway line on the ground that the visitors to the prostitutes had to cross the Railway line and by so doing their lives would be in danger, and for the disobedience of the order passed directed their prosecution under S. 186, 1 P.C. It was held that the order was not one con-

templated by this section and was, *ultra vires*, 2 C.W.N. 70. But a Magistrate is empowered to prevent overcrowding and to improve the ventilation to direct the hereditary priest of a certain temple to widen and heighten the doorway of the temple. 6 B.H.C.R. (Cr. Ca.) 85.

ORDER MAY IN CASES OF EMERGENCY BE PASSED EX PARTE.—In special and urgent cases alone an order may be passed *ex parte*, 3 B.L.R. (Ap. Cr.) 3; 6 M. 203; 2 C.W.N. 737; 38 M. 489; (1910) M.W.N. 354—8 M.L.T., 180—11 Cr. L.J. 449—7 Ind. Cas. 343; 27 C. 785 and 203. Ordinarily the party against whom an order is made should have an opportunity to show cause against it, 10 W.R. (Cr.) 83; 5 B.L.R. 131. Where a party called upon to show cause appeared ten minutes after the order made *ex parte* was made absolute and applied to be heard but the Magistrate declined to do so, it was held that the Magistrate ought to have under the circumstances heard the applicant, 2 C.W.N. 572; see also 25 C.W.N. 663—35 C.L.J. 397. The order must on the face of it show the *emergency* which render the necessity of passing an *ex parte* order, and, if not, the order is liable to be set aside in revision, 2 C.W.N. 747. Proceedings under this section are judicial proceedings within S. 4 (m), *supra*, 19 M. 18. The object of the section is to enable the Magistrate in cases of emergency to make an immediate order for preventing an imminent breach of the peace, but it was never intended to relieve him of the duty of making proper inquiry into the circumstances which make it likely that such a breach of the peace will occur. It is incumbent on him to limit the operation of the order to such reasonable time as may be necessary to enable him to hold a sufficient inquiry and if necessary to deal with the case under this section, 5 C. 132. It is not proper for a Magistrate after passing an *ex parte* order under this section, when its propriety or legality is challenged, to postpone the hearing of the matter from time to time until about the termination of the force of the order. Such matters are to be disposed off quickly in order to avoid unnecessary encroaching on the civil rights and liberties of the subject, 24 Cr. L.J. 164—71 Ind. Cas. 516.

ORDER MAY BE DIRECTED TO THE PUBLIC GENERALLY WHEN FREQUENTING OR VISITING A PLACE.—In this section an exception is made to the general rule that the order should be directed to a particular individual. In emergent cases it may be directed to the *public generally* when frequenting or visiting a particular place, *e.g.*, a temple, bathing ghat, or a fair or market, but it should not be confined to a portion of the community or a class of the public, 8 A. 99; 13 B. 180; 19 C. 127. An order may be directed to an individual but when it is impossible on account of numerous individuals to serve notices on each of them, a general order to the whole number of such individuals designated as the "public" may be issued and such an order will have the same effect as a separate service of order on each individual provided that it has been so promulgated and has come within the knowledge of each individual. This section is intended to extend rather than to limit the scope of the order so as to include therein every casual or frequent visitor from outside the limits of the particular locality within which the order is to have application. A general order by a Magistrate that no person shall sacrifice or cause to be sacrificed any cow within a certain specified area and period is a legal order, 16 Cr. L.J. 190—27 Ind. Cas. 670. A Magistrate has no power to issue a prohibitory order on the public, except as qualified by the last lines of sub-section (3). The order can only be issued to the public generally when resorting to a public place. An order directing the public in general to abstain from attending the *Hat* is bad since it is not until the public attend the *Hat* that the order can be binding on them. They cannot be forbidden by the order to do an act when the order cannot be addressed to them until after they have done that act. 26 Cr. L.J. 874—86 Ind. Cas. 610. This section authorizes him only to direct an order to the public generally when frequenting a particular place, 16 Bom. L.R. 683—16 Cr. L.J. 98—27 Ind. Cas. 146. For form of the order, see Sch. V Form No. 21.

MAGISTRATE MAY RESCIND OR ALTER ANY ORDER.—The power to rescind or alter is neither revisional nor appellate but is a special jurisdiction vested in the Magistrate by Statute, 24 Cr. L.J. 331—72 Ind. Cas. 171. The jurisdiction is confined to rescind or alter any order made. A Magistrate has no jurisdiction to prevent a party before him from

doing an act which he is permitted to do, 32 M.L.J. 352, followed in 16 L.W. 452. When a Magistrate after taking evidence finds his first order was wrong and passed without jurisdiction, he will be acting properly in recalling his first order, 13 W.R. (Cr.) 72. When an order has been set aside by the Magistrate who passed it, he had no power to revive it without starting fresh proceedings, 8 C. 580. An order by a joint Magistrate while acting as District Magistrate may be rescinded or altered after his reversion by the then District Magistrate, and the latter cannot transfer the application for rescission or alteration to the former, 16 Cr. L.J. 74=25 Ind. Cas. 666. Under sub-sec. (4) a Magistrate has jurisdiction only to rescind or alter any order made under the section by himself or any Magistrate subordinate to him. A Magistrate has no jurisdiction on appeal from an order under S. 144 to prohibit the counter-petitioners before him from doing an act which they were permitted to do by the order appealed against, 42 M.L.J. 352; 16 L.W. 452. The powers given by this section are not confined to cases where there has been a change of circumstances since the original order was passed. The Magistrate has power to rescind an order previously made because the circumstances no longer require it to remain in force. He should equally have power to rescind it if he is satisfied that it never ought to have been made. There is nothing in the wording of the section to limit the powers. No valid reasons exist to limit the words of the section. It is clearly desirable that a Magistrate should not interfere with an order once made, unless very good reasons are disclosed for doing so. It may equally be desirable that these reasons should be clearly defined in the section itself. But that is a matter for the Legislature and as the section at present stands the powers given are in no way limited to cases in which the circumstances have altered. To read into the section, words limiting its operation would be to usurp the functions of the Legislature which it is not within the competence of the High Court or any other Court, 2 Patna 94 (F.B.); 26 Cr. L.J. 874=86 Ind. Cas. 810.

NO ORDER SHALL REMAIN IN FORCE FOR MORE THAN TWO MONTHS.—An order purporting to be under this section ceases to be effective after the expiry of two months from the date of the order. Any observation made in such an order as regards the possession of the parties is simply an incidental observation and cannot have the force of an order under S. 145 determining the question of actual possession and which could be determined subsequently in proceedings under S. 145, 26 Cr. L.J. 1229=88 Ind. Cas. 845. A Magistrate cannot by passing successive orders under the section extend the operation of the order indirectly beyond two months, 11 C.W.N. 79; 13 C.W.N. 195=11 Cr. L.J. 12=4 Ind. Cas. 590; 38 M. 489. Non-specification of the duration of time does not make the order invalid. Under cl. (5) it will be presumed in the absence of anything to the contrary in the order itself, that its duration is limited to the full period of two months, 34 C. 897. Confirmation of the *ex parte* order could not extend the operation of the first order to a further period of two months from the date of its confirmation, 13 C.W.N. 195. This section applies to temporary orders in urgent cases of nuisance or apprehended danger, and it is distinctly provided that except when specially extended by notification of Government, no such order shall remain in force for more than two months. When the records did not show any indication of urgency, and the order itself did not set forth material facts of the case as required by law and the order was in effect a second extension of two months prohibiting the procession, which is in contravention of cl. (5) of this section, it was held to be *ultra vires*. It was also pointed out that it was open to the Magistrates to address Government for issue of a certificate under sub sec. (5) of this section, 27 M.L.J. 628=(1913) M.W.N. 1003=14 Cr. L.J. 858=21 Ind. Cas. 898; 20 C.W.N. 758; 16 L.W. 452=(1922) M.W.N. 612; 24 Cr. L.J. 689=69 Ind. Cas. 339. The Magistrate cannot under the shelter of this section, which relates to the passing of provisional order to tide over temporary emergencies in cases where immediate prevention or speedy remedy is desirable, issue a permanent injunction restraining parties from doing anything. Successive orders are invalid and cannot be supported as fresh orders. Such orders are an abuse of the process of the Court specially where the Civil Court has passed a temporary injunction against one party. It is the duty of Criminal Courts to respect the opinion of Civil Courts, and for preserving peace to take action against those infringing the rights of others and protect those in the enjoyment of lawful rights, 23 Cr. L.J. 689=69 Ind. Cas. 689. The arm of law is long enough to

prevent such evasion of the express provision of the Code by arbitrary and successive renewals of the orders passed under this section, and the High Court has power to prevent such evasion, 38 M. 489; 16 L.W. 452—(1922) M.W.N. 612, see also 11 Cr. L.J. 12—4 Ind. Cas. 590. Repeated recourse should not be had to the provisions of this section in the same dispute. If it is considered probable that danger to the public may remain even after the expiry of two months from the date of the order, the proper course is to take steps to obtain an order from Government or to take action under the security sections of the Code, 16 Cr. J.L. 892—80 Ind. Cas. 144. An order cannot be made under this section prohibiting a person from taking part in the management of a temple until the *de facto* manager was duly evicted in due course of law, as such an order contravenes sub sec. (6) of this section, 24 M. 45; nor can a Magistrate issue a perpetual injunction under this section, 8 C. 880; 5 C. 7; 28 C. 168; 18 M. 41; 26 A. 144; 24 M. 45; 28 A. 837. An order which, on the date on which it is sought to be revised by the High Court, had ceased to be in force by efflux of time under the last clause of this section should not be interfered in revision, 16 Cr. L.J. 272—28 Ind. Cas. 160, but where the order is illegal on the face of it and affects the rights of a party, the High Court will interfere, 42 M.L.J. 392; 16 L.W. 452—(1922) M.W.N. 612; 24 M. 45; but see 47 M.L.J. 439—(1924) M.W.N. 675—25 Cr. L.J. 394, where the High Court refused to follow, 42 M.L.J. 392, and followed the earlier decision in 28 Ind. Cas. 160, holding that the order which has expired by efflux of time should not be revised, see also, 16 Cr. L.J. 272.

UNLESS THE LOCAL GOVERNMENT BY NOTIFICATION OTHERWISE DIRECTS.—The Local Government's power is not limited to any particular kind of procession and the period can be extended so long as the danger apprehended continues and no reasons are to be stated by Government, 45 A. 526. If the Local Government considers that there was danger to human life, health or safety, or likelihood of a riot or affray, in allowing a procession to pass down a public street, it was perfectly competent under sub-Sec. (6) to extend the period of the order passed by the Magistrate and was not limited to any particular kind of procession. The Local Government was also competent to extend the order so long as the danger apprehended continues to exist and it is not necessary for the Local Government to state its reasons or even to state the fact of likelihood of a riot or affray or other danger. 45 A. 526 at 527.

REVISION.—The High Court has now power to revise orders under this section. Sub-section (3) of S. 495 *infra* which declared that orders under this section are not proceedings within the meaning of S. 495, *infra*, is now omitted and it is no longer necessary to invoke the aid of the Government of India Act, 44 M.L.J. 328—17 L.W. 409 is no longer law. When a Magistrate has jurisdiction to pass an order under this section in case of need whether that order was or was not the best that could have been passed or not is not a question which should be considered in revision, 8 M.L.T. 217—11 Cr. L.J. 194—4 Ind. Cas. 1128. The High Court has power under S. 439 read with S. 495 to set aside an order under this section directing the removal of property into Court and to restore *status quo*, 12 C.W.N. 1044. When the case is not one which can properly be dealt with under this section, it is subject to revision as any other judicial proceedings, 1 C.L.R. 68; 25 C. 852. The High Court may exercise its powers of revision when there is a gross miscarriage of justice in regard to an order under this section, 26 M.L.J. 208, or to prevent the abuse of the powers of the Court, (1914) M.W.N. 169. Where the order has expired by efflux of time it would be mere waste of time to adjudicate upon matters which have no practical effect and the High Court would not therefore interfere on the merits of the order or annul it in revision, 47 M.L.J. 439, where 28 Ind. Cas. 160 is followed and 42 M.L.J. 392 not followed, but see 25 Cr. L.J. 260—84 Ind. Cas. 324, where an order which had already expired, when the application for revision was made to the High Court, was set aside by the Patna High Court on the ground that it was clearly illegal as no preliminary order was passed and served on the party as required by law.

REFERENCE.—Orders under this section are now proceedings within S. 495, *infra* and can be dealt with under S. 439, *infra*.

CHAPTER XII.

DISPUTES AS TO IMMOVEABLE PROPERTY.

145. (1) Whenever a District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is satisfied from a police-report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof, within the local limits of his 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, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

Procedure where dispute concerning land, etc., is likely to cause breach of peace.

(2) For the purposes of this section the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

(3) A copy of the order shall be served in manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.

(4) The Magistrate shall then, without reference to the merits of the claims of any of such 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 respectively*, consider the effect of such evidence, 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 before mentioned in such possession of the said subject :

Inquiry as to possession.

Provided, that if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date.

Provided also, that, if the Magistrate considers the case one of emergency, he may at any time attach the subject of dispute, pending his decision under this section.

(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be

stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final.

(6) If the Magistrate decides that one of the parties was or should under the first proviso to sub-section (4) be treated as being in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction, and, when he proceeds under the first proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed.

(7) When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding, and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purpose of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto.

(8) If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale-proceeds thereof, as he thinks fit.

(9) The Magistrate may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing.

(10) Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under section 107.

AMENDMENT.—Sub-sections (7) (8), (9) and (10) are new. So also the last portion of Sub-section (6). Sub-section (7) is elaborated considerably, and power is now given to add even rival claimants claiming as legal representatives of a deceased party. In sub-section (4) for the words "receive the evidence" the words "receive all such evidence as may be" have been substituted; and the new sub-section (9) gives power to the Magistrate on the application of either party to issue summons to witness to give evidence or to produce any document or thing. Power is also given by Sub-section (6) to restore to possession the party forcibly and wrongfully dispossessed. Sub-section (10) expressly reserves the power to proceed under B. 107 *supra*.

SCOPE OF THE SECTION.—The object of the provisions of this section is to bring to an end by a summary process disputes relating to land which are in their nature, likely, if not suppressed; to end in breaches of the peace; the mere fact that the dispute is of a religious nature, is not sufficient to justify a Magistrate taking action but there must be positive proof that a breach of the peace is likely to occur if proceedings are not taken. 25 Cr. L.J. 28-75; Ind. Cas. 990-26 Cr. L.J. 870-88 Ind. Cas. 808. Proceedings under this section are taken not in the interest of private parties but for the preservation of public peace and in-

case the Magistrate is satisfied that the likelihood of the breach of the peace either did not exist or has ceased to exist, it is his proper duty to drop proceedings without notice and to withdraw from interfering with the rights of the parties in the property in dispute. 49 M. 232. What the legislature intended by this section was to bring the dispute to a prompt termination and to compel the parties concerned in it to set their differences at rest without delay and ones for all by having recourse to the Civil Courts. 30 C. 155 (F.B.) at 169. The maintenance of the public peace was the object before the mind of Legislature, and where that supreme object is in view there can be no question but that the convenience and even the rights of individuals must at times be sacrificed for its attainment. It would be improper to lean too much in attempting to construe the section, upon analogies derived from suits and other civil proceedings, the result of which are very different from the proceedings under this section, and in which the rights of individuals *inter se* are alone in question. It is assumed as a possible consequence of proceedings under this section that the owner of the property may temporarily be deprived of possession of what is rightfully his and subjected to other inconveniences. But this and such like considerations, it was presumably necessary to subordinate to the imperative necessity of preserving the peace. 30 C 155 (F.B.) at 195. The procedure prescribed by this section is intended solely for the purpose of preventing a breach of the peace where a dispute exists concerning any land, or water, or the boundaries thereof; which dispute, if no proceedings were taken, would be likely to cause a breach of the peace. The institution of such proceedings is a matter in the discretion of the Magistrate. By the addition of the new sub sec. (10) the Magistrate may now proceed under S. 107 or under this section. see 39 C. 150 (F.B.) which laid down that where there is a dispute concerning land a Magistrate is not precluded from proceeding under S. 107, *supra*. The existence of a dispute likely to cause a breach of the peace is a condition precedent absolutely necessary to give the Magistrate jurisdiction to enter upon such an inquiry as to possession..... Any inquiry as to possession that is made under the provisions of the section is made not for the purpose of strengthening the position of the one party or of the other in the dispute between them, but because such an inquiry is necessary for the making of an order declaring the party in possession to be entitled to retain possession until evicted from the property in due course of law, and forbidding all disturbance of such possession until such eviction, 30 C. 112 at 118. The Magistrate, in order to assume jurisdiction under this section has to satisfy himself as to the likelihood of a breach of the peace and he has to exercise his own judgment upon the materials placed before him and to arrive at a conclusion as to whether on the materials placed before him there was a likelihood of a breach of the peace, and should not be satisfied in acting merely upon an expression of opinion by the police. (1924) Pat. 83=26 Cr. L.J. 183=83 Ind. Cas. 693; 33 C. 33; 26 Cr. L.J. 944=86 Ind. Cas. 1008. The law does not require a Magistrate to record in his final order under this section an express finding that a breach of the peace is imminent. A finding as to the existence of a dispute likely to cause a breach of the peace is a matter to be considered in relation to the preliminary order under sub-sec. (1) and where the preliminary order states that the Magistrate is satisfied on the materials before him that a dispute likely to cause a breach of the peace with regard to the property in dispute exists there is a sufficient compliance with law and his final order cannot be questioned on the ground that it did not contain a finding as to the likelihood of a breach of the peace, 26 Cr. L.J. 1581=90 Ind. Cas. 841. A party to a proceeding under this section is not in the position of a plaintiff in a civil suit who has set the Court in motion and has a right to require a decision upon the question raised by him. If a Magistrate either refuses to make an order under sub-sec. (1) or having made such an order subsequently cancels the same on the ground that a dispute likely to cause a breach of the peace does not exist, no private person has any *status* to contest the propriety of his refusal to make an inquiry into the question of possession, 30 C. 112 at 117 followed in 49 M. 232. An order under this section is only a mere police-order made to prevent a breach of the peace; it does not confer any *title* on the person declared by the order to be in possession. He is only entitled to retain such possession until he is evicted by a person who can prove a better title or who can prove a better right to possession, 29 C. 187 (P.C.). An order under this section does not signify that the successful party is thereby entitled as of right to the property, in defiance of whatever legal title there may be existing in favour of the rightful owner; the order only entitles the successful party to possession pending the decree of a Civil

Court, 18 L.W. 649. There is nothing in this section to prevent a Magistrate joining together various claims to possession and dealing with them in one proceeding, 28 Cr. L.J. 424-85 Ind. Cas. 40 ; 18 L.W. 649. It is not the actual parties but all parties who may have notice of the proceedings that are bound by the order, since the object of the section is to prevent a breach of the peace, 11 Bom. L.R. 377-11 Cr. L.J. 64-2 Ind. Cas. 513. This section did not before the amendment expressly authorise the successful party to be placed in possession by the Court, but now, by the amendment, power is given to restore the successful party to possession. The functions of a Magistrate acting under this section are of quasi-executive character having for their object and justification the prevention of a breach of public peace. For that purpose the Magistrate could only decide the fact of possession, 6 Bom. L.R. 216. Under this section a special jurisdiction is vested in Subordinate Criminal Courts under special circumstances and for a special purpose. Where either the special circumstances do not exist or when the order does not attain the purpose for which the jurisdiction is created, then the special jurisdiction vested falls to the ground. The circumstances under which the jurisdiction springs up are those which give rise to an apprehension of a breach of the peace and if there is no such apprehension there is no jurisdiction to make the order. The purpose the Legislature had in view is a prevention of a breach of the peace, 28 C. 446 ; 24 C.W.N. 621-31 C.L.J. 389. This section is intended to provide a speedy remedy for prevention of the breaches of the peace arising out of disputes concerning immoveable property. The Code contemplates a determination of the question of possession without reference to the merits of the claims of the disputing parties to a right to possess. The question of possession has to be determined with reference to a specified point of time, *vis.*, the date of the initial order or in the case of forcible dispossession a date within two months next preceding such order. The legislature could hardly have contemplated an elaborate protracted inquiry the result of which might be in many instances to defeat the very object in view, 32 C. 1093. This section is concerned solely with the fact of actual physical possession, whether lawful or unlawful, whether in contemplation of law enjoyed by the possessor in his own right or on behalf of others, 3 L. W. 161-4 Cr. L. Rev. 432-29 Ind. Cas. 311. So in proceedings under this section any question as to whether possession is on behalf of others or in one's own behalf is quite irrelevant ; questions as to rights of parties raised by their written statements under this section are quite irrelevant as such proceedings are initiated in the interests of the public order and tranquillity, and it is his preliminary order that settles the actual issues between the parties and founds his jurisdiction, 16 Cr. L.J. 525 ; 26 Ind. Cas. 153. In cases under this section the tribunal inquiring into the case is not under the necessity which a Court trying a civil case or ordinary criminal case, is under, of coming to a conclusion at all, 14 C. 361 at 363. Proceedings under this section are summary proceedings of a quasi civil nature the object being to prevent a breach of the peace and no right of title is decided and no one's life or liberty is in question and S. 360, *supra* cannot apply, 26 Cr. L.J. 315-86 Ind. Cas. 979. Before the amendment, a Magistrate had no power under the section to oust one party and to place another in possession of the disputed property as he has power to do under S. 522 *infra* when there is a conviction for an offence, 13 A.L.J. 332 but the new addition to sub-sec. (6), empowers the Magistrate to restore to possession the party forcibly and wrongfully dispossessed. The Magistrate has power in proceedings under this section give one of the parties a right of way over a plot of land in the possession of the other party ; because he has power to declare the possession of one party to the plot the greater will include the less, *vis.* to declare a right of way, 28 Cr. L.J. 772-86 Ind. Cas. 404. When once a Magistrate has issued a preliminary order under this section, he has no jurisdiction to cancel the same without holding an inquiry as required by sub-Section (4) or (5). Failure to do so is illegal and the order dismissing the petition was set aside as not warranted by law, 7 Cr. L. Rev. 193.

DISTRICT MAGISTRATE SUB-DIVISIONAL MAGISTRATE OR A MAGISTRATE OF THE FIRST CLASS.—Only these Magistrates are empowered to act under this section *Presidency Magistrates* too were sought to be included in the amending Bill, but the amendment fell through. In S. 6 *supra* *Presidency Magistrates* and *Magistrates of the First Class* are specially mentioned as two different courts so that the expression "*Magistrate of the first class*" cannot include a *Presidency Magistrate*. In the *Presidency towns* the *Commissioner of Police* is an *ex officio* *Magistrate of the first class* who can exercise powers under

this chapter. See S. 7 of Madras Act III of 1888. In the towns of Calcutta and Bombay, Commissioners of Police, though not ordinarily Magistrates may be invested with powers necessary for the preservation of peace and prevention of crime. Under S. 13 *supra* a sub-divisional Magistrate may be a Magistrate of the First or Second Class in charge of a sub-division. So a Magistrate of the Second Class in charge of a sub-division can exercise powers under this section although a Magistrate of a Second Class without a sub-division charge, cannot exercise powers under this section. A Bench of Magistrates are ordinarily empowered to try cases or class of cases referred to them within certain limits and they will not be empowered to inquire into miscellaneous proceedings under this chapter which are not trials for offences. But a Bench may be invested with any of the powers conferred or conferrable by and under this Code on a Magistrate, See S. 15 *supra*. Therefore proceedings under this section are cognisable by a Bench of Magistrates if specially empowered, e.g. Benches of Magistrates in the Hill stations of Nilgiris and Kodaikanal are so empowered. See *Fort St. George Gazette*, 1876 p. 1204 and 1901 p. 298.

IS SATISFIED FROM A POLICE REPORT OR OTHER INFORMATION.—The Magistrate has a wide discretion whether proceedings are to be instituted or not. He is in no way bound to act on all that is stated in the Police report before him, 27 C. 892, 30 C. 112. No rule can be laid down so as to specify the sufficiency of the materials upon which the Magistrate is entitled to act. But the Magistrate must form his own judgment and not proceed upon a mere expression of opinion by the police, 31 C. 33 followed in (1924) Pat. 83 and Cr. R. Case 227 of 1924. A mere petition by an officer in the employ of one of the interested parties is not however such information upon which a Magistrate can act without receiving further evidence, 29 M. 581. A statement by a Magistrate that he has been directed by the Judge to hold an investigation is not sufficient to satisfy the requirements of this section, 9 W. R. (Cr.) 64. Though no initiation of proceedings can be ordered by a superior tribunal, yet it may draw the attention of the Magistrate to the nature of the dispute before it so that the Magistrate may exercise his own discretion in the matter, 20 C. 520; 24 C. 391; 10 Cr. L. J. 231. A mere expression of opinion by a police officer without sufficient materials, in his report that there is a likelihood of a breach of the peace, or a police report which states in the vaguest terms that a breach of the peace may occur should not be acted upon, 11 C. W. N. 835 and 198. A Magistrate should specify the nature of the information received by him and state the material facts which by the exercise of a judicial discretion he derived therefrom and which in his judgment constitute grounds for believing that a dispute concerning certain land exists which is likely to cause a breach of the peace, if he does not take necessary steps to prevent it. Unless he is in a position in this way to present clear and rational grounds, capable of being estimated according to their merits on the mere statement of them, he has no legal foundation on which to base his investigation *inter partes*, relative to possession. He is not in any way limited as to the materials he might make use of to base his finding. No complaint is necessary, nor is he confined to evidence recorded on oath, 19 W. R. (Cr.) 10. The nature of the information is not defined and the Magistrate has a wide discretion as to the sufficiency of the information and so long as it is reasonable it cannot be interfered with; a mere statement on oath of one of the parties is not sufficient, 10 C. 73. So also a written report of the *amin* is not itself sufficient, 20 W. R. (Cr.) 57. A petition which refers to the commission of various offences which involve no breach of the peace is not sufficient, 4 C. W. N. 87. A mere telegram has been held to be no information within this section, 22 B. 949 at 956. The preliminary order should contain the fact of the Magistrate being satisfied as to the breach of the peace concerning a dispute as to immoveable property and the grounds thereof, 24 B. 527; 28 C. 416. The omission to set forth in the preliminary order the grounds of the Magistrate's being satisfied as to the likelihood of a breach of the peace do not affect the jurisdiction of the Magistrate, and is not fatal to the final order, 36 M. 276 at 234-235; 33 C. 332 (F.B.); 30 M. 343; 33 C. 66 (F.B.); 18 Cr. L.J. 156; 17 M. L.J. 449; 16 M.L.J. 143; Weir II, 98. Proceedings initiated without sufficient materials before the Magistrate from which he could satisfy himself that there is a likelihood of the breach of the peace are void and cannot be cured by S. 537, *infra*, 20 C. 513; 11 C. W. N. 835 and any evidence that a Magistrate may take in the course of the inquiry cannot give him jurisdiction which he did not otherwise possess when he started proceedings.

DISPUTE LIKELY TO CAUSE A BREACH OF PEACE EXISTS CONCERNING LAND.—

"Dispute" under this section means a reasonable dispute, a *bona fide* dispute, a dispute between parties which have each some resemblance of a right or supposed right, 6 C. 838. A mere verbal altercation between two parties claiming a right is not sufficient, 5 C. 194. The Magistrate must record a distinct finding that the dispute is such as is likely to cause a breach of the peace, Welr II, 117. The finding is to be recorded in the preliminary order and the final order cannot be questioned, that it did not contain a finding as to the likelihood of a breach of the peace, 26 Cr. L.J. 1881-90 Ind. Cas. 831. If there is no present danger of a breach of the peace, the fact that such dispute is likely to cause breach of the peace in the future will not justify a Magistrate making an order under the section. 7 C.L.R. 352; 8 C.W.N. 590; 26 A. 190; 15 C.W.N. 271-11 Cr. L.J. 728-8 Ind. Cas. 892. The word "likely" in this section does not mean that a breach of the peace complained of is "imminent or likely to happen immediately," but simply signifies that there should be a probability or likelihood of a breach of the peace, 8 Cr. L.J. 170 where 83 C. 33 and 352 and various other rulings are referred to. Two essential pre-requisites to give the Magistrate jurisdiction are—(1) a dispute likely to cause a breach of the peace; (2) that such dispute should concern land or water, etc. The section does not primarily contemplate cases in which there have already been overt act of violence. All the disputants may be persons of peaceable disposition, but if the dispute is in its nature of such a kind that it is likely, having regard to the known conditions of society to lead to breach of the peace, that is enough to warrant the Magistrate initiating proceedings under this section, 30 C. 155 (F.B.) at 200; 30 A. 41; 21 C. 29; when the apprehension of the breach of the peace is not clear but is only colourable, proceedings instituted are without jurisdiction, 6 C. 835; 10 C. 78; 4 C.W.N. 87; 6 C.W.N. 340; 5 C.L.J. 418; 11 A. L.J. 636. Proceedings under this section are initiated only by complying with the provisions of sub-sec. (1), which are imperative in their nature, (1913) M.W.N. 798 following 32 C. 852 and distinguishing 36 M. 275; 24 Ind. Cas. 160. The term "land" in this section has a very wide significance. It includes crops or other produce of land and even the rents and profits of the land. The mere fact that the crops which are the subject of dispute have been removed from the land is not sufficient to oust the jurisdiction of the Magistrate under this section, Welr II, 103. A dispute as regards mines and minerals and the right to work therein falls within the scope of this section, [1922] Pat. 122; 4 Pat. L.J. 154; 2 Pat. L.J. 678; a dispute as to a right to collect rent is a dispute within this section, 16 Cr. L.J. 284; 17 M.L.J. 233; 11 C. 313; 16 C. 513; 12 M. 88.

• WITHIN THE LOCAL LIMITS OF HIS JURISDICTION.—The section does not authorise a Magistrate to decide possession when the subject of dispute is beyond his jurisdiction. 17 W.R. (Cr.) 33; where proceeding were validly instituted and the District Magistrate transferred the case to some other Magistrate for disposal, it is not essential that the Magistrate to whom the case was transferred should have local jurisdiction; all that is necessary is that he must be empowered to enquire into the matter. But where there was no valid initiation of proceedings they cannot be validated by transfer to a Court of competent jurisdiction. When the land in dispute is situated partly in one district and partly in another, the Magistrate of one district could properly act on a police-report of an officer of the other district in respect of land within his jurisdiction and pass a preliminary order, 29 C. 883, followed in 1 Cr.L.J. 329.

SHALL MAKE AN ORDER IN WRITING.—See 39 C. 150 (F.B.) which laid down that when there is a dispute concerning land a Magistrate is not precluded from proceeding under S. 107 *supra*. It was held in various decisions that the expression "shall" occurring in this section leaves no discretion to the Magistrate if he finds that certain circumstances exist, and when these circumstances exist, *vis.*, a dispute likely to cause a breach of the peace concerning land or water, etc., he is bound to proceed under this section and he is precluded from proceeding under S. 107, *supra*, see 35 C. 117; 12 C.W.N. 608; 23 A. 406; 7 C.W.N. 746; 32 C. 966; 26 M. 471; 25 B. 179. But unless and until the Court is in a position to say that the party sought to be bound down is clearly in the wrong S. 107, *supra* should not be resorted to, 26 Cr. L.J. 1562-90 Ind. Cas. 432; see also [1922] Patna 241-68 Ind. Cas. 149, where it was laid down that where one party is clearly in the wrong and threatens to disturb

the right of another who is in actual possession of the land, this section has no application. In the light of the new sub-section (10) these decisions are no longer law on this point. A Magistrate's order under this section is no bar to his passing an order under S. 107 *supra* on the same facts where he is satisfied that notwithstanding the order, one of the parties is likely to take the law into his own hands, 36 M. 318. See for a converse case, 39 C. 489. The new amendment gives ample discretion to the Magistrate to proceed either under this section or section 107 *supra*. A formal order in writing is absolutely necessary to give the Magistrate jurisdiction, 30 C. 443; 32 C. 562; 2 A.L.J. 272; 7 C.W.N. 174; 4 Lah 66; 23 Cr. L.J. 1177—88 Ind. Cas. 601; 13 Cr. L.J. 296—14 Ind. Cas. 760; 15 Cr. L.J. 628—30 Ind. Cas. 482, but the order need not be self-contained, if the police-report on which the order is based is referred to in the order in express terms, 33 C. 352 (F.B.); 36 M. 275; it is sufficient if the order should specify clearly the subject-matter in dispute with reference to which the order is made, 27 A. 296; 30 C. 443; but non-specification of the boundaries of the disputed lands will not vitiate the Magistrate's proceedings, 5 C.W.N. 563.

STATING THE GROUNDS OF BEING SATISFIED.—The Magistrate's order must contain a statement of the facts from which he is satisfied of the likelihood of breach of the peace and also should specify clearly the sufficiency of the materials upon which he takes action, 33 C. 33; 24 B. 527; see (1924) Patna 83 where it was held that a Magistrate would not be justified in acting merely upon the expression of an opinion by the police but must exercise his own judgment upon the materials placed before him. The preliminary order need not be self-contained and where it makes in express terms a reference to a police report or other information on which action is taken, the proceedings are not defective, but validly instituted, 33 C. 352 (F.B.); 36 C. 370; 30 M. 543; 36 M. 275; 24 B. 527; 32 A. 132. If the preliminary order does not clearly state the grounds on which the Magistrate is satisfied as to the likelihood of a breach of the peace his order is materially defective and made without jurisdiction, 4 M.L.T. 213. Even when the Magistrate acts on a local inquiry made by himself he must state the grounds of his being satisfied that there is a likelihood of a breach of the peace, 9 C.W.N. 621, but when the Magistrate held a local enquiry in the presence of both parties and satisfied himself that there was a likelihood of a breach of the peace, the omission to state the source of information at the inquiry itself does not vitiate his proceedings, 7 C.W.N. 599; where parties are aware of a dispute likely to cause a breach of the peace the Magistrate is not ousted of his jurisdiction simply because in the notice issued it is not stated that a dispute exists likely to cause a breach of the peace, 27 Ind. Cas. 848; 33 C.L.J. 69. The object of drawing up a proceeding under sub-section (1) is to inform the parties of the grounds or source of his information which satisfied the Magistrate that a dispute existed, 32 C. 771. The object of setting forth in the order the grounds of his being satisfied is to enable the parties to know what case they have to meet. Where both the parties move the Magistrate to take action and the Magistrate issues a preliminary order without setting forth his reasons in full the parties are prejudiced in many ways, 32 A. 132; see also 15 Cr. L.J. 279; 23 Ind. Cas. 487.

REQUIRING PARTIES CONCERNED TO ATTEND HIS COURT.—The expression, "parties concerned in such disputes" indicates all persons claiming to be in possession at the date of the preliminary order and not all parties interested in, or claiming a right to the property in dispute; all parties interested in, or claiming a right are not entitled to be, and should not be made parties to the proceeding. To require a Magistrate to do so, would be to impose upon him in some cases, an almost impossible task and would undoubtedly have the effect of unduly prolonging and greatly embarrassing the proceedings, and defeating them of their summary character, 30 C. 153 (F.B.) at 196. It is the duty of the Magistrate in the first instance to find out which parties are concerned in the dispute, 5 C.W.N. 300, and a person concerned in the dispute need not actually be present near the land, 20 C.W.N. 973. Landlords who set up false tenants as cultivators to oust the real tenants in possession are necessary parties. Undivided brothers of the original party are necessary parties, 3 C.W.N. 329. The possession of a servant is that of his master and the master should be made a party and no valid order can be made without him, 6 C.L.R. 193. But a reversioner is not a necessary party as he can have no possible right to present possession, 24 A. 439; 27 C. 892.

Parties can be added, up to the time of the beginning of the inquiry and if a Magistrate refuses to allow a party to intervene, not on the ground that he has no interest in the subject of dispute, he is acting without jurisdiction, 30 C. 155 (F.B.); 20 C. 867. A third party can come in the course of the proceedings for the purpose of showing that no dispute likely to cause a breach of the peace really existed or exists. It is not clear that the Legislature contemplated that such third party should be made a party to the proceeding. 5 C.W.N. 900 at 903. The language of sub-section (5) also makes this position clear that a third party interested in the dispute is entitled to show that no such dispute as aforesaid exist or has existed. The object of the law is to obtain a settlement of the dispute and if a party is absent, strict proof of service on him is required and it will be better in most cases to order fresh service to secure an effective settlement of the dispute. If a party after due service of notice fails to appear, a warrant cannot be issued to enforce his attendance, 5 C.W.N. 71; 8 C.W.N. 642; 34 C. 840; 12 C.W.N. 771; 30 C. 818. This section contemplates one proceeding against all parties known to be concerned in the dispute so as to conclude the matter definitely and finally, 27 C. 892. In a dispute between old and new tenants of an estate the receiver who was not in actual possession but who only granted leases to some of the new tenants is not a necessary party, 9 M.L.T. 802; 12 Cr. L.J. 185—9 Ind. Cas. 1009, where 30 C. 593 is distinguished. The order should clearly specify the place where the parties are to attend. Where a Magistrate issued an order which did not state the place of trial and he being on tour, a party was not able to be present, the order made by the Magistrate was set aside, 7 C.W.N. 705.

PUT IN WRITTEN STATEMENTS OF THEIR RESPECTIVE CLAIMS.—Written statements of the parties are merely materials to assist the Magistrate in ascertaining the grounds on which they claim possession. The fact that the written statement of one party is not required to be served upon the other is conclusive to show that its contents, neither found nor limit the jurisdiction, 3 L.W. 164 at 167—6 Cr. L. Rev. 15 at 18—16 Cr. L.J. 525—29 Ind. Cas. 541. The allegations in the written statement are required to be proved like any other fact, and so on a written statement alone a Magistrate is not entitled to base an order, 5 C.W.N. 71; 34 C. 840; 8 C.W.N. 642; 12 C.W.N. 771. When a party fails to appear and file a written statement, the Magistrate cannot, when there is evidence, say that he could not decide possession, but he must proceed and come to a conclusion, if possible, 11 W.R. (Cr.) 9.

AS RESPECTS THE FACT OF ACTUAL POSSESSION.—The Magistrate has no jurisdiction to inquire into the rights of the parties. By his training and experience he will very often be incompetent to decide such a question. All that he is to look into is the fact of actual possession and that too on a particular date, *vis.*, the date of his preliminary order under sub-section (1), 7 C.L.J. 389—18 Cr. L.J. 370; 27 Cr. L.J. 784; 27 Cr. L.J. 785—95 Ind. Cas. 62. This section is concerned solely with actual physical possession, whether lawful or unlawful, whether in contemplation of law enjoyed by the possessor in his own right or on behalf of others. This seems clearly to follow from the words of the section, 3 L.W. 164 at 167—6 Cr. L. Rev. 15 at 17—16 Cr. L.J. 28—29 Ind. Cas. 541; (1926) Pat. 160; 27 Cr. L.J. 784—95 Ind. Cas. 820. By actual possession is meant not merely bodily possession, but also possession of a master by his servant, possession of a landlord by his immediate tenant, that is, the person who pays rent to him; possession by receipt of rent is actual possession, 11 C. 413; 16 C. 513; 17 M.L.T. 325; 12 M. 88; 16 Cr. L.J. 284; see 16 C. 281 as to possession of forest land. The Magistrate cannot call upon the parties to furnish a statement of their titles. He is not entitled to consider the claims of the parties as regards the right to possess except in so far as it might assist him in determining the *factum of actual possession*, 26 B. 179; 30 C. 155 (F.B.). The Court is to decide the fact of actual possession and that alone, 4 C.L.J. 562. "Actual Possession" in a dispute between rival landlords need not be taken to exclude possession by receipt of rent and be taken to include possession of a landlord by his immediate tenants, (1915) M.W.N. 267—17 M.L.F. 325—16 Cr. L.J. 284—28 Ind. Cas. 332 where 12 M. 88; 11 C. 413; 15 C. 527; 16 C. 513; Weir II 108, are followed and 23 C. 80; 7 C.W.N. 462 are distinguished. A Magistrate cannot go behind the decision of a Civil Court even in a case where the Civil Court had no jurisdiction or in a case where symbolical delivery of possession was made by the Civil Court, 27 C.W.N. 267. It is the duty of the Magistrate to uphold possession given by a Civil Court, so that a person who had

obtained a decree declaring his right to possession, and had been put in possession might not find himself again forced to litigate his title, 2 C.L.J. 147. Where in a proceeding under this section a party has once been declared to be in possession of land, no order to the contrary should be passed in a subsequent proceeding under this section concerning the same land unless the Magistrate finds that there has been a change of possession since the passing of the last order, 27 Cr. L.J. 815=95 Ind. Cas. 479.

SUB-SECTION (2) ; LAND OR WATER.—The expression was formerly *tangible immoveable property* and much difficulty and inconvenience was felt in construing the expression. The expression 'land' was held to include a temple, Weir II 99, 110 and 112 ; crops 15 A. 394, rents 11 C. 413 ; 15 C. 527 ; 16 C. 513 ; 12 M. 88 ; the expression 'land or water' now includes buildings, markets, fisheries, crops, rents or profits of land. The definition of land is wide enough to cover mining rights, and even prospecting or boring licences, which can only be utilised by going upon the land and exercising some rights relating to it. 24 Cr. L.J. 108=71 Ind. Cas. 236. Proceedings cannot be instituted under this section with respect to moveables, 25 Cr. L.J. 440=77 Ind. Cas. 728. The Madras High Court in Weir II 108, held that the mere fact that the crops which are the subject of disputes have been removed from the land is not sufficient to oust the jurisdiction of the Magistrate under this section, but in 30 C. 110, it was held that when the crops were severed from the land no action could be taken as the heading of Chap. XII is disputes as to immoveable property. See also 28 A. 286 where it was held that a Magistrate has no jurisdiction to attach under S. 146, *infra* a crop of *mokna* no longer growing on the trees. By a private arrangement between dealers in a market a *Chaudri* was appointed to regulate trade and he was to be remunerated by voluntary payments by dealers, such payment having no connection with the ordinary rents and profits of the market, due to the zamindar. In a dispute between the servants of the zamindar and the *Chaudri*, it was held that the dispute did not relate to the profits of the market, and so proceedings under this section could not be taken, and the proper course is to proceed under S. 107, *infra*, 38 A. 143. A dispute as to the hereditary right to perform the duties of a *patari* of an idol in a temple is not a right to the use of land, 37 C. 578 ; where 29 M. 237 is not followed 52 C. 59. But the Madras High Court consistently took a different view, 27 M.L.J. 587 ; 29 M. 237 where 11 M. 323 is followed. But a claim to perform a religious ceremony in a public temple when such claim is the subject of dispute likely to cause a breach of the peace comes within this section, 24 B. 527. The offerings given by the worshippers of a deity for the worship are not profits arising out of a building or the land upon which the deity was installed and the order made under this section that a certain person is in possession of such offerings is one made without jurisdiction, 38 C. 387 ; 5 Pat. L.J. 216. A dispute between two parties as to the collection and distribution of fees paid by pilgrims at *Gaya* for performing *Sradha* although there is a likelihood of a breach of the peace on account of such dispute does not come within this section as such fees can in no sense be said to be profits arising out of land, 3 C. L.J. 137. In 4 Bom. L.R. 438 ; it was held that a dispute as to the right to take the sandal paste from the decorations of the idol does not come within this section. A dispute as to the right of succession to a *mutt* and its appurtenances does not come within the purview of this section, 11 W.R. (Cr.) 23. But a dispute as to the possession of a temple is one regarding immoveable property within this section and it could be attached under S. 146, *infra*, Weir II 110 and 112. See also 38 C. 387. A right to collect payments for carrying passengers to and from a ferry cannot be treated apart from the possession of the lands used on either side of the stream for landing the passengers, and so where the dispute is with regard to a ferry including the land and water on which the right is exercised, the case properly comes within this section, 26 C. 188. The right to use a ferry may come within S. 147, *infra*, 3 C.W.N. 148. A fishery right comes within this section, 35 C. 117. A dispute not relating to the possession of a share in a fishery, but to a share in its profits may be dealt with under this section, 11 C.L.J. 512. A dispute as to the right to collect rents is a dispute within the operation of this section, (1915) H.W.N. 287=17 M.L.T. 228=16 Cr. L.J. 284=28 Ind. Cas. 322 ; 11 C. 413 ; 13 C. 813 ; 12 M. 88 ; 16 C.L.J. 285. The question for decision in such a case must always be, who was actually collecting rents at the date of the preliminary order,

(1915) M.W.N. 287—17 M.L.T. 223—16 Cr. L.J. 284—28 Ind. Cas. 332, but it must relate to the whole property in dispute and a right to collect rent in respect of a share of an undivided joint property does not come within this section, 6 C.W.N. 341; 5 A. 607; 23 C. 80; 36 C. 386. But a dispute regarding the right to collect rent between joint owners governed by Mitakshara Law is within this section and the Magistrate has jurisdiction to appoint a receiver to such joint estate, 27 C. 259, followed in (1928) Pat. 142, unless by such right an attempt is made to exclude a sharer from possession and enjoyment of his share. A mere dispute as to the right to collect rent from tenants when there is no dispute either as to the extent of the shares or as to the *factum* of possession is not a dispute as to rents and profits within the meaning of this section, 5 Cr. L.J. 393; see also 19 C.W.N. 359—16 Cr. L.J. 590—80 Ind. Cas. 142. Where the traders in a market owned by a zamindar appoint a *chaudri* to regulate sale etc, agreeing to remunerate him by means of a small contribution for each beast of burden that brought goods to the market and where the servants of the owner object to his collecting the same, the dispute does not relate to a market or its rent within the meaning of this section, 36 A. 143. Where there is no question of shares as between parties to the proceeding and the question of shares arises only at the time of payment of rent this section does apply, 19 C.W.N. 359—30 Ind. Cas. 142. Joint possession is not within the scope of this section, 2 C.L.R. 62; 4 C.W.N. 426; 7 C.W.N. 118; 11 C.W.N. 512; 11 C.L.J. 412; 10 C.W.N. 1088; 40 C. 982. But if it is found that one co-sharer is in actual possession and the other is not, an order may be made under this section, 40 C. 982. No proceeding can be taken under this section to determine the question as to which partner is in exclusive possession of the partnership properties as manager, 32 C. 249; a Manager of a Hindu family is entitled to be protected in his possession by proceedings under this section against the other members of the family, 31 M. 318.

SUB-SECTION (3) : COPY OF THE ORDER SHALL BE SERVED, ETC.—The object of this sub-section is to give notice to all persons interested in the subject-matter of dispute so that they can appear in court at the time of the hearing. 30 C. 155 (F.B.) at 197. A person on whom a preliminary order under sub-section (1) has not been served and who has not been given an opportunity to prove his possessions of the subject of dispute cannot be subjected to a final order under this section, 26 Cr. L.J. 1281—80 Ind. Cas. 541. This clause is in accordance with the decisions in 20 C. 520 and 813; and follows the suggestions contained in 4 C. 850 and over-rules the decision in 24 C. 85. When objection is taken that the order has not been served, the Magistrate ought not to be satisfied by the mere written return of the process-server, but should examine him and allow the party to cross-examine him on this point, 8 C. W.N. 719.

IN THE MANNER PROVIDED FOR SERVICE OF SUMMONS.—See Ss. 68 to 72, *supra*. If parties are absent they may be declared *ex parte* after due proof of service of notice on them, 8 C.W.N. 642. Failure to comply with the provisions of this sub-section can be cured by S. 537, *infra*, and will not invalidate the proceedings, 27 Cr. L.J. 660—81 Ind. Cas. 768. See also 30 A. 41; 30 M. 548; 15 Cr. L.J. 279.

UPON SUCH PERSON OR PERSONS AS THE MAGISTRATE DIRECTS.—A Magistrate ought before entering on his inquiry to satisfy himself to the best of his ability on the information before him, as to who are the persons claiming to be in present possession of the subject of dispute, 30 C. 155 (F.B.); 24 C. 55; 21 C. 915; 24 B. 327; 6 C.W.N. 101; 3 C.W.N. 329. Parties concerned in such dispute are not limited to the parties actually concerned in the dispute, but also those persons concerned in the subject-matter of the dispute who would be affected by the Magistrate's order declaring possession, and therefore they must also have notice of the proceedings, 4 C.W.N. 613. The decision in 30 C. 155 (F.B.) is an authority for the view that the question of mis-joinder and non-joinder of parties does not ordinarily affect jurisdiction. It is a question of procedure by which jurisdiction is not affected, whether a party has been wrongly included or excluded. The invalidity of proceeding against one member of a party does not necessarily invalidate the whole proceedings, e.g., a minor though interested in the dispute and a proper party may not be an essential party especially as he would not be a likely person to cause a breach of the peace. Thus the proceedings cannot be held to be bad in respect at least of persons who are actually parties and who are not prejudiced. 23 Cr. L.J. 1287—80 Ind. Cas. 181. This section contemplates one proceeding

against all parties known to be concerned in the dispute so as to conclude the matter definitely so far as the Criminal Courts are concerned, 27 C. 892. The object of the section being to obtain a settlement of disputes regarding possession of land, as are likely to cause a breach of the peace, any person who is really interested in the subject-matter of the dispute ought not to be left unerved, as this course would operate mischievously on the absent party, as the orders behind the back of such a party would be inoperative, and would tend not to settle disputes, but to a renewal of it in different directions, and between other parties. 4 C.W.N. 783 at 785.

The issue of a warrant to enforce the attendance of an absenting party under this section is illegal as the matter under enquiry under this section is not one relating to the commission of an offence but the settlement of a dispute as to possession and it was entirely optional with the parties or any of them to be present or not. 8 C.W.N. 71.

ONE COPY SHALL BE PUBLISHED.—The object of the publication is to give notice to all parties interested in the subject of dispute. 30 C. 183 (F.B.) at 197. It was once held that the provision herein contained is *mandatory*, and the publication is a condition precedent to the exercise of the Magistrate's jurisdiction in an inquiry as to possession, 8 C.W.N. 590; 9 C.W.N. 809; but now see the Full Bench ruling in 33 C. 68, where it was held that the provision was *directory*, and related to a matter of procedure only, and not of jurisdiction and the omission to comply with it does not destroy the jurisdiction of the court which arises as soon as the preliminary order is passed under sub-section (1). See 30 A. 41 where it was held that such a defect was only an irregularity cured by S. 537, *infra*. See also 30 M. 538; 15 Cr. L.J. 279. But when a Magistrate did not serve any notice upon a party, and failed also to affix a notice to some conspicuous place at or near the subject of dispute as required by this sub-section and passed a final order without receiving a written statement or recording evidence produced, it was held that the irregularities committed by the Magistrate were so great as to amount to want of jurisdiction justifying interference by the High Court, 35 C. 774.

The use of the word "then" is very significant and makes the publication of the notice under sub-Section (3) a condition precedent to the holding of the enquiry as to possession, 33 C. 68 (F.B.).

SUB-SECTION (4), INQUIRY AS TO POSSESSION.—A Magistrate has no jurisdiction to inquire into the rights of the parties as by his training and experience he will very often be incompetent to decide such a question. All that he has to look to is the fact of actual possession and that generally, possession at a particular date, *vis.*, the date of his preliminary order under sub-Section (1), 7 C.L.J. 389; 42 M.L.J. 147; 27 Cr. L.J. 735—95 Ind. Cas. 62. A Magistrate cannot call upon the parties to furnish a statement of their title and he is not at liberty to enter into the merits of their respective claims as regards the right to possess except so far as it might assist him in determining the question of actual possession, 25 B. 179; 30 C. 155 (F.B.); 6 C.L.J. 182; (1910) M.W.N. 300—8 M.L.T. 104—11 Cr. L.J. 383—6 Ind. Cas. 398. This section is concerned solely with the fact of actual physical possession whether lawful or unlawful, whether in the contemplation of law enjoyed by the possessor in his own right or on behalf of others. Therefore in proceedings under this section any question as to whether possession is on behalf of others or in one's own right is quite irrelevant, 3 L.W. 164 at 167—16 Cr. L.J. 525—29 Ind. Cas. 541; 7 Bom. L.R. 18. Actual possession is to be found by the Magistrate regardless of the symbolical possession given to one of the parties by a Civil Court, 16 Cr. L.J. 738—31 Ind. Cas. 176. Evidence of title is admissible in an inquiry under this section to enable the court to decide the question of actual possession, but proof of title is not proof of actual possession. If a Magistrate uses evidence of title to supplement the evidence of user by both parties but not establishing exclusive possession by either party, then he is deciding with reference to the claims of the parties to a right to possess the subject of dispute which the Code forbids him from doing, 34 M. 123. If a Magistrate uses evidence of title in order to guide and assist his mind in coming to a decision upon the question of possession, he would not be transgressing the provisions of this section by using the evidence of title for his limited purpose but if instead of proceeding to decide as to the actual possession he virtually puts aside the consideration of this question and determines the question of title alone he is clearly doing that which the law has forbidden him to do, 7 C. 45

at 80 followed in 11 C. 159 ; (1910) M.W.N. 300—8 M.L.T. 164—11 Cr. L.J. 353—6 Ind. Cas. 398 ; 15 L.W. 62—(1922) M.W.N. 12 ; when a Magistrate ignoring the evidence as to actual possession of one party merely gave effect to an order of the Settlement Department, and dealt with the case as if it were a civil suit, framing several issues and discussing them at great length without deciding the *factum* of actual possession, his order was set aside as one passed without jurisdiction, 35 C. 795. Possession through the exercise of a right of collecting rents from tenants in possession though not in a juristic point of view of actual possession, is possession within this section. 25 Cr.L.J. 398—34 Ind. Cas. 932. Possession that can be pleaded under this section must be based on a claim of right to possession. Possession of an agent or servant which is permissive cannot give a party to a proceeding a *locus standi* as against his principal or master, 37 Cr. L.J. 213—32 Ind. Cas. 163, where 10 C.W.N. 1088 is followed. A Civil Court's decision as to possession is not conclusive but the Magistrate must come to his own conclusion on the evidence on record, 15 Cr. L.J. 653—25 Ind. Cas. 991, but possession can be declared on the admission of a party as to the possession of his opponent, 9 M.L.T. 91—12 Cr. L.J. 37—9 Ind. Cas. 285. A Magistrate cannot refer the question of possession to a Tahsildar for enquiry and on receipt of his report without hearing the evidence himself; pass an order declaring possession, 10 A.L.J. 465—13 Cr. L.J. 777—17 Ind. Cas. 409. See also 17 C.W.N. 144—17 C.L.J. 610—15 Cr. L.J. 30—18 Ind. Cas. 255. As to possession of forest lands, see 15 C. 281.

The power under this section is very much limited and a very exceptional jurisdiction has been conferred on a Magistrate by this section and he must act in strict accordance with statutory provisions ; power is given for purposes of preserving the peace and it is only for that purpose where a breach of the peace is imminent he can attach the property in dispute. Where therefore a Magistrate made an order attaching certain land and arranged for its cultivation to prevent future litigation about the produce, *held*, the Magistrate acted in excess of his powers and his order was set aside. 7 Lah. 134.

PERUSE THE STATEMENTS PUT IN.—The allegations in the statement put in by a party requires to be proved, and therefore a Magistrate is not competent to pass an order in favour of one party merely on the strength of the written statement filed by him under sub-Section (1) of this section, 8 C.W.N. 71 ; 30 C. 112 ; 13 Cr. L.J. 298 ; an order under this section cannot be based solely on the written statement of one of the parties without any evidence whatever though the other party is absent, 8 C.W.N. 632 ; but an order made on a perusal of the written statement of the parties that the possession of the first party was that of an agent and the second party the principal was entitled to possession, was upheld by the Madras High Court, (1914) M.W.N. 798. It is the duty of the Magistrate to inquire into the question and in the absence of the parties, he would be well advised to abstain from passing any final order, 12 C.W.N. 771. When a party applies for time to file a written statement, it is within the discretion of the Magistrate to grant it or not, 8 C.W.N. 642.

HEAR THE PARTIES.—These words mean, hear the evidence of parties and arguments of counsel or pleaders appearing on their behalf, or arguments addressed by the parties themselves and if the Magistrate refuses to receive arguments he is not complying with the provisions of law which are imperative, 5 Pat. L.J. 246 at 247 following 11 C. 762. No order can be passed newly upon a Tahsildar's report without hearing parties and recording their evidence. 10 A.L.J. 468—13 Cr. L.J. 777—17 Ind. Cas. 409.

RECEIVE ALL SUCH EVIDENCE AS MAY BE PRODUCED BY THEM.—Proceedings under this chapter are summary proceedings of a quasi-civil nature, the object being to prevent a breach of the peace, and no right or title is decided, no one's life or liberty is in question. In recording evidence, the imperative provisions of S. 860, *intra*, has no application and therefore it is not obligatory on the Court to read over the depositions of the witnesses in the presence of the parties or their pleaders, 26 Cr. L.J. 315—26 Ind. Cas. 279. It was held previously that the Magistrate was not bound to summon witnesses at the instance of the parties or to compel their attendance after they have been summoned, but failed to appear, 38 C. 25. But the new sub-section (9) provides that the Magistrate may, if he thinks fit, at any stage of the proceeding on the application of either party, issue summons

to any witness directing him to attend, or to produce any document or thing. This section does not specify that the procedure to be followed is either that prescribed for summons-cases or warrant-cases. On the other hand sub-Sec. (4) provides that the *Magistrate shall receive all such evidence as may be produced* by the disputing parties, consider the effect of such evidence and take such further evidence, if any, as he thinks necessary. The Legislature has deliberately omitted to extend the procedure prescribed in summons-cases or warrant-cases to proceedings under this section. This difference is undoubtedly remarkable, and the reason is not difficult to find. This section was intended to provide a speedy remedy for prevention of the breaches of the peace arising from disputes as to immoveable property and the Code contemplates a determination of the question of possession without reference to the merits of the respective claims of the disputing parties to a right to possess the subject-matter in dispute, and the question of possession has to be determined with reference to a specified time. The Legislature could hardly have contemplated an elaborate and protracted investigation, the result of which might, in many cases, be to defeat the very object in view, namely, an effective prevention of a breach of the peace, which might be defeated if the Court could be compelled to summon and re-summon witnesses at the choice of the parties. Having regard to the nature of the question to be determined, the parties ought not to have any difficulty in producing, without the assistance of the Court, evidence which would ordinarily be at their disposal. The Magistrate is given no choice in receiving the evidence produced. From the provisions of the Code it is not obligatory upon the Magistrate to assist the parties to produce their witnesses and they cannot claim as a *matter of right* that process should be issued by the Court to enable them to bring forward their evidence, 32 C. 1093 at 1099, 1100. After this decision in 32 C. 1093 which is followed in 38 C. 24 little reliance could be placed on the decisions in 30 C. 508; 21 C. 29; 11 C. 762; 18 W.R. (Cr.) 63. But the Magistrate is given a wide discretion to summon witnesses on the application of either party under sub-section (9) which did not exist before. 17 M.L.T. 228 = (1915) M.W.N. 287. Moreover on the date originally fixed the Magistrate should take all the evidence that is produced before him, and unless he considers it necessary for good reason to require further evidence, should decide *then and there*, if he can, which of the parties is in actual possession, 17 C.L.J. 610. A Magistrate cannot refuse to examine the witnesses present in Court on behalf of one of the parties, on the ground that sufficient evidence has already been recorded, and the High Court has power to interfere as he acts in contravention of the express terms of sub-section (4), 31 C. 685; but this decision was distinguished in 3 C.L.J. 478, where it was held that it was not intended in 31 C. 685 to lay down the broad rule that the Magistrate had no discretion but was bound under all circumstances to examine every witness, and if he omitted to do so, he acted without jurisdiction; and he has a discretion in the circumstances of each particular case. The view taken in 29 M. 561 is somewhat different. There, one party wanted to produce evidence to show that there was no dispute likely to cause a breach of the peace so that the preliminary order under sub-section (1) might be cancelled under sub-section (5). The Magistrate refused to receive the evidence tendered and the High Court held that the refusal to receive the evidence gave the High Court no option but to declare that the Magistrate's order was one passed without jurisdiction and set it aside. See 11 A.L.J. 589; 15 Cr. L.J. 470-24 Ind. Cas. 330. If the party does not choose to appear and examine his witnesses the Magistrate is not bound to examine them himself, assuming that they were present, 4 Cr. L. Rev. 253. This section directs the Magistrate to receive the evidence produced by the parties and on a consideration thereof to come to a decision and therefore the question as to who is in actual possession should not be delegated to arbitrators even by the consent of the parties, 32 C. 552. Where at the instance of the parties arbitrators are appointed to settle the question of possession and the Magistrate passed final orders taking into consideration the finding arrived at by the arbitrators, it was held that proceedings were legally terminated, 7 C.W.N. 481. If the parties express a desire to settle their dispute by reference to arbitration, the proper course for the Magistrate seems to be to stay further proceedings on the ground that there was no longer any dispute likely to cause a breach of the peace, 30 C. 1084. The scheme of the section is against the view that a reference to arbitration and the award thereon can be made the basis of an order declaring possession. A compromise can only be taken as evidence for an order under sub-section (5), that there was no longer any dispute likely to cause a breach of the peace and cannot possibly be made the basis of an order under

sub-section (6) declaring possession, 3 Pat. 288; 32 C. 862; 27 Cr. L.J. 220—92 Ind. Cas. 172. When a dispute was referred to arbitration, and the trying Magistrate recorded an order, "further proceedings are unnecessary and they are therefore stayed," but the arbitration having failed, the Magistrate nearly two years later purported to revive the proceedings and called upon the parties to appear with evidence, held that the Magistrate acted without jurisdiction as his previous order was in terms one under sub-sec. (5) and directly it was passed he was *functus officio*, and fresh proceedings should be drawn up only on the basis of the then existing circumstances and not on what existed two years previously and that it should not be assumed that the causes which existed previously still continued to exist, 18 C.W.N. 271. Where a Magistrate decided the question of possession upon the evidence not taken by himself but taken by his predecessor, his proceedings are not bad, as S. 350 *infra*, governs such a case since proceedings under this section is an inquiry within the meaning of S. 4 (k), *supra*, 13 C.W.N. 420; 22 C. 898; See also 25 Cr. L.J. 89—78 Ind. Cas. 25, where it was held that a Magistrate has jurisdiction to decide a case under this section upon evidence partly recorded by himself and partly by his predecessor even though a party demanded a *de novo* hearing. The rulings in 4 M.H.C.R. Appx. 20 and Weir II 97, are no longer law. Where a Magistrate without examining witnesses on their side though one of the parties was present in Court, passed an order relying on the documents filed before him, the latest of which was ten years old, it was held that he ought not to have exercised his jurisdiction unless and until he had sufficient evidence before him and that he was bound to take such further evidence as became necessary after consideration of the document, 18 C.W.N. 700—19 C.L.J. 356. Where a Magistrate without recording evidence as required by sub-section (4) based his decision on evidence recorded by a Subordinate Magistrate at the local enquiry, it was held that the order was one made without jurisdiction and the High Court in setting aside the order directed the Magistrate to take the case again on file, and hold a fresh enquiry, 31 M. 82; but a Magistrate may depute a Subordinate Magistrate to hold a local investigation and on receipt of the report of such Magistrate, he should himself receive the evidence produced by the parties and himself conclude the inquiry under this section, Weir II 118; and he cannot act merely on such report and pass an order without recording evidence himself, 10 A.L.J. 465; 13 Cr. L.J. 777—17 Ind. Cas. 403, where an order was made on local inspection and inquiry from persons present at the time without taking any evidence in the case the order was set aside as one made without jurisdiction, 45 C. 1056; 38 M.L.J. 73—11 L.W. 285; 4 C.W.N. 779; 13 Cr. L.J. 236.

IF POSSIBLE DECIDE WHICH PARTY AT THE DATE OF HIS ORDER WAS IN POSSESSION.—The words 'if...possible decide' are very significant. The Magistrate is not bound to come to a decision. In cases falling under this section "the tribunal trying the case is not under the necessity which a Court trying a civil case or ordinary criminal case is under, of coming to a conclusion at all. The legislature contemplates circumstances in which it may be desirable for such a tribunal as that of a Deputy Magistrate, presumably unacquainted with the conduct of civil proceedings, being strictly a criminal tribunal, to say that the facts of the case do not enable him to come to a conclusion and looking at the circumstances of the case and the conflicting nature of the evidence and the various other circumstances which were before the Magistrate, the wise and proper course for him to have adopted would have been to have accepted the liberty which the Code gave him of not coming to a conclusion as to the fact of possession and to have passed an order under S. 145," 14 C. 261 at 264. A compromise cannot possibly be made the basis of an order declaring possession, 27 Cr. L.J. 220—92 Ind. Cas. 172. The date of the order under sub-section (1) is taken as the critical date for the purpose of determining possession and the question of possession is to be decided on evidence taken by the Magistrate. Where a Magistrate discarded the evidence on record as unreliable, and decided the case upon what he said and heard and inferred at a local investigation held by himself, it was held that the Magistrate acted with material irregularity in his jurisdiction and his final order was bad, 10 C.W.N. 181; 7 Cr. L. Rev. 448. A final order should embody a clear finding as to possession at the date of the preliminary order. It is not enough to find possession a year before that date, 9 Cr. L.J. 505—20 Ind. Cas. 159; see also 1 L.W. 939—13 Cr. L.J. 708—25 Ind. Cas. 156; 15 Cr. L.J. 239—27 Ind. Cas. 311. A Magistrate also cannot summarily deal with the matter

after a mere inspection of the locality, 4 C.W.N. 779, 36 M.L.J. 73—11 L.W. 285, nor can he pass an order against a party who is absent without recording some evidence, 6 C.W.N. 924, 6 M.L.T. 91—10 Cr. L.J. 6—21 Ind. Cas. 428; 7 C.W.N. 331; 8 C.W.N. 642. but a Magistrate can pass an order without making any inquiry when the party against whom the order is made admits the possession of the opposite party, 9 M.L.T. 91. So also the Magistrate cannot pass an order on the agreement of the parties to have the case decided on documents alone without adducing oral evidence as to actual possession, 24 Cr. L.J. 279—71 Ind. Cas. 399. The Magistrate cannot go behind the decision of the Civil Court in the matter between the parties, 37 C.L.J. 256; 22 C.W.N. 479; 29 C. 208; 6 C. 335; 17 A.L.J. 434; 32 C. 796; 5 Pat. L.J. 104; 27 Cr. L.J. 43—91 Ind. Cas. 75. An order made without a judicial determination of the fact of possession is illegal. As to the question of possession the law contemplates not the opinions of Magistrates on such questions but their *judicial decisions* arrived at on proper materials in regular proceedings, 2 C.L.J. 555; it is the duty of the Magistrate under this section to complete the inquiry after he had passed a preliminary order, 24 Cr. L.J. 64—71 Ind. Cas. 112; where a Magistrate found that the evidence as to possession was equally unreliable but declared possession of one of the parties relying on the presumption as to possession arising on title, it was held that the order was bad and he was directed to proceed under S. 146, *infra*, 24 Cr. L.J. 141—71 Ind. Cas. 365. Where an order is passed after due inquiry against a party, that party cannot by merely transferring the subject of dispute evade the finding character of the final order of the Magistrate and the Magistrate was not entitled to initiate fresh proceedings on the application of a transferee but must maintain the possession of the party previously declared by him to be in possession, 37 C.L.J. 39; 27 C.W.N. 171. In the absence of any other evidence of possession a Magistrate would be justified in finding possession to be with a person to whom symbolical possession is shown to have been given in execution of a decree of Civil Court, 13 C. 169. But where there was no actual or symbolical delivery of possession, mere certificate-holder's possession cannot be declared. 31 M. 416. Possession that can be pleaded and found under this section must be based on a claim of right to possession. Possession of an agent or a servant which is permissive cannot give a party to a proceeding a *locus standi* as against his principal or master, 27 Cr. L.J. 212—92 Ind. Cas. 164 where 10 C.W.N. 1088 is followed. Possession through the exercise of a right of collecting rent from tenants in possession though not in a juristic point of view of actual possession, is possession within the meaning of this section, 26 Cr. L.J. 395—84 Ind. Cas. 942; 17 M.L.T. 225; 12 M. 88; 11 C. 413; 16 C. 513; 16 Cr. L.J. 294.

AT THE DATE OF THE ORDER BEFORE MENTIONED.—The time of possession which the Magistrate has to find is the date of the preliminary order, passed by him under sub-section (1) initiating proceedings. He cannot treat a subsequent proceeding as a continuation of the earlier one and cannot refer back to the possession held by one or other parties upon the date of the earlier proceeding in determining which of them should be declared to be in possession on the date of the subsequent proceeding, 5 C.W.N. 900; 18 C.W.N. 700.

FIRST PROVISIO TO SUB-SECTION (4).—It is incumbent on the Magistrate to find possession on the date of his preliminary order and the proviso only applies if there is forcible and wrongful dispossession within two months thereof. If a party is out of possession more than two months previous to the preliminary order no presumption under this proviso will arise, 27 Cr. L.J. 68—91 Ind. Cas. 244; 27 Cr. L.J. 471—93 Ind. Cas. 655. "As the law stands at present, the date of the order under sub-section (1) of this section is taken as the critical date for the purpose of determining actual possession. This appears to give unfair advantage to a person who has forcibly dispossessed another. But difficulties arise when the test of actual possession at the time of the institution of proceedings is departed from. We think that the proviso we have added to sub-section (4) as far as possible will meet the evil in question without involving the Magistrate in an inquiry into title or right to possession which is the function of a Civil Court"—*Report of the Select Committee*. The possession of the party forcibly and wrongfully dispossessed must be deemed to continue. The scheme of

the inquiry is retrospective and not prospective, 27 Cr. L.J. 220—82 Ind. Cas. 172. The dispossession herein contemplated must be a forcible and wrongful dispossession, and possession delivered under a decree of a Civil Court will not be a dispossession of that character, (1922) Pat. 423—23 Cr. L.J. 319. Under this section even if a party is wrongfully dispossessed action cannot be taken unless such dispossession was also forcible. The dispossession must be forcible and wrongful, 26 Cr. L.J. 268—85 Ind. Cas. 332; 3 Patna 809. The distinction drawn is between forcible entries which are rightful and forcible entries which are wrongful—and that depends on whether the person entering was entitled to use force and not merely whether he has a legal right to possession. If for instance a landlord came armed with a writ or a warrant in his favour to eject his former tenant then although force might in the end be used it will not be a wrongful dispossession. If, on the other hand, he took the law into his own hands and used force without any such legal sanction then that would be forcible and wrongful dispossession of the tenant. The word, “wrongful” means no more than “otherwise than in due course of law.” Possession taken by show of force is forcible dispossession, 27 Bom. L.R. 1353—27 Cr. L.J. 661 (2)—94 Ind. Cas. 702 (2); see 22 C. 297 where it was pointed out that to hold that the Magistrate is precluded from inquiring into anything before the date when he actually commenced his own proceedings might in some cases lead to a person who has been acting in an unwarranted manner misusing the process of the law to enable him to carry out a high-handed and improper scheme which could never have been the intention of the Legislature. The jurisdiction of a Magistrate to initiate proceedings under this section is not determined by the date of dispossession of one of the parties claiming the land. It is determined by an apprehension based on reliable information that a dispute likely to cause a breach of the peace exists between two parties concerning some land. This proviso merely recites a circumstance under which presumption of possession may be made in favour of one of the disputants. Where the Magistrate has failed to record a finding but made general observations as to the ownership of the property in dispute, the order is not one made in accordance with law, and the High Court is justified in setting aside the order, 25 Cr. L.J. 156—71 Ind. Cas. 508; 7 Cr. L. Rev. 448. It does not debar the Magistrate from deciding the question of actual possession on other grounds also. In any case a Magistrate does not act without jurisdiction if he decides the question of actual possession on grounds other than the presumption referred to in this proviso, 11 A.L.J. 305 at 308.—15 Cr. L.J. 223—19 Ind. Cas. 319; where two months elapse after the death of the person in possession there is no forcible dispossession within two months, 20 C.W.N. 978; 18 Cr. L.J. 284.

SECOND PROVISIO TO SUB-SECTION (4).—Power to attach given to the Magistrate by this proviso is quite different from that given by S. 146, *infra*. The power under this proviso is to be exercised in cases of emergency before holding an inquiry regarding possession, while S. 146, *infra*, authorises attachment only after the conclusion of the inquiry, and if the Magistrate decided that none of the parties was in actual possession or is unable to satisfy himself as to which of them was in actual possession at the date of his preliminary order, (1910) M.W.N. 821—8 M.L.T. 318. It is not obligatory on a Magistrate to attach the subject of dispute when he is unable to decide which party was in possession; the proper course in such a case is to follow the procedure in S. 146, *infra* and attach, but, if a Magistrate fully conscious of the powers vested in him declined to follow it, the High Court should not interfere with his discretion in revision, 6 Cr. L. Rev. 236. In cases of emergency a Magistrate has power under this section to attach the subject of dispute. When after receiving evidence the Magistrate finds there is no danger of a breach of the peace he has no jurisdiction to direct the attached property to remain in Court custody pending the decision of a competent Court on the question of title, 26 Cr. L.J. 1378—86 Ind. Cas. 514. Where the Hindus of a certain locality were using a well and the Mahomedans of the locality moved the Magistrate who initiated proceedings and ultimately not being satisfied that either party was in exclusive possession attached the well, it was held that the attachment was not justified as the only question before the Magistrate was whether the Mahomedans also were entitled to use the well and therefore the Magistrate had no power to prevent the Hindus from using the well, 23 A.L.J. 41. A receiver cannot be appointed when the Magistrate acts under this proviso as he could do when

acting under S. 146, *infra*, (1910) M.W.N. 821-8, M.L.T. 313, followed in 26 Cr. L.J. 1378-89 Ind. Cas. 814; 3 Pat. L.J. 147-19 Cr. L.J. 249. The appointment of a receiver is not prohibited by this proviso, but he has not and cannot exercise all the powers of one appointed under S. 146, *infra*. A receiver appointed under this proviso must be treated only as an agent or servant of the Magistrate whose order is only an administrative order passed for the management of the property, 13 Cr. L.J. 295-14 Ind. Cas. 759. This view receives support from sub-Section (1) newly added. It is competent to a Magistrate under this proviso to order the attachment not only of the land about the possession of which there is a dispute but also of the crops harvested and rents received since the beginning of the disturbance, 13 Cr. L.J. 295-14 Ind. Cas. 759. An elephant cannot be attached under this proviso, but when a forest has been attached and the elephant was not removed from the forest at the time of attachment, the officer attaching the forest was entitled to take possession of the elephant. *Prima facie* the person in whose favour the final order is passed under this section concerning the forest is entitled also to the possession of the elephant, (1912) M.W.N. 530; but in 20 A. L.J. 908 it was held that an order for the attachment of a house and the moveable in it is *ultra vires* as the Magistrate had no jurisdiction to attach anything except land and its rents and profits. The High Court has no jurisdiction to appoint a receiver pending the disposal of a Revision petition preferred to the High Court against an order made by a Magistrate under this section. S. 423 (1) (d) cannot have any application as the order cannot be incidental to or consequential on an order which has not yet been passed in the criminal Revision case and which may eventually not be in petitioners' favour at all, and the High Court cannot be deemed to possess all the powers which a Magistrate possesses under this chapter, 42 M.L.J. 893.

JOINT POSSESSION.—When property is found as a fact to be not constructively but actually in the joint possession of the parties, this section cannot apply. An order for joint possession would obviously rather encourage than prevent a breach of the peace but when it is found that the property as a fact is not in joint possession, it appears to be immaterial whether the parties have a joint title to it or not, 40 C. 982 at 986. This section contemplates a dispute between two parties, each of which asserts a right to hold *actual possession* of the property as against the other and not to a dispute between a party claiming to hold *joint possession* of the property in the dispute and one of them tries to evict the other by force, 4, C.W.N. 426; 7 C.W.N. 118 and 462; 11 C.W.N. 512; 32 C. 249; 16 Cr. L.J. 52 and 525; 17 Cr. L.J. 76; 38 C. 986. Where the Magistrate finds the property is in joint possession of both the parties he has no jurisdiction to make an order under this section, 24 Cr. L.J. 889-75 Ind. Cas. 69; 23 C. 80; 34 Ind. Cas. 473; 21 Cr. L.J. 790. In 10 C.W.N. 1033 an order under this section in favour of a managing *Shahait* was set aside, holding that the parties were in law in joint possession notwithstanding the exclusive management by one of them acting as manager on behalf of the entire body. If the public are declared to be in possession of a piece of land, then both parties to the dispute are included in that term and the possession thereof is joint possession and the jurisdiction of the Magistrate under the section is ousted, 17 C.W.N. 205-17 C.L.J. 397-13 Cr. L.J. 789-17 Ind. Cas. 583; where a Magistrate finds that the first party and the second party are both jointly entitled to the land, he cannot hold that one of them is in possession to the exclusion of the other, and so maintain that party's possession under this section. If a breach of the peace is likely, action is to be taken under S. 107 *supra*, 11 A.L.J. 686-11 Cr. L.J. 495-20 Ind. Cas. 751, but a dispute between two sets of joint owners each claiming exclusive possession of the land forming part of the joint estate, through their respective tenants is within this section and an order declaring the exclusive possession of a tenant of one party is not therefore without jurisdiction, 38 C. 889. This section is applicable to disputes between co-sharers each claiming to be in possession of the disputed land to the exclusion of the others and the Magistrate ought to inquire and decide such actual possession of the applicant, 2 Lab. 372; 20 C.W.N. 518; 17 C.W.N. 944. This section is not applicable to a case where one party asserts exclusive possession and the opposite party asserts joint possession with the other, 17 C.W.N. 205-17 C.L.J. 397; but the mere fact that there may be a joint title to the land will not prevent the application of this section, 20 C.W.N. 518; where possession.

is not claimed exclusively but is claimed on behalf of both parties the Court has no jurisdiction, 2 L.W. 107-16 Cr. L.J. 52-26 Ind. Cas. 544 where 4 C.W.N. 426 is followed and 31 M. 318 is distinguished.

SUB-SECTION (5).—It must be borne in mind that proceedings under this section are not taken in the interests of private parties but for the preservation of public peace and if the Magistrate is satisfied that the likelihood either did or did not exist, or that it has ceased to exist, it is his duty to drop proceedings under this section and to withdraw from interfering with the rights of parties in the property and it is not open to a party to come up to the High Court in Revision and say that the Magistrate had no business to drop proceedings on the ground that there was no likelihood of a breach of the peace without giving him an opportunity to show that there was such a likelihood. It is the Magistrate's duty to be satisfied that there is no breach of the peace in his district, and if he is so satisfied it is not for a private party to object. This sub-section provides for a special case and its existence does not take away the power of the Magistrate himself to drop proceedings if he is so satisfied, 49 M. 232 ; 30 C.W.N. 112 ; 30 L.W. 58. A Magistrate has, at any stage of the enquiry, ample jurisdiction to drop proceedings on being satisfied, there is no apprehension of a breach of the peace. If parties have a right to have proceedings stayed, there is no reason why a Magistrate should be powerless to do so without the intervention of a party interested, 17 Cr. L.J. 133-33 Ind. Cas. 314. The three methods by which proceedings under this section can be terminated, are those provided in this sub-section, sub-section (6) and by an order of attachment under S. 146 *infra* ; (1924) Patna 231. A Magistrate is bound to cancel his initial order and stay further proceedings when it is found that there was no longer any apprehension of a breach of the peace, which is the first condition necessary to give him jurisdiction, 38 C.L.J. 284 ; 47 M. 713 ; 30 C. at 116. When after taking evidence, a breach of the peace is found against, the Magistrate has no jurisdiction to pass an order under sub-section (6) declaring possession of one of the parties, 28 Cr. L.J. 1333-89 Ind. Cas. 710. A Magistrate is empowered by this sub-section to stay or cancel his order under sub-section (1) even before making any inquiry under sub-section (4) if he is satisfied whatever the source of his information may have been, that the state of things does not exist which alone give him jurisdiction to proceed with the inquiry. When once he has such information before him the whole object of the proceeding ceases and any inquiry that he might make becomes a mere inquiry in a civil dispute, an inquiry of a kind which is not ordinarily within the jurisdiction of a Magistrate. 30 C. 112 at 116, followed in 2 Lab. 364. The object of the section being finally to determine disputes and effectively stop a breach of the peace, the fact that in a previous criminal case between the parties the Magistrate was of opinion that one of the parties was in possession is not conclusive as to possession, and can in no sense be taken to have settled the dispute and on the strength of that drop proceedings under this section, 26 Cr. L.J. 870-88 Ind. Cas. 806. A party who is required by a preliminary order under sub-Section (1) to attend at the Magistrate's Court is entitled to show that no dispute likely to cause a breach of the peace exists or had existed and it is not open to such Magistrate to refuse to receive such evidence when tendered. When the Magistrate refuses to receive such evidence his order will be set aside as one passed without jurisdiction, 29 M. 361. Nor can a Magistrate who had drawn up proceedings under sub-Section (1) with respect to a plot of land refuse to allow a tenant of the land an opportunity to show that there was no dispute likely to cause a breach of the peace, 37 C. 288. Proceedings under this section should terminate in one or other of the ways contemplated by law and it is improper for the Magistrate to stop proceedings by recording an order "*parties absent, case filed.*" 6 C.W.N. 923 ; 20 Cr. L.J. 484-81 Ind. Cas. 352. Where both the parties admitted that there was not likelihood of a breach of the peace, the Magistrate is not bound to enquire into the matter. 33 C.L.J. 69, and where he finds that there is no likelihood of a breach of the peace and refuse to take action he cannot direct the proceeds of the sale of attached crops to be handed over to one of the parties, 17 L.W. 429. When proceedings started with regard to a dispute to a ferry was stayed owing to the parties referring their differences to arbitration and the Magistrate passed an order '*further proceedings are unnecessary and they are therefore stayed*' held that the order was one in terms of this sub-section and directly it was passed, the Magistrate ceased to have jurisdiction. When once proceedings are cancelled under this sub-Section the

Magistrate has no jurisdiction to allow one of the parties to reap the crops to the exclusion of the other, 3 C.L.J. 573. Any party interested may intervene under this sub-Section for the purpose of showing that no such dispute likely to cause a breach of the peace concerning any land exists or has existed but he cannot become nor can he be made a party to the dispute, 30 C. 150; 3 C.W.N. 329; 5 C.W.N. 900. A Magistrate has jurisdiction to cancel the order of his predecessor made under sub-Section (1) and stay proceedings under this sub-Section and also to order the restitution of property attached and placed in the hands of a receiver *Weir II 108*. When a Magistrate conceals his preliminary order under this sub-section on the ground that there no longer existed a dispute likely to cause a breach of the peace whatever be the source of his information, the High Court has no power to interfere in revision with the order of the Magistrate, 30 C. 112, 37 M.713; 22 L.W. 524=49 M.L.J. 784=(1925) M.W.N. 192. Nor can a District Magistrate, revise an order once cancelled by a Subordinate Magistrate under this sub-section, 20 C. 729, but a District Magistrate may initiate proceeding under this section independently, 29 C. 242. A Magistrate is not entitled to strike off proceedings under this section. There must be some evidence before him that there is no apprehension of a breach of the peace and in that case only he is entitled to drop proceedings, 25 Cr. L.J. 105=83 Ind. Cas. 665; 27 Cr. L.J. 220=92 Ind. Cas. 172. To stop proceedings (1) a party may disclaim the lands in dispute thereby showing no likelihood of a breach of the peace and no necessity to continue the inquiry, (2) one of the parties may show that title to the disputed land is already before the Civil Court and so there is no necessity for putting the parties to expense and trouble by continuing the proceedings. A decision arrived at incidentally by a criminal or even by a civil Court is of no avail to stop proceedings. 26 Cr. L.J. 370=86 Ind. Cas. 80. When a Magistrate drops proceedings under this section, the sale proceeds of the crops on the land deposited in Court may be ordered to be restored to the persons who raise them. But it is also proper to order that deposits made in Courts may be kept in Court, until one party or other obtains an order from a Civil Court, 47 M. 713; 20 L.W. 924; 17 L.W. 429; 1 L.W. 1032; 16 Cr. L. J. 104=27 Ind. Cas. 152. But in 49 M. 232 it was held that it was not right for the Magistrate after having dropped proceedings under this sub-section to make any further order in the matter. He must leave the parties to settle their rights in the manner they think best, meanwhile holding his hands and the money realised by the sale of the crops will have to be kept in Court deposit and not handed over to any party until a decree of the Civil Court is produced entitling to receive the same. After cancelling the order the Magistrate cannot attach the subject of dispute, 5 Cr. L. Rev. 402.

ANY PERSON INTERESTED.—These words are important. A third party can intervene and satisfy a Magistrate that no dispute likely to cause a breach of the peace exists or existed. Such a person joins the proceedings to bring the proceedings to a determination. 30 C. 155; 5 C.W.N. 329. But it is doubtful whether such party can appear to prove his own possession under sub-Sections (1) or (4) as he does not become a party to the proceedings. Where proceedings were drawn up under this section with regard to a plot of land, a person who is a tenant of a part of the property in dispute ought to be allowed an opportunity to show that there is no dispute likely to cause a breach of the peace. 11 C.L.J. 414.

SUB-SECTION (6).—This sub-section and form No.21 of Sch. V of the Code permit a Magistrate to give directions as to possession with a legal effect that it is valid until actually evicted or ousted in due course of law and not merely until the institution of a civil suit for determining the legal rights to the property in dispute, 27 Bom. L.R. 1333=27 Cr. L.J. 661 (2)=94 Ind. Cas. 709 (2). By the addition newly made to this sub-section power has been expressly given to the Magistrate to restore to possession a party forcibly and wrongfully dispossessed. "The object of the section is to enable a Magistrate to intervene and to pass a temporary order in regard to the possession of the property in dispute to have effect until the actual right of one of the parties has been determined by any competent court. It is consequently his duty when that right has been declared within a time not remote from his taking proceedings under this section to maintain any order which has been passed by any competent court and therefore to take proceedings which necessarily must have the effect of modifying or even cancelling such orders is to assume a

jurisdiction which the law does not contemplate. The duty of the Magistrate was to carry out the orders of the Civil Court and to maintain those orders by assisting the possession of any person whose title is found by that Court." 28 C. 525 at 528, 529. This view has been accepted and followed in 29 C. 203 at 210. Where possession of immoveable property is delivered to an auction purchaser under O. 21, r. 35, C.P.O. a Magistrate acts without jurisdiction in proceeding under this section, as such possession is actual possession and not symbolical possession, 5 Pat. L.J. 105; 25 Cr. L.J. 88=76 Ind. Cas. 24; 39 C.L.J. 363. It seems contrary to all principles of justice that a judgment-debtor should be allowed to retain possession against his decree-holder who has actually been given possession, against him by a Civil Court and in a criminal proceeding, to assert that possession and by force of the order of the Magistrate drive the decree-holder and auction-purchaser back to the Civil Court for a further declaration of his right, 23 C.L.J. 555; 40 C. 982. Where the rights of parties are determined by a competent court the dispute is at an end and the successful party should be maintained in possession; the defeated party will not be allowed to seek further redress in a criminal court alleging existence of a breach of the peace, 6 C. 835. See also 37 C.L.J. 128=20 C.W.N. 795. When once the rights of the parties have been determined by a competent Court the dispute is at an end, and the defeated party will not be allowed to seek the assistance of a Criminal Court and the police to neutralise the effect of the decrees of a competent Civil Court, 6 C. 835 at 841; 16 W.R. (Cr.) 24; 24 W.R. (Cr.) 17, but a Magistrate is competent to proceed under this section with regard to properties which form the subject-matter of a pending suit under S. 9 of the Specific Relief Act, 36 C. 370, and can also pass a prohibitory order under this section for preserving the public peace, notwithstanding that the Civil Court had refused an injunction, 7 M. 460. A Magistrate is bound to maintain possession of the person who had been actually put in possession by the Civil Court, 6 W.R. (Cr.) 19, and he cannot go behind the order of the Civil Court delivered possession to a party, 6 C.W.N. 831; 24 B. 527; 9 C.W.N. 392; 37 C.L.J. 128. When the defeated party in attempting to regain possession which he had lost in execution of the decrees of the Civil Court, and a breach of the peace is apprehended, the proper course for the Magistrate to adopt is to bind down that party to keep the peace, 7 C.L.R. 516, but the decrees of the Civil Court must be recent, 3 C.W.N. 719; 6 C.W.N. 38 and 161; 32 C. 795; but (1914) M.W.N. 798 see where *Ayling, J.*, not accepting the view of the Calcutta decisions held that the jurisdiction of the Magistrate to take proceedings under this section is not affected by the existence of a decree of the Civil Court, *vs* the possession and title of one of the parties, and where the Magistrate is satisfied of a breach of the peace, and records a formal order under sub-Section (1) his proceedings are not *ultra vires*, as the whole scheme of the Chapter contemplates an inquiry solely with reference to the fact of actual possession irrespective of title, but where no possession either actual or symbolical was given to a purchaser at a Court sale but he obtained only delivery certificates he cannot on the strength of such certificates alone be declared in possession under this section, 31 M. 516 distinguishing 32 C. 795 and 6 C.W.N. 38. An order for possession could not be made against a mere servant without his master being on record, 6 C.L.R. 193 followed in 9 Cr. L. Rev. 17. An order under this sub-section binds only the actual parties to the proceedings, *Welf II*, 106; 18 M. 51; 3 C.W.N. 329, but this view has not been followed in 11 Bom. L.R. 377, where it was held that the provisions of this section make it clear that the parties whom the Magistrate has to deal with are not merely the actual parties before him, but all persons who may be concerned in the dispute. A Magistrate has jurisdiction to make an order in favour of a manager when the actual proprietors are non-residents of the place, 31 C. 48; 24 B. 527; 25 C. 423; "such possession" in sub-Section (1) must mean actual possession; the possession of an agent or manager where the proprietors are absent is within the section. In 22 C. 287 it was held that when the proprietor was residing within the jurisdiction of the Magistrate it was a mere irregularity or at the most an error of law to make the manager a party to the proceedings, and such procedure did not affect the Magistrate's jurisdiction. See also 27 Cr. L.J. 142=21 Ind. Cas. 314.

For form of order declaring a party entitled to retain possession of land, etc., see Sub. V. form No. 22 infra.

SHALL ISSUE AN ORDER.—The order contemplated is the final order deciding the question of possession of the subject of dispute and is only a police order made to prevent a breach of the peace. It decides no question of title. 29 C. 187. The magisterial order is to remain in force until the Civil Court has *seisin* of the matter. 2 B.L.R. (Ap. Cr.) 27; 2 C.L.R. 62; 18 Ind. Cas. 898. A disobedience of the order is punishable under S. 188, I.P.C.

DECLARING SUCH PARTY TO BE ENTITLED TO POSSESSION.—The Magistrate by his order declares that the party found by him to be in actual possession should be permitted to retain possession until evicted therefrom in due course of law. This is made clear by the marginal note to sub-Section (6) and also the language used in form No. 22 in Sch. V *infra*, to the effect "entitled to *retain such possession* until ousted in due course of law." The word entitled is not happily used, as its use is likely to form an impression that the decision is on the question of title which the Magistrate is prohibited from going into under sub-Section (4).

UNTIL EVICTED IN DUE COURSE OF LAW.—The Civil Court decree need not be between the same parties. 8 C.W.N. 562. The expression 'evicted in due course of law' is as much applicable to proceedings under the Tenancy Act as it is to ejection under the decrees of a Civil Court, 82 Ind. Cas. 651.

SUB-SECTION (7).—Proceedings under this section do not terminate with the death of any party to the dispute and there was no express provision to bring on record the legal representative. Now provision is made by this sub-section expressly authorising the Magistrate on the death of a party to make his legal representative party to the proceedings and if necessary to decide who such legal representative is. Express provision is now made for bringing on record the legal representative of a deceased party, and rival claimants even can be added as parties without determining which of them is the legal representative. But when during the pendency of a Revision Petition in the High Court, the petition dies, it was held, before the amendment, that his legal representatives have no right to be brought on record to enable them to continue the proceeding in the High Court, 31 M.L.J. (Sh. n.) 18.

SUB-SECTION (8).—This new sub-section empowers the Magistrate to pass necessary orders for the custody or sale of property in dispute which is subject to speedy and natural decay if such an order would be for the benefit of the parties. Power is also given to the Magistrate upon the completion of the inquiry to make such orders as to the disposal of the property or the sale proceeds thereof as he thinks fit.

SUB-SECTION (9).—This is new. On the application of either party the Magistrate, if he thinks fit, may issue summons to witnesses to attend the Court to give evidence or to produce any document or thing. The wording before was 'receive the evidence produced by the parties.' This worked great hardship as Magistrates refused to assist parties to secure attendance of witnesses holding that they were not bound to issue summons to witnesses under the section; the decisions in 32 C. 1093; 38 C. 24; 17 M.L.T. 15, held a Magistrate was not bound to assist parties to secure witnesses, but 18 C.W.N. 94 took a different view. See also 21 C. 29; 30 C. 508.

SUB-SECTION (10) is new and is in accordance with the view expressed in 39 C. 150 (F.B.); 26 M. 371; 25 B. 179.

POWERS OF HIGH COURT IN REVISION.—Orders passed under Chapter XII of the Code are now held to be proceedings revisable under S. 435 *infra*, by the repeal of sub-Section (3) to S. 435 and the High Court's power to revise is not limited to matters of jurisdiction only, i.e., to cases in which the Magistrate taking proceedings under this section acts without jurisdiction as was held in the following decisions, 26 C. 625; 28 C. 416; 30 C. 165; 31 M. 318; 36 M. 275; 27 M.L.J. 208; 19 C.W.N. 123; 33 C. 68; 35 C. 774; 43 C. 522. In 36 M. 275 the power of the High Court was very much restricted and in 26 A. 144, the power of the High Court to interfere under S. 15 of the Charter Act was even doubted. There is no longer any necessity to resort to the provisions of S. 107 of the Government of India Act and orders under S. 145 can be revised now under Ss. 435 and 429 of the Code. But

the High Court will not interfere with the Magistrate's discretion in starting proceedings as he thinks proper according to its judgment, 37 C.L.J. 39. Where the Magistrate has decided on the evidence in favour of one party as being in possession of the land in dispute the High Court cannot reconsider the Magistrate's decision; 15 W.R. (Cr.) 36; 25 W.R. (Cr.) 16. Ordinarily the High Court will not interfere with the findings of fact in the exercise of its revisional jurisdiction. But there can be no doubt that it has jurisdiction to review even questions of fact as the words of S. 435 clearly indicate, and it will do so where there is a clear miscarriage of justice. A perverse finding of fact contrary to a mass of unrebutted evidence regarding possession of one of the parties is liable to be set aside in Revision. 25 Cr. L.J. 1068=81 Ind. Cas. 890. If there is material before the Magistrate he is the only judge as to whether the material is sufficient or not, and the High Court cannot interfere in such a case with the findings arrived at by the Magistrate. 27 Cr. L.J. 471=93 Ind. Cas. 695. The High Court has no power to entertain a petition for the appointment of a receiver pending a Criminal Revision against the order of the lower Court. 49 M.L.J. 893=22 L. W. 723=(1925) W.W.N. 772. In setting aside an order passed by the Magistrate the High Court in revision has no power itself to pass such an order as should have been passed by the Magistrate in the case, 22 C. 297, nor can the High Court require the Magistrate to proceed under Chapter XII when setting aside the order, as the matter is entirely within the discretion of the Magistrate who must be satisfied of a likelihood that a breach of the peace still existed, 23 W.R. (Cr.) 38; but the High Court may point out to the Magistrate that mere binding over both parties to keep the peace in a dispute concerning land does by no means put an end to the contention, whereas by taking proceedings under this section an order declaring and maintaining the possession of one of the contending parties, until the right is established in a civil court, may be passed, 3 C.W.N. 297; the High Court also cannot direct the revival of proceedings when the Magistrate in the exercise of his discretion dropped further proceedings, 30 C. 112. Where the High Court decided that a particular case fell under Chapter XII of the Code and directed the Magistrate to take the case on his file and dispose of it according to law and the District Magistrate under his powers transferred the case to another Magistrate, the latter Magistrate was bound to inquire into the matter and it is not open to him to go behind the High Court's order, 3 Bom. L.R. 416. Persons who are not parties to the proceedings in the lower Court have no right to apply to the High Court in revision. 26 Cr. L.J. 1033=87 Ind. Cas. 928.

HIGH COURT'S POWER TO TRANSFER.—It was held in 26 M. 188 that the High Court has power both under S. 526 *infra* and S. 29 of the Letters Patent to transfer a case under this section. It was argued on the strength of 25 B. 179 that proceedings under this section is not a 'criminal case,' but their Lordships held that they were unable to agree with the decision of the Bombay High Court and that if this was not a criminal case it was difficult to conceive what it was. In 28 C. 709 the Calcutta High Court held that the Magistrate taking cognizance of a case under this section is a criminal court and the High Court has power to transfer such a case both under the Chapter Act and the Letters Patent, but the power to do so under S. 526 *infra* was doubted. But in 2 C.L.J. 814, it was held that under S. 526, *infra*, a transfer can be made as proceeding under this section is a criminal case, explaining 28 C. 709 and following 22 C. 898 and 26 M. 188. See also 34 A. 533. See 7 Cr. L. J. 429 where it was held following 26 M. 188 that proceedings under this section are criminal cases within the meaning of the words in S. 526, *infra*, and so S. 526 applied to such proceedings.

POWERS OF SESSIONS JUDGE OR DISTRICT MAGISTRATE TO REVISE OR MAKE REFERENCE TO HIGH COURT.—Proceedings under Chapter XII of the Code are now proceedings with regard to which a Sessions Judge has power of revision or reference he has the power to call for records in such proceedings. The decision in 28 C. 416 is no longer law. A Sessions Judge has power also to draw the attention of the Magistrate to the nature of the dispute in the trial before the Judge, so that the Magistrate might exercise his own discretion whether proceedings under this section were necessary to settle matters pending the regular determination by a competent Civil Court, 20 C. 520 at 525. A District Magistrate has no power to set aside an order passed by a Magistrate under the section

but if he is satisfied that the order passed is erroneous, the proper course open to him is to make a reference to the High Court under S. 438 *infra*, 28 Cr. L.J. 1186=88 Ind. Cas. 526.

REVIEW AND REVIVAL OF THE PREVIOUS ORDER.—There is no authority for holding that a Magistrate can review a final order passed by himself under this section, 35 C 360; 21 Ind. Cas. 477; nor can he revive his proceedings after the dispute has been settled and an order has been passed striking off the case. An order passed under this section is a final order and it is not open to a Magistrate who passed the same or his successor to review it or set it aside in any way, 24 A.L.J. 227. A new proceeding could not be started on the old materials, 20 C. 867; 27 C. 981. To enable a Magistrate to take fresh proceedings it would be necessary to set forth new materials, 6 C.W.N. 923, and the Magistrate will have to pass a fresh preliminary order under sub-Section (1). In 4 C.L.J. 418, pending a revision in the High Court and after a rule has been issued on the District Magistrate to show cause why his order should not be set aside, a Magistrate subordinate to the District Magistrate instituted fresh proceedings on the old materials. The High Court held that during the pendency of the rule in the High Court proceedings in the lower Court in the same matter must be considered to have been stayed and the institution of proceedings by a subordinate Magistrate was highly improper. The High Court is entitled to require from the trying Magistrate a statement of his reasons for his decision, sufficient to enable the High Court to determine whether he has or has not complied with sub-Section (4) of this section and whether he has directed his mind to the consideration of the effect of the evidence adduced. 33 C.L.J. 366. The possession of a receiver appointed under this chapter should properly be regarded as possession on behalf of the party who should ultimately be found by the Magistrate to be in possession. 22 M.L.J. 154.

COSTS OF PROCEEDINGS UNDER THIS SECTION.—See notes under S. 148 *infra*. Proceedings under this section is a quasi civil case and according to the law as enacted in S. 148 *infra*, the successful party may recover his costs from his adversary in such a case, 8 C.W.N. 178. The costs contemplated as specified in sub-Section (3) of S. 148 may include any expenses incurred in respect of witnesses and pleaders' fees which the court may consider as reasonable, 27 Cr. L.J. 471=93 Ind. Cas. 695. The High Court has no power to award costs incurred before it when disposing of a Revision case against an order of the Magistrate under this chapter as S. 148 *infra* empowers only the Magistrate passing a decision to award costs, 48 M. 262 (F.B.) but the Bombay High Court took a different view in 27 Bom. L.R. 1853=27 Cr. L.J. 661 (2)=95 Ind. Cas. 709 (2).

LIMITATION FOR SUITS BY UNSUCCESSFUL PARTY.—Article 47 of the second schedule to the Limitation Act, 1908, applies to a suit for possession of land in respect of which an order under this section has been passed even though the Magistrate acted illegally and with material irregularity provided the plaintiff had notice of the proceedings even though the notice was not served in due course of law. The suit must be brought within three years from the date of the order, 38 M. 432; 48 M.L.J. 372; 23 C. 731. The period of three years runs from the date of the order, of the Magistrate and not from the date on which a rule issued by the High Court under S. 15 of the Charter Act was finally disposed of, 12 C.W.N. 340. The effect of the order of the Magistrate under the section is that on a failure by the unsuccessful party to sue, to get rid of the order in three years the successful party acquires title under S. 28 of the Limitation Act, 18 Ind. Cas. 24.

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 persons entitled to possession thereof :

Power to attach subject of dispute.

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 the 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.

Provided that, in the event of a receiver of the property, the subject of dispute, being subsequently appointed by any Civil Court, possession shall be made over to him by the receiver appointed by the Magistrate, who shall thereupon be discharged.

AMENDMENT.—Provisos to sub-section (1) and sub-section (2) are new, and in sub-section (2) the words "if no receiver of the property, the subject of dispute, has been appointed by a Civil Court" have been newly added.

SCOPE OF THE SECTION.—This section cannot be applied where the Civil Court has not only determined the rights of the parties but has also determined the possession so far as it was in its power to do, 48 A. 397. The jurisdiction of the Magistrate to attach property under this section arises only when he has made the inquiry contemplated by S. 145, *infra* and considered the evidence produced by the parties and he cannot then satisfy himself as to which of the parties is in actual possession of the subject-matter in dispute, 15 Cr. L.J. 370 ; 24 Cr. L.J. 880—74 Ind. Cas. 80 ; 6 Bom. L.R. 723. The Magistrate is neither called upon nor empowered to consider the question of rightful possession, 7 Bom. L.R. 10 ; 3 L.W. 164. An attachment can only be made after the Magistrate had made a reasonable effort varying of course with the circumstances of each particular case, to decide the question of possession. When under extraneous consideration and without considering the evidence a Magistrate attaches the property the order of attachment is bad, 24 Cr. L.J. 754—74 Ind. Cas. 252 ; 40 C. 103 ; 20 Cr. L.J. 17—48 Ind. Cas. 497 ; 18 Cr. L.J. 239—27 Ind. Cas. 911. When the Magistrate finds that neither party is in possession of the immovable and moveable property of a certain *muff* in dispute and there is a likelihood of a breach of the peace, he can attach the property both moveable and immovable under this section, the moveable property being appurtenant to the *muff* and therefore the attachment is valid, 24 A.L.J. 382—27 Cr. L.J. 429—93 Ind. Cas. 157, following 1 Pat. L.J. 355—18 Cr. L.J. 227—33 Ind. Cas. 319. It should be held as a very important principle in cases under S. 145, *supra*, that a Magistrate should be extremely reluctant to attach property in dispute. Where land is admittedly subject year by year and season by season to cultivation, it is his duty to collect and sift the evidence and come to a conclusion as regards possession, 26 Cr. L.J. 1293—83 Ind. Cas. 356. An order of attachment made without recording his inability to find possession with either party is *ultra vires*, 27 Ind. Cas. 911. Where proceedings have been instituted in respect of two plots of land and the Magistrate found one plot to be in the possession of one of the parties and with regard to the other attached the same, finding that both the parties were in possession, *held* that the order of attachment was *ultra vires* as this section had no application when parties were in joint possession, the section applying only when the Magistrate finds that neither of the parties is in possession, 9 C.W.N. 887 ; 27 M.L.J. 169 ; 15 Cr. L.J. 372—23 Ind. Cas. 323. Where each of the parties had the keys of certain rooms in dispute and the Magistrate made an order of attachment under this section saying he was unable to find which of them was in possession his order was held bad, Weir II, 774 (Mad Bd). It was recently held by the Madras High Court that if the parties were in possession by turns, it was possible for the Magistrate to make an order under S. 145, *supra*, by declaring who was in possession at the date of the preliminary order and consequently no attachment

could be made ; when land in dispute is not in the possession of two rival contending parties an order for attachment was held good, 5 C.W.N. 105. Once an order has been passed by a Court it can come to an end only in one or two circumstances, first being, that there is no longer any likelihood of a breach of the peace in regard to the subject of dispute, in which case the Magistrate would be justified in withdrawing the attachment at any time. Secondly, the Magistrate is competent to release the subject-matter of dispute from attachment if a competent Court has decided the rights of the parties thereto, 26 Cr. L.J. 1055 = 87 Ind. Cas. 973. See also 17 M.L.T. 392 = 16 Cr. L.J. 481 = 29 Ind. Cas. 321 ; 24 A.L.J. 399 = 27 Cr. L.J. 559 = 93 Ind. Cas. 1055. Where an attachment was raised by the lower Court relying solely on the entry in a record of rights, the High Court set aside the order and directed the land to be attached holding that the entry could at the most be treated as a presumptive evidence of a relation of landlord and tenant existing, but could not be considered as a final decision of a competent Court, 30 C.W.N. 616. It is obvious that orders of this sort attaching property might easily be turned to the prejudice of the party in actual possession, e.g., in a sham dispute between A and B when no evidence is offered by either party the Magistrate might proceed to attach the property and the person actually in possession might thereby be ousted, 24 W.R. (Cr.) 40. When one party is in possession of a *portion* but not in possession of the *whole* of the property in dispute and the effect of declaring possession was to place the party in possession of the portion in the possession of the other party, the proper order under the circumstances was to attach the whole property under this section, 22 C. 297. If the component parts of the subject-matter in dispute are distinct and separate, the Magistrate may, if necessary, deal with different parts separately, 5 C.W.N. 720.

UNABLE TO SATISFY HIMSELF AS TO POSSESSION.—The special provision of this section is not meant to relieve the Magistrate from his duty of deciding on the merits but only allows an order for attachment to be made, when it is impossible to decide which party is in possession, Weir II, 110. The doubt on which a Magistrate can act arises from his inability to decide on the evidence offered by the contending parties as to the actual possession and not on a doubt entertained without inquiry, 1 C.L.R. 273. A summary order of attachment cannot be made without passing a preliminary order under S 145, *supra*, 1 C.L.R. 86 ; 15 Cr. L.J. 470 ; 24 Ind. Cas. 350 ; 16 M.L.T. 52 ; 30 C. 918 ; 40 C. 105. Proceedings under this section are legal only if proceedings under S. 145, *supra*, are legally and properly taken, 16 M.L.T. 52 ; 2 A.L.J. 149. An order for attachment made without examining any witness although a number of them were present in Court was invalid, 35 C.L.J. 291 ; (1922) Pat. 534 = 23 Cr. L.J. 277. When a Magistrate after refusing to grant time to a party to produce evidence heard the parties and being unable to satisfy himself as to which of them was in possession attached the subject-matter in dispute, it was held he acted without jurisdiction, 12 C.W.N. 896 ; 17 Bom. L.R. 392 ; but it was held in 14 C.W.N. 80, distinguishing the decision in 12 C.W.N. 896, that when on the date fixed for filing written statement, both parties failed to appear before the Magistrate and to adduce evidence as to the fact of actual possession, an order under this section may be perfectly justifiable. In proceedings under S. 147, *infra*, instituted with regard to a dispute as to the right to use a well by turns the Magistrate cannot attach the well in dispute, 3 Cr. L. Rev. 474.

DECIDES THAT NONE OF THE PARTIES WAS THEN IN SUCH POSSESSION.—The word "then" refers to sub-section (4) of S. 145, *supra*. The words "if possible decide" is very significant. A Magistrate acting under this chapter unlike a Civil Court is not bound to come to a conclusion on the question of possession. The law says it is only when the Magistrate decides that none of the parties was in possession or is unable to satisfy himself as to which of them is in possession that he can attach the property under this section. When the Magistrate finds that neither party is in possession but a third party is in actual possession but he does not claim possession, the proper course is to attach the property, 20 Cr. L. J. 215 = 49 Ind. Cas. 775. When the Magistrate finds that both the parties were in possession by receipt of rent from tenants of different portions of the land in dispute, it was open to him to find that neither party was in possession, 1 C.L.J. 331 ; 9 C.W.N. 887. In the absence of information the Magistrate himself may hold a local inquiry under S. 148, *infra*, or in various ways may inform himself as to the facts of the case. He may send a *Kanungo* out to the

spot and make his report or send for the headman of the village and ask him what the facts were. If he had done these, he would have fully armed himself with jurisdiction; but when he did nothing of the kind but passed the order "no evidence produced by either side, land attached under S. 146" the order was set aside and attachment raised, 40 C. 105; 9 Cr. L.J. 272; 12 C.W.N. 898; 15 C.W.N. 80; 15 Cr. L.J. 470—24 Ind. Cas. 350. Such possession means actual possession from the date of the preliminary order under S. 145, 7 Bom. L.R. 18.

COMPETENT COURT.—Originally the expression was "Civil Court" and it was held in 15 A. 393 that the section did not give jurisdiction to pass an order of attachment of the subject-matter in dispute which would have to be determined in a Revenue Court. The words "competent Court" are not confined to mean only competent Civil Court. The words "competent Civil Court" occurred in the Code of 1882, but the word "Civil" was deliberately omitted in 1891 amendment. An order of a Revenue Court directing mutation to be made in favour of a certain person is an order of a competent Court within the meaning of this section, 46 A. 879. An order by the survey authorities under S. 41, Bengal Tenancy Act, has the force of Civil Court decree. 37 C. 331. This section is not exclusive and an attaching Magistrate has inherent power to release from attachment when the likelihood of a breach of the peace has disappeared and he cannot refuse to raise the attachment in such a case, holding that no competent Court had determined the rights of the parties, 1 Lab. 461.

PROVISO TO SUB-SECTION (1).—This proviso is new and empowers the District Magistrate or the Magistrate who attaches property to withdraw the attachment if he is satisfied without the parties obtaining the decision of a competent Court as to their rights, that there is no longer any likelihood of a breach of the peace in regard to the subject in dispute. This is a very salutary provision and the decision in, 2 Cr. L. Rev. 441, which held that a Magistrate who attached the property cannot review his order and raise the attachment is no longer law. It is open now to the Magistrate under this proviso to make over possession to any person he thinks fit. But he must exercise a judicial discretion in the matter of handing over possession. He is not bound to make over possession to anybody and there may be cases in which it is sufficient for him to make an order withdrawing the attachment and leave some party to take possession, but he is not bound to direct the receiver to hand over property without making over possession of the books of account to anybody and thus leave the party to scramble for the estate, 26 Cr. L.J. 1629—90 Ind. Cas. 926.

EFFECT OF ATTACHMENT.—Although an attachment under this section interferes with the physical possession, it does not affect the legal rights of the parties concerned and the property under attachment is held for the person ultimately shown to be entitled to the same, 18 C.W.N. 163; 20 C.W.N. 481—22 C.L.J. 263—31 Ind. Cas. 242, where 30 M. 12, is followed. An attachment under this section operates in law for purposes of limitation, simply as a detention or custody of the property by the Magistrate who, pending the decision of a competent Court, holds it merely on behalf of the party entitled on the date of attachment, whether he be one of the actual parties to the dispute before him or any other. For purposes of limitation the *seisin* or legal possession will, during the attachment, be in the true owner, and the attachment will not amount to a dispossession of the owner. The title of the true owner cannot be extinguished however long such attachment may continue, 26 M. 410; 28 C. 86; 32 C. 856. A magistrate is not entitled to treat the profits of the land attached as *derelict* and treat it as lapsing to Government, 12 Cr. L.J. 403—11 Ind. Cas. 587. A civil suit for mere declaration only under S. 42 of the Specific Relief Act will lie without asking for recovery of possession, 15 C.W.N. 758. If subsequent to the attachment by Magistrate the land is left waste, damages cannot be recovered by a successful party by a suit from the defendant, as the loss of produce was not the probable result of the defendant's act but the consequence of the Magistrate's order, 12 Cr. L.J. 14; 15 C.W.N. 98; 6 M. 426. When a temple, the subject-matter of dispute, is attached, it does not necessarily follow that the temple is to be closed altogether, Weir II, 110 and 112. The Magistrate should after determination of the rights withdraw the order of attachment and release the property. 17 M.L. T. 392. An attachment cannot be kept in force merely on the ground that the unsuccessful

party in the Civil Court intend to file an appeal, 15 Cr. L.J. 500. On the passing of an order adjudicating rights with respect to the attached land the attachment should be raised, 37 C. 331. A Magistrate is not entitled after the decision of the Civil Court to withhold the profits of the attached property during the period of attachment, 1893 A.W.N. 100.

SUB-SECTION (2).—A Receiver cannot be appointed before completing the inquiry under S. 145, *supra*, and such an order of appointment is *ultra vires*, 13 Cr. L.J. 536—15 Ind. Cas. 808.

The words "and if no receiver of property, the subject of dispute, has been appointed by the Civil Court" have been newly added. The Magistrate may appoint a receiver only if no receiver is appointed by a Civil Court, and thus emphasising that it is the proper function of a Civil Court to appoint a receiver pending the civil suit instituted to adjudicate title to the property. The amendment removes the difficulty of two receivers being appointed, one by the Civil Court and the other by the Magistrate under this section.

The proviso newly added makes the intention of the Legislature very clear and restricts the power of the Criminal Court to appoint a receiver very much.

REVISION.—When an order passed under this section is on the face of it *ultra vires*, the High Court will interfere in revision, 15 Cr. L.J. 500; 15 C. 361; 18 M. 14; 22 C. 297 and the revisional powers can be exercised under Ss. 435 and 439, *supra*, as orders under Chap. XII are now proceedings subject to revision. When a Magistrate attached certain property and appointed a receiver under sub-Sec. (2) of this section but refused to make over the property to the successful party in the District Court, on the ground that the other party was going to prefer an appeal, his order was set aside as one made without jurisdiction, 15 Cr. L.J. 500; when a Subordinate Magistrate attached certain lands and leased out the same but the District Magistrate cancelled the lease and made another arrangement for management, *held*, the High Court had no jurisdiction to revise the order of the District Magistrate, 29 C. 382.

147. (1) Whenever any District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is satisfied, from a police report or other information, that a dispute likely to cause a breach of peace exists regarding any alleged right of user of any land or water as explained in section 145, sub-section (2) (whether such right be claimed as an easement or otherwise), within the local limits of his jurisdiction, he may make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend the Court in person or by pleader within a time to be fixed by such Magistrate and to put in written statements of their respective claims and shall thereafter inquire into the matter in the manner provided in section 145, and the provisions of that section shall, as far as may be, be applicable in the case of such inquiry.

(2) If it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right:

Provided that no such order shall be made where the right is exercisable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry, or where

the right is exercisable only at particular seasons or on particular occasions, unless the right has been exercised during the last of such seasons or on the last of such occasions before such institution.

(3) *If it appears to such Magistrate that such right does not exist, he may make an order prohibiting any exercise of the alleged right.*

(4) *An order under this section shall be subject to any subsequent decision of a Civil Court of competent jurisdiction.*

AMENDMENT.—This section which deals with disputes concerning easements, etc., has been re-drafted in order to make its meaning clearer. The principal changes introduced are—(1) the definition of the subject-matter in dispute has been modified so as to avoid difficulties which have been created by decisions raising doubts as to the applicability of the section, to rights not resembling easements or to rights acquired by contract; (2) the specific reference to the rights of way has been omitted as it has been questioned whether it may not, by implication exclude negative easements from the scope of the section; (3) the nature of the orders which a Magistrate may pass and their continuance pending the order of a competent Civil Court to the contrary have been clearly defined.—*St. of Obs. and Reas.*

FROM A POLICE REPORT OR OTHER INFORMATION.—These words are new. Before the amendment the word "as aforesaid" occurred in the section. Now the language in this and S. 145, *supra*, is identical. For commentaries see p. 174, *supra*.

DISPUTE LIKELY TO CAUSE A BREACH OF THE PEACE EXISTS.—Unless there are special circumstances giving rise to an apprehension of a breach of the peace there is no jurisdiction to make an order under this section. 25 Cr. L.J. 283—77 Ind. Cas. 289. For commentaries see p. 175, *supra*.

SCOPE OF THE SECTION.—The words of the section as amended do not give the Magistrate any power of directing one of the parties to do a positive act by way of a mandatory injunction, say, directing a party to demolish a wall built by him. It seems that the power given to a Magistrate under this section is analogous to the power given to a Civil Court to grant a temporary injunction restraining a person from doing a certain act, but the section does not authorise the Magistrate to make an order in the nature of a mandatory injunction directing a party to perform a certain act. The order of the Magistrate may be declared erroneous by a Civil Court which grants a mandatory injunction with great care and caution. It was never intended that the Magistrate should exercise the power of making such an order by a summary procedure. Form No. 24, Sch. V, gives a form of the order under this section and it merely contains a direction that the person against whom it is made, shall not do certain things. The change in the wording of the section was made with a view to make it clear that the Magistrate has only the power to issue a prohibitory order restraining any person from doing any act of interfering with the right of another when the Magistrate finds that the right exists and no order can be passed, such as to demolish a wall put up. 30 C.W.N. 238—41 C.L.J. 568—26 Cr. L.J. 1268—88 Ind. Cas. 1041. The provisions of this section are of an emergency character and are of a summary nature. The Magistrate is not to usurp the functions of a Civil Court, (1926) Pat. 187—27 Cr. L.J. 841—95 Ind. Cas 781. A dispute concerning a right to take water from an artificial water channel for irrigation comes within this section. 20 Cr. L.J. 209—49 Ind. Cas. 769.

REGARDING ANY ALLEGED RIGHT OF USE OF ANY IMMOVEABLE PROPERTY.—The words before the amendment were 'the right to use any land or water including any right of way.' The language of the section as it stood before the amendment was very much criticised in 5 C.W.N. 67 by *Prinsep, J.* as inartistic and meaningless. It was held in A.M. 121 that a Magistrate has no jurisdiction to direct the removal of an obstruction as the

proper course is to proceed under Chapter X of the Code for removal of an unlawful obstruction from a thoroughfare; but in 28 M.L.J. 233=15 M.L.T. 230=(1914) M.W.N. 394=15 Cr. L.J. 362=23 Ind. Cas. 730, it was held dissenting from 4 M. 121, that the fact that S. 133 *supra*, expressly provides for an order by the Magistrate directing the removal of obstruction to pathways did not necessarily imply that a similar order cannot be passed under this section. It was further held that the section applied both to public and private pathways. But see 39 C. 560. There is nothing to prevent a party claiming a pathway as a personal easement as well as a public right. If the pathway is proved to be a public one then no question of easement arises, but if he fails to prove the public nature of the path, then he may prove his right of easement. (1926) Pat. 187=27 Cr. L.J. 841=95 Ind. Cas. 761. A dispute as to a right to enter a temple and officiate at a ceremony whenever necessary is a dispute within the scope of this section. 27 M.L.J. 887=16 M.L.T. 427=15 Cr. L.J. 871=25 Ind. Cas. 999; 48 M.L.J. 528=26 Cr. L.J. 1057=88 Ind. Cas. 2; 11 M. 323; 29 M. 237. But a mere right to perform puja of an idol without any dispute as regards the temple or any land belonging to the idol, cannot be said to be a right of user of any land as explained in S. 145, *supra*, and therefore such a dispute cannot be considered as one coming under the provisions of this section. 52 C. 989. A right to worship at a particular grave does not exist and therefore the ancillary right to go over the land to the grave cannot exist, (1928) Pat. 64. Right to worship for one day in a year and the right to make due and proper preparation for the holding of that worship by erecting huts for the puja is in the nature of an easement and comes within this section and not under S. 145, *supra*. 17 C.W.N. 205=13 Cr. L.J. 789=13 C.L.J. 397=17 Ind. Cas. 533. So also a dispute likely to cause a breach of the peace concerning a right to perform a religious ceremony in a mosque, 11 M. 323; 29 M. 237; 24 B. 527, but a contrary view was taken in 37 C. 578, which was dissented from in 27 M.L.J. 587. See 52 C. 989. A right to use a privy was held to be within the section, 15 Bom. L.R. 329=14 Cr. L.J. 400=20 Ind. Cas. 224. It is doubtful whether the right of using a highway is within the scope of this section. The carrying of a corpse along a highway is not an unlawful use of the highway except when danger to public health is occasioned thereby, and therefore an order preventing a Hindu funeral procession from passing along a highway to which the Mahomedans objected is bad in law, 7 M. 49; 6 M.L.J. 193; 6 M. 203. This section in no sense authorises a Magistrate to prohibit the use of a public highway by any class of persons unless he apprehends a breach of the peace which cannot be avoided without an order from him. But when no present breach of the peace is apprehended, no action can be taken under this section, 15 Cr. L.J. 291=23 Ind. Cas. 499. The right to drag a cart in procession along a highway to a temple is a right of user of land within this section. 27 Bom. L.R. 1058=26 Cr. L.J. 1422=89 Ind. Cas. 848; no order can be passed under this section on proceedings taken under S. 133, *supra*. The two proceedings are entirely distinct, 15 C.W.N. 667=12 Cr. L.J. 43=9 Ind. Cas. 262.

WHETHER SUCH RIGHT BE CLAIMED AS AN EASEMENT OR NOT.—The language of the section is made very clear now. The claim to a pathway as an easement is not inconsistent with a public right of way. It is not necessary under this section to give full proof that a right exists. That is for a Civil Court to decide. The inquiry contemplated herein is more or less of a summary character and reasonable ground of a *bona fide* claim is to be shown; the Magistrate is not to usurp the functions of a Civil Court in a dispute under this section, (1926) Pat. 187=27 Cr. L.J. 841. A Magistrate has power under this section to issue an order protecting persons exercising their right of taking water from a well when the right is threatened to be interfered with by others, (1911) 1 M.W.N. 44. So also where the dispute relates to the right of the use of a well on two days out of every eight days, this section applies, not S. 145 *supra*. 3 Cr. L. Rev. 474; 21 M.L.J. 485=9 M.L.T. 209=(1911) 1 M.W.N. 44=11 Cr. L. J. 721=8 Ind. Cas. 848; but in disputes regarding easements the provisions of this section are to be used with care, as inquiries by Magistrate may lead to injustice being done by defective procedure which may involve complicated questions relating to rights of parties which can only be determined by a Civil Court, 21 C. 727; 4 C.W.N. 779; 23 C. 557; the proper course for the Magistrates to adopt is to take action under Chapter VIII of the Code.

MAY MAKE AN ORDER IN WRITING.—Doubt was expressed in 21 C. 727 whether a Magistrate was bound to pass a preliminary order under this section also as he was bound to do under sub-Section (1) of S. 145, *supra*. This doubt has now been cleared, by enacting "he may make an order" etc.; compare the language used in S. 145 (1), *supra* "shall make an order in writing." It is only after serving the order on the parties concerned requiring them to attend the Court on a fixed date and put in their written statements of their claims that the Magistrate gets jurisdiction to inquire into the matter as provided in S. 145 *supra*.

SHALL THEREAFTER INQUIRE IN THE MANNER PROVIDED IN S. 145.—The inquiry contemplated by this section is an inquiry by the Magistrate and not by the police and the Magistrate cannot act on the result of a police inquiry, 30 C.W.N. 868. An order under this section is not bad merely because the Magistrate has not formally recorded a proceeding that there is likelihood of a breach of the peace, 27 M.L.J. 887 where 2 C.W.N. 670 is followed. What the section says is he *may make* an order in writing and inquire in the manner provided by S. 145, *supra*. It may not be obligatory on him to record a formal proceeding stating the grounds of his being satisfied that a dispute likely to cause a breach of the peace exists before issuing process. The inquiry contemplated by this section is a judicial inquiry after due notice to the parties concerned and the Magistrate is to form a judicial opinion based upon evidence legally recorded by him in the manner provided by S. 356, *infra*, 21 C. 727; 2 C.W.N. 670. A person against whom proceedings are taken under this section is entitled to produce evidence to prove that the case does not fall within this section. In 19 M.L.J. 18; when objection was taken that the case did not fall within the section as the Magistrate made an order under S. 145, *supra*, without notice to the parties of his intention to proceed under that section and without a preliminary order under sub-section (1) of S. 145 *supra*, it was held that the Magistrate acted without jurisdiction.

MAKE AN ORDER PROHIBITING ANY INTERFERENCE OF SUCH RIGHT.—It was held by the Calcutta High Court in 5 C.W.N. 67 and 335 that the Magistrate was competent to direct the removal of an obstruction to the exercise of a right, but the Madras High Court held in Welr II, 118; Welr I, 143, that an order directing the removal of a fence so as to allow the use of a right of way cannot be passed under this section. But the section does not give a Magistrate any power of directing one of the parties to do a positive act by way of a mandatory injunction, e.g. to demolish a wall shutting out light and air of the other party. The power is analogous to the power given to the Civil Court to issue a temporary injunction restraining a person from doing an act interfering with the right of another, 30 C.W.N. 238; 41 C.L.J. 318—28 Cr. L.J. 1285—88 Ind. Cas. 1041. In 25 M.L.J. 233, it was held that an obstruction to a private or public pathway could be ordered to be removed by the Magistrate under this section. In 13 Cr. L.J. 184, it was held that a Magistrate has power to invoke police assistance to carry out an injunction issued by him under this section to have an obstruction removed. But in 35 C. 923 it was held that this section contemplates orders directed to the parties to the dispute and does not enable the Magistrate to enforce his orders thereunder through the agency of the police, and that an order passed sometime after the termination of the proceedings under this section directing the removal of a bund by the police is without jurisdiction. This section does not enable a Magistrate to make a declaratory order but only enables him to forbid arbitrary interference of rights actually enjoyed, 5 C. 194. This section does not authorise a Magistrate to attach the subject of dispute, 4 Cr. L. Rev. 374.

IF IT APPEARS THAT SUCH RIGHT EXISTS.—The words such right exists' mean such right as is claimed by the party, (1928) Pat.187—27 Cr. L.J. 841. An order under this section cannot be made without legal proof. An order passed solely on the written statement of one of the parties without recording some evidence in proof of the allegations contained in the statement is illegal even though the other party remains *ex parte*, 30 C. 913, but when allegations of one party are admitted by the other party no evidence is necessary, 7 C.W.N. 251. Where the only evidence is that of user it should be such as to show some considerable length of time, 4 M.H.C.R. Appx. xxiv. In the absence of a finding that the right has been exercised within the period specified by this section the final order cannot be maintained, 25 Cr. L.J. 998—81 Ind. Cas. 703 but where the non-exercise of the right within the period specified was

due to circumstances beyond the control of the person claiming to exercise the right, this proviso cannot apply. 27 Bom. L.R. 1058=28 Cr. L.J. 1422=89 Ind. Cas. 848.

PROVISO TO SUB-SECTION (2).—An order under this section is made without jurisdiction if it is made in the absence of a finding that the right was exercised within three months anterior to the inquiry, 14 Cr. L.J. 303=19 Ind. Cas. 389 ; 20 Cr. L.J. 858=31 Ind. Cas. 848. Under this section the Magistrate has no power of attaching the subject-matter in dispute, viz., a well, the right to use the water of which by turns was in dispute, the order of attachment of the well was held to be made without jurisdiction, 4 Cr. L. Rev. 473.

148. (1) Whenever a local inquiry is necessary for the purposes of this chapter, any District Magistrate or Sub-Divisional Magistrate may depute any Magistrate subordinate to him to make the inquiry, and may furnish him with such written instructions as may seem necessary for his guidance, and may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid.

Local inquiry.

(2) The report of the person so deputed may be read as evidence in the case.

(3) When any costs have been incurred by any party to a proceeding under this chapter the Magistrate passing a decision under section 145, section 146, or section 147, may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole or in part or proportion. *Such costs may include any expenses incurred in respect of witnesses and of pleaders' fees which the court may consider reasonable.*

Order as to costs.

AMENDMENTS.—The words "all costs so directed to be paid may be recovered as if they were fines" have been now omitted on account of the amendment in S. 547 *infra*, which deals with the recovery of all monies other than fines ordered to be levied under the provisions of the Code. The last portion of sub-section (3) is new and it is now made clear what legitimate costs are meant to be included within this section.

WHENEYER A LOCAL INQUIRY IS NECESSARY.—The local inquiry referred to in the section should be restricted solely to some question relating to the features of the property about which any matter which can be proved before the Magistrate by oral evidence such as the question of actual possession. 3 C.L.R. 134 at 136. The rule that in criminal cases, courts are only justified in holding local inspection in order to explain the facts appearing does not apply to cases under S. 147, *supra*, nor is there anything in the law to prevent the presiding Magistrate making a local investigation himself provided he records what is said and does not act on hearsay evidence. 15 C.L.J. 267=12 Cr. L.J. 319=10 Ind. Cas. 615. But before a Magistrate begins to record evidence he may make a local inspection to see the exact lie of the land and its features and when he restricts his inquiry to those points and makes a note of the area, and prepares a plan and places it on record, he will not be acting outside his jurisdiction. 21 Cr. L.J. 507=72 Ind. Cas. 991 ; See also 21 Cr. L.J. 487. The result of the local inquiry may be used to test the evidence recorded but the Magistrate cannot discard the evidence on what he may have seen and heard and inferred from such inquiry when there is nothing on record on that subject. If he does so he acts without jurisdiction, 10 C.W.N. 181. The object of local inspection is to understand and appreciate the topography of the land in dispute, in order to aid the Magistrate in appreciating the evidence offered in Court. But the local inspection cannot take the place

of legal evidence, much less the result thereof be used as a basis for the decision. 25 Cr. L.J. 312—77 Ind. Cas. 492; 25 Cr. L.J. 535—81 Ind. Cas. 38; (1922) Pat. 249; 61 Ind. Cas. 712; (1921) Pat. 74.

MAY DEPUTE ANY MAGISTRATE SUBORDINATE TO HIM.—The power to depute does not necessarily imply that the Magistrate before whom the proceedings are pending may not himself hold the local inquiry as is provided for by this section, 5 C.W.N. 686. The duty of making the local inquiry should be deputed to a Magistrate and not to a *Kanungo*, 7 C.L.R. 392 but it was held in 13 Cr. L.J. 489—12 Ind. Cas. 88, that this section is an enabling section and the deputation of a *Kanungo* to make an investigation under this section is not bad under the general provision of law; anybody who has seen a place may be examined as to what he saw and the *Kanungo* may give evidence and his report is admissible under S. 157 Ind. Ev. Act to corroborate his sworn testimony. In 1 Pat. 75 it was held that a Magistrate, had no jurisdiction to direct a pleader commissioner to hold a local inquiry and to receive in evidence a report submitted by him after completing the inquiry.

FURNISH HIM WITH WRITTEN INSTRUCTIONS FOR HIS GUIDANCE.—The instructions contemplated herein, may include instructions to examine witnesses, inspection of the locality, time and place of inquiry or local inspection, the nature of the report to be submitted, the date on or before which proceeding are to be returned etc.

THE REPORT MAY BE READ AS EVIDENCE.—The Magistrate ought not to depute to a Subordinate Magistrate the *whole investigation* under S. 145, *supra*, but on receipt of the report of such Magistrate, he should himself take written statements from the parties and receive the evidence produced by them and conclude the investigation, Welr II, 118. The report is evidence without the Magistrate being called on to prove it. 1 Pat. 75. When an inquiry has been made and the result reported, it becomes part of the proceedings in the case and the party affected by it is entitled to be acquainted with the result thereof and to have an opportunity of rebutting the report of such inquiry if he thinks necessary. 21 W.R. (Cr.) 25.

Sub Sec. (3): ORDER AS TO COSTS.—A Magistrate has power under this section to direct by whom any costs incurred by the parties in a proceeding before him under this chapter are to be paid. But the costs referred to in this section are evidently the costs incurred in the Magisterial proceedings. This sub-section gives a wide discretion to the Magistrate for awarding and assessing costs but his jurisdiction is limited to the costs which might have been incurred and admissible under the much wider provisions of the Code as to costs incidental to the proceedings, and when he awards *other costs*, the High Court will interfere in revision, 13 Cr. L. J. 297—14 Ind. Cas. 761 nor should he include additional costs for extra fees and travelling and other expenses, etc., incurred by bringing a pleader from a distance, 9 C.W.N. 887; 14 C.W.N. lxxiii and (1922) Pat. 564; he cannot include costs for cutting crops which have been incurred, 32 C. 602. The Magistrate should not arbitrarily decide what the costs should be, (1922) Pat. 564; 23 Cr. L.J. 508. Power to award costs is a good deal restricted now.

THE MAGISTRATE PASSING A DECISION MAY DIRECT.—As to the mode of recovery, see S. 547 *infra*. S. 386 only refers to cases where there has been a conviction and sentences of which fine forms a part, 25 Cr.L.J. 126—71 Ind. Cas. 254. A dismissal for default is not such a “*decision*” as is referred to in this section as will entitle a Magistrate to award costs and the order made was set aside as one passed without jurisdiction, 4 Cr. L. Rev, 258. An order allowing proceedings initiated under S.145, *supra* to be withdrawn is not a “*decision*” within the meaning of this section and an award of costs is illegal and made without jurisdiction, 9 M.L.T. 324—12 Cr. L.J. 49—8 Ind. Cas. 289. The award of costs should be made by the Magistrate at the time of passing his decision, yet the fact that costs were awarded subsequently would not render the award invalid especially where the circumstances of the case necessitated the postponement of the question, 29 M. 373; 16 L.W. 613; 24 Cr. L.J. 80—71 Ind. Cas. 128. An order as to costs does not become illegal simply because it was not made at the time of pronouncing judgment in the proceedings under Chapter XII, 29 M. 373;

28 C. 37; 24 C. 757; 21 C. 609; 11 Cr. L. J. 335 = 5 Ind. Cas. 943; 47 C. 973. The order will be good if it is made within a reasonable time while the same Magistrate is sitting and after notice to the parties and allowing them an opportunity of being heard, 22 C. 384 and 387; 24 C. 757; 47 C. 973; 18 C. W. N. 645 = 15 C. L. J. 287 = 12 Cr. L. J. 319 = 10 Ind. Cas. 615. But if made without notice and without giving the party an opportunity of contesting the award, the order is one made without jurisdiction, 28 C. 302; 24 Cr. L. J. 80 = 71 Ind. Cas. 128. The order ought to be made only in the presence of both parties. 10 C. W. N. 1030; 12 C. W. N. ccvii. 13 C. W. N. clxxx. If at the time of passing the decision the Magistrate awarded costs, there is no objection to the amount of such costs being assessed afterwards by his successor. 22 C. 384 and 387; 23 C. 37; (1913) M. W. N. 771; 27 M. L. J. 813 = 16 M. L. T. 238 = (1913) M. W. N. 790 = 15 Cr. L. J. 676 = 25 Ind. Cas. 1004; 21 C. 609. The assessment of costs by a separate order after hearing parties is not illegal if provision for costs is made at the time of passing the order, (1913) M. W. N. 771 = 14 M. L. T. 135 = 21 Ind. Cas. 170. A successor cannot pass an order for costs when the predecessor's order is silent, 11 Cr. L. J. 335 = 5 Ind. Cas. 943. This section evidently contemplates costs incurred in the Magisterial proceedings. When the High Court sits in revision it is not exercising the powers of Magistrates under this chapter and therefore the costs in the revision proceedings cannot be included. The question whether the High Court exercising its powers of revision has inherent power to award costs to the successful party has been settled by the Full Bench decision, 45 M. 913. It is true that S. 561-A has been newly enacted to save the inherent powers of the High Court. But the Court cannot by invoking its inherent powers extend the powers given to it by the statute; nor can the award of cost be treated as incidental or consequential to the disposal of a revision petition within the meaning of S. 423 (1) (d), *infra*, for it does not necessarily follow from an order passed in revision, 48 M. 262 (F. B.). The Bombay High Court in 27 Bom. L. R. 1353 has taken a different view and held that the High Court can award costs in a revision petition under S. 145 *supra*.

REVISION.—The High Court has now power under S. 499 to revise orders as to costs, the restriction in S. 436 (3) having been removed. The High Court will not interfere in revision with an order under this section on the ground that the costs are either deficient or excessive, 15 C. W. N. 811; 17 Cr. L. J. 339. A wide discretion to award costs is given to a Magistrate by this section, and the High Court has no power in revision to interfere with the exercise of that discretion by the Magistrate if exercised properly, 9 C. W. N. 187. In the absence of materials to show that the assessment of costs was not proper the Court refused to interfere in revision, 28 M. L. J. 134 = 27 Ind. Cas. 220.

CHAPTER XIII.

PREVENTIVE ACTION OF THE POLICE.

149. Every police-officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent, the commission of any cognizable offence.

Police to prevent cognizable offences.

POLICE-OFFICER MAY INTERPOSE FOR THE PURPOSE OF PREVENTING.—S. 151 *infra* empowers a police-officer to arrest without warrant if it appears to him that the commission of an offence cannot be otherwise prevented, and S. 60 *supra* lays down the subsequent procedure to be adopted by him. See S. 55 *supra*, which empowers officers in charge of police-stations to arrest for the purpose of restraining bad characters to prevent commission of crimes.

COGNIZABLE OFFENCE.—For definitions see S. 4 (f) *supra*. See Sch. II *infra* as to what offences are cognizable.

150. Every police-officer receiving information of a design to commit any cognizable offence shall communicate such information to the police-officer to whom he is subordinate, and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence.

Information of design to commit such offences.

INFORMATION OF A DESIGN TO COMMIT.—This section relates to the design to commit a cognizable offence and not to the actual commission of such offence.

SHALL COMMUNICATE SUCH INFORMATION.—Every police-officer is bound to give information to his superior officer of the design to commit a cognizable offence and his failure to do so is an offence punishable under S. 176 I.P.O. He is also bound to give information to any other officer whose duty it is to prevent or take cognizance of the commission of such an offence, e.g. an officer in charge of a police station ought to be informed of the design to commit a cognizable offence within the limits of the station.

151. A police-officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.

Arrest to prevent such offence.

KNOWING OF A DESIGN.—The word used is "knowing"; mere suspicion is of no avail. See S. 157 *infra*, as to the procedure to be adopted when a cognizable offence is suspected.

MAY ARREST WITHOUT WARRANT.—Under S. 62, *supra*, all arrests made without warrant under this section must be reported to the District or Sub-Divisional Magistrate. After arrest the provisions of Ss. 60 to 63, *supra*, should be followed. A Police-Officer may also arrest any person obstructing him while in the execution of his duty under S. 54 (1) fifth clause, *supra*.

152. A police-officer may of his own authority interpose to prevent any injury attempted to be committed in his view to any public property, moveable or immovable, or the removal or injury of any public land mark, or buoy, or other mark used for navigation.

Prevention of injury to public property.

SCOPE OF THE SECTION.—This section is intended to prevent injury to public property made punishable under Ss. 430 to 433, I.P.O. and the Police-Officer can arrest without a warrant as the offence is a cognizable one. If not cognizable, must apply for warrant authorising him to arrest. He is entitled to arrest under S. 54 (1) cl. 5, if he is obstructed in the execution of his duty. If the injury is already committed and the offence is non-cognizable, the Police-Officer under S. 24 of Act V of 1861 (Police Act) can only take the name and address of the offender with a view to prosecute the offender.

153. (1) Any officer in charge of a police station may, without a warrant, enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, used or kept therein, whenever he has reason to believe that there are

Inspection of weights and measures.

in such place any weights, measures or instruments for weighing, which are false.

(2) If he finds in such place any weights, measures or instruments for weighing which are false, he may seize the same, and shall forthwith give information of such seizure to a Magistrate having jurisdiction.

OFFICER IN CHARGE OF A POLICE STATION.—For definition, see S. 4 (p) *supra*.

WITHIN THE LIMITS OF SUCH STATION.—The power is to be exercised by the officer within the limits of his station and not outside. Chapter XIII, I.P.C. deals with offences relating to weights and measures. See Act XXXI of 1871 which relates to weights and measures of capacity and S. 11 of the Act empowers rules to be framed.

This section does not apply to the Police in the Towns of Calcutta and Bombay. In Madras Act, III of 1888, S. 12 empowers the Commissioner of Police to keep in his office Standard weights and measures.

GIVE INFORMATION OF SEIZURE TO A MAGISTRATE HAVING JURISDICTION.—See Sch. II, Col. 9 and Chapter XIII I.P.C., offences relating to weights and measures. The Magistrate having jurisdiction as specified in Col. 9 of Sch. II is a Presidency Magistrate, or a Magistrate of the first or second class.

PART V.

INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE.

CHAPTER XIV.

154. Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police-station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the Local Government may prescribe in this behalf.

INFORMATION.—The word '*Information*' is not defined in the Code. The information contemplated by this section is a statement made by informants of their own initiative and before the commencement of the investigation. This will be the first step for commencing an investigation. Information on which an investigation has commenced is the first information of the occurrence. The law does not contemplate that when in the course of investigation something has been elicited, a first information can thereon be recorded. In every trial it is important that it should be known to the judicial officer what are the facts given out immediately after the occurrence and reported to the police and the object of the first information is to make him so acquainted. In addition to the entry of the first information in the diary, if the police-officer makes any memorandum of what the first informant said, that memorandum should be produced, 7 C.W.N. 345; 21 Cr. L.J. 486; (1911) 2 M.W.N. 373 and 14, Where A gave information of the commission of arson to a village headman who under S. 45 *supra* reported the same to the police, and a police-officer came to the village and took

a statement from A, it was held that A's statement was one taken under this section, 28 M. 565, but a different view was taken in 31 M. 508 where it was held that such statement was one taken under S. 162 *infra*. The Full Bench decision in 32 M. 258 did not approve of the decision in 31 M. 508 and drew a distinction between cases where the village headman was bound by law (S. 45 *supra*) to pass on the information and in cases where he was bound to report to the police or to the Magistrate and in the former class of cases, any statement taken by the police-officer from the person who gave the statement to the police will be treated as information to the police under this section. The object of a first information being to show what was the manner in which the occurrence was related when the case was first started, it should always be carefully and accurately recorded, 11 C.W.N. 554 at 556. The law requires that the first information should be the statement of the person himself giving the information; and it becomes valueless if it is drawn up by some one other than the proper informant. A statement recorded several days after the commencement of the investigation and after there had been some development, is not only no first information but has very little or no value at all, 25 M.L.T. 379; 11 C.W.N. 554 and 7 C.W.N. 345. The first information is always of great importance in a criminal case and where it has been made a considerable time after the occurrence and by a person who knew the facts well, no person whose name is not disclosed in it should be convicted, 11 Cr. L.J. 99—4 Ind. Cas. 980. A first information drawn up by a police-officer and finally settled by an attorney is not a first information within this section, 46 C.W.N. 145—13 Cr. L.J. 85—13 Ind. Cas. 721. The first information if recorded as directed by this section at the time it is made is of considerable help at the trial because it shows on what materials the investigation commenced and what was the story then told, 11 C.W.N. 554. The first information is the first step in the proceeding, 32 M. 258. First information is what is given first to the police in point of time whoever the informant may be, and not what the police may select and record as first information, 8 C.W.N. 318; 6 C.W.N. 521; 7 C.W.N. 345; 47 A. 280. Statements made in the course of investigation can be proved only by examining the police-officer to whom the statement was made, 22 Cr. L.J. 410—61 Ind. Cas. 850; 21 Cr. L.J. 743—68 Ind. Cas. 217. First information report, is the well known technical description of a report under this section giving first information of a cognisable crime which is usually made by the complainant or some one on his behalf. The language is inapplicable to a statement made by the accused, 28 Cr. L.J. 450—17 Ind. Cas. 890.

RELATING TO THE COMMISSION OF A COGNIZABLE OFFENCE.—The offence may have been committed within or without the local limits of the particular police station. See Ss. 156-157 as to local limits of police station. See also S. 4 (1) (*f*) *supra* as to definition of cognisable offence.

IF GIVEN ORALLY.—An information under this section could be given either orally or in writing; if given orally, the police-officer is required to record it and every such information whether given in writing or reduced to writing requires to be signed by the person giving it. Such information forms the basis upon which the investigation under this chapter commences. A police-officer making an investigation has power under S. 160 *infra* to require the attendance of witnesses who appear to be acquainted with the circumstances of the case and examine them. Such persons are bound to attend and are bound to answer all questions relating to the case, other than questions, the answers to which would incriminate them. S. 162 lays down that no statements made by a person to a police-officer in the course of such investigation shall, if reduced by writing be signed by him. 3 Rang. 577.

A police-officer is bound to receive a complaint when it is preferred to him or where the commission of an offence is reported to him orally he is to take down the complaint in writing. But a suit for damages cannot be maintained against a police-officer merely because he refused to receive a complaint of theft preferred to him. If he fails to perform his duty as a public servant, he does not render himself liable for damages, but can only be dealt with by his superior officer for neglect of duty, 49 M.L.J. 450.

TO AN OFFICER IN CHARGE OF A POLICE STATION.—For definition of an officer in charge of a police station see S. 4. (1) (*g*) *supra*.

SHALL BE REDUCED TO WRITING.—An information to a police-officer should not be made on oath. If it is false it cannot be made the subject of a charge under S. 193, I.P. C., but it might come under S. 182 or 211, I.P.O., but if the person giving the information is examined under S. 161 *infra* he will be liable under S. 193, I.P.C., if he has intentionally given a false statement, 8 B. 216. But a statement recorded by the police-officer under S. 161 cannot be treated as information given to the police under this section and if false punishable under S. 182, I.P.C. The word "give" in S. 182 I.P.C. does not bear the restricted meaning of the word "volunteer," 25 Cr. L.J. 1832=90 Ind. Cas. 316. The complaint or information reduced to writing forms part of the first information report. The writing containing the first information is not a judicial record and is no evidence of the existence of facts mentioned therein, 1897 A.W.N. 47.

SHALL BE SIGNED.—A person giving the information is to sign the statement reduced to writing unlike Ss. 161 and 162 *infra*, and refusal to sign is punishable under S. 180, I.P.C.

ENTERED IN A BOOK TO BE KEPT BY SUCH OFFICER—This book is the general diary also known as "*the station diary*" or "*station-house register*" kept under S. 44, Act V of 1861. Under S. 172 (2) *infra*, any Criminal Court may send for police diaries of a case under inquiry or trial in any such court and may use such diaries not as evidence in the case but to aid it on such enquiry or trial; neither the accused nor his agent shall be entitled to call for such diaries nor shall he or they be entitled to see them merely because they are referred to by the court; but if they are used by the Police-Officer who made them to refresh his memory or if the court uses them for the purpose of contradicting such Police-officer the provisions of the Indian Evidence Act, 1872, S. 145 or S. 161 shall apply. The Code is silent as to what a Station House Officer should do when he receives information as to the commission of an offence outside his station. There is nothing to prevent him from receiving and recording the information though he may not have power to investigate, 15 Cr. L. J. 622=3 Cr. L. Rev. 245=25 Ind. Cas. 630. A false entry in the station diary is punishable under S. 177 I.P.C. 20 A. 151.

155. (1) When information is given to an officer in charge of a police-station of the commission within the limits of such station of a non-cognizable offence, he shall enter in a book to be kept as aforesaid the substance of such information, and refer the informant to the Magistrate.

Information in non-cognizable cases.

(2) No police-officer shall investigate a non-cognizable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial, or of a Presidency Magistrate.

Investigation into non-cognizable cases.

(3) Any police-officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.

OBJECT OF THE SECTION.—The object of the Legislature in enacting this section is to allow aggrieved persons direct access to justice without the intervention of the Police. This is the only section in Chapter XIV of the Code which applies to the Police in Calcutta, 15 C. 898 at 606 (F.B.); it also applies to the Police in the town of Bombay, 21 B. 495.

NON-COGNIZABLE OFFENCE.—For definition of non-cognizable offence, see S.4 (1) *supra*.

SHALL ENTER IN A BOOK TO BE KEPT AS AFORESAID.—This book is what is called the *Station or general Diary*. See in this connection, 20 A. 151.

REFER THE INFORMANT TO THE MAGISTRATE.—The Police-Officer receiving the information can now submit a report to the Magistrate in non-cognizable cases and Magistrates are entitled to take cognizance of non-cognizable offences upon police reports without examining the police-officer on oath, 49 M. 525 (F.B.). If the alleged offence had been committed in his view, and he makes a formal report, it was held that it will amount to a complaint as defined in S. 4 (1) (h) *supra*, 26 B. 150, In 6 M. L. T. 289—11 Cr. L. J. 156—4 Ind. Cas. 1043, it was held that when on a certain information received, the police finding that the facts disclosed a non-cognizable offence, reported the case to the Presidency Magistrate for orders under sub-sec. (2) of this section, it was competent for them to do so under sub sec. (2) and the Magistrate had jurisdiction to pass orders without first taking cognizance of the case in one of the three ways mentioned in S. 190, *infra*. See also, 11 A.L.J. 331. This section deals only with powers of a police-officer. It confers no power on Magistrates to direct a local investigation by the police or to call for a police report, 12 B. 161; but such a power to order an investigation is conferred in cognizable cases on Magistrates empowered under S. 190, *infra*, by S. 156 (3), *infra*. A Magistrate is competent to order an investigation under this section when he receives a police report in a non-cognizable case if he has reason to doubt its correctness, 16 Cr. L.J. 97, —27 Ind. Cas. 145. If a Magistrate not being empowered erroneously and in good faith orders a police investigation in a non-cognizable case his proceedings shall not be void, S. 529 (b), *infra*.

OR OF A PRESIDENCY MAGISTRATE.—This is the only section in this chapter which applies to the police in Calcutta. But this section is not sufficient to amount to a provision that the whole chapter is applicable to the police in Calcutta or to give them any power to make an investigation under it. 15 C. 595 at 606. See also 52 C. 67; 27 Cr. L.J. 957—96 Ind. Cas. 809.

156. (1) Any officer in charge of a police-station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial.

Investigation into cognizable cases.

(2) No proceeding of a police-officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned.

SCOPE OF THE SECTION.—This section is not limited in its application to offences only, but extends also to matters mentioned in S. 55 *supra*, dealing with the arrest of bad character, etc. The reference in this section to Chapter XV, *infra* is only as to the *venue*, 1893 A.W.N. 124.

OFFICER IN CHARGE OF A POLICE-STATION.—For definition, see S. 4 (1) (p) *supra*.

INVESTIGATE ANY COGNIZABLE CASE.—For definition of "investigation" and "cognizable offence," See S. 4 (1) (i), *supra*. Having regard to the definition of judicial proceeding in S. 4 (1) (m), *supra* the investigation by a police-officer is not in any stage a judicial proceeding, as he has no power to record evidence *on oath* and though persons examined by him are bound to answer under S. 161 (2) all questions put to them, yet they are no longer bound to answer *truly*.

SUB-SECTION (3).—This clause enables a Magistrate who under S. 190, *infra* can take cognizance of an offence, to order a police investigation if it is a cognizable case. An order

by a Sessions Judge directing the police to make an inquiry under this section is *ultra vires*, 11 Cr. L. J. 330—8 Ind. Gas. 915. Under S. 202, a local investigation by the police may be ordered only *after* the examination of the complainant, and before issue of process to the accused, here a reference could be made to the police before examining the complainant and the issue of process, 9 M. 222. This clause is not intended to provide an alternate procedure to that laid down in S. 200, which finds a place in Chapter XVI and not in Chapter XIV which deals with the procedure and powers of the police, 10 M. L. T. 120—12 Cr. L. J. 463—11 Ind. Gas. 929—(1911) 2 M. W. N. 74. But it was held in 8 Bom. L. R. 589 and 30 C. 923, that under this sub-section the Magistrate may direct the police to investigate, and upon receipt of the police-report may hold a judicial inquiry himself under S. 159, *intra*, without proceeding under this Chapter. It is the duty of the committing Magistrate, and failing him, of the Sessions Judge to inquire fully into the circumstances of the delay in the investigation of the police and to consider its bearing on the prosecution story, 2 Bom. L. R. 1092.

Chapter V, section 1, 128, *Orders of the Madras Police*, give the following tabulated form showing the proper procedure under the Code on receipt of a complaint or information of the commission of a cognizable offence and on receipt of an order from a Magistrate to investigate a non-cognizable offence.

CIRCUMSTANCES.

PROCEDURE.

Cognizable Cases.

1. The facts appear to constitute a cognizable offence. No person accused, or if accused, not arrested. Station-house officer determines to enter on an investigation either at the scene of the alleged crime (S. 157, Cr. P. C.) or at the station-house [S. 157, proviso (a).]

Send original information, whether it be the Village Magistrate's report or the information written or dictated by complainant or informant, with Occurrence Report, Form No. 44, Volume II, to the Magistrate having jurisdiction.

2. The facts do not appear to constitute an offence, or, in cases of a petty nature, there is no chance of procuring any evidence so that the Police think that there is no necessity for entering on an investigation [Proviso (b), S. 157, Cr. P. C.]

Send original information, whether it be the Village Magistrate's report or the information written or dictated by complainant or informant, with Occurrence Report, to the Magistrate having jurisdiction, explaining reasons for not investigating.

3. Accused arrested on sufficient grounds. Investigation cannot be completed within 24 hours.

Send accused at once to the nearest Magistrate with Crime Occurrence Memo, containing an exact copy of the entries regarding the case in the station house report.

Note.—If the accused is forwarded to a Magistrate other than the Magistrate having jurisdiction, Occurrence Report as in case 1 must be sent to the latter.

(a) On completion of the investigation, the case is found to be true.

Send Charge Sheet, Form No. 45, Volume II, to the Magistrate having jurisdiction.

(b) On completion of the investigation, the case is found to be false.

Send Referred Charge Sheet, Form No. 46, Volume II, to the Magistrate having jurisdiction through the Divisional Inspector.

4. On completion of the investigation, the case is found to be true, the Police have done all in their power to find the offender or offenders and have failed.

Send Form No. 47, Volume II, through the Inspector of the Division, to the Magistrate having jurisdiction.

5. The accused arrested. Inquiry likely to be completed within 24 hours.

Detain the accused, Send Occurrence Report as in case 1.

(a.) On completion of the investigation, the case is found to be true.

Send the accused, or, in bailable cases, Bail bond, Forms Nos. 48, 49 and 50, Vol. II, with Charge Sheet to the Magistrate having jurisdiction.

CIRCUMSTANCES.

PROCEDURE.

(b) On completion of the investigation the case is found to be false or evidence is insufficient to justify transmission of the accused to Magistrate.

Release the accused on bail and send bond with Referred Charge Sheet, through the Divisional Inspector to the Magistrate having jurisdiction.

6. The accused not found, but after investigation the case is found to be true, and such facts elicited as would justify his arrest.

Send Charge Sheet to the Magistrate having jurisdiction, asking for warrant.

7. The accused not arrested or no person accused. After full investigation it is found that no offence has been committed.

Send Referred Charge Sheet, through the Divisional Inspector, to the Magistrate having jurisdiction.

8. After investigation it is found that the facts constitute an offence of a less grave nature than at first alleged; e.g., charge of robbery found to amount in fact only to theft.

Send Referred Charge Sheet through the Divisional Inspector, to the Magistrate having jurisdiction, asking for authority to correct the record.

8A. After investigation it is found that the facts constitute a graver offence than at first alleged.

Send a Supplemental Occurrence Report to the Magistrate having jurisdiction.

9. The parties concerned in a compoundable cognizable case request the Police to stop investigation on the ground that a compromise has been effected.

Send Referred Charge Sheet through the Divisional Inspector, to the Magistrate having jurisdiction, for orders.

Non-Cognizable Cases.

1. After investigation ordered by Magistrate, case found to be true.

Send Charge Sheet to the Magistrate by whom the case was referred. *Vide* also P.O. No. 136 (b).

2. After investigation ordered by Magistrate, case found to be false.

Send Referred Charge Sheet to the Magistrate by whom the case was referred, through the Divisional Inspector.

3. Accused arrested under S. 57, Cr. P.O. name and residence not ascertained within 24 hours.

Send the accused with Occurrence Report to the Magistrate having jurisdiction.

4. Accused arrested under S. 57, Cr. P.O. name and residence ascertained within 24 hours.

Release the accused and send bond with Occurrence Report to the Magistrate having jurisdiction.

Note.—(1) Station-house officers should endeavour to ascertain the truth and real nature of the case from the complainant, and get the charge put up in its true character.

(2) A report will be made to the Magistrate under S. 173, Cr. P. O. in all cases investigated by the police, irrespective of results.

(3) An investigation is held to be completed—

(a) when the police have done all in their power to find the offender or offenders and have failed.

(b) when the police arrest and charge an offender;

(c) when the police refer as false a charge that they have investigated.

(4) The results of police investigation into cases connected with other Government departments should be communicated at once by the police-officer making the investigation to the local head of such department or establishment.

157. (1) If, from information received or otherwise, an officer in charge of a police-station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police-report, and shall proceed in person, or shall depute one of his subordinate officers *not being below such rank as the Local Government may, by general or special order, prescribe in this behalf*, to proceed to the spot to investigate the facts and circumstances of the case *and if necessary, to take measures* for the discovery and arrest of the offender :

Procedure where cognisable offence suspected.

Provided as follows :—

(a) when any information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police-station need not proceed in person or depute a subordinate officer to make an investigation on the spot ;

Where local investigation dispensed with.

Where police officer in charge sees no sufficient ground for investigation.

(b) if it appear to the officer in charge of a police-station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub-section (1), the officer in charge of the police-station shall state in his said report his reasons for not fully complying with the requirements of that sub-section, *and, in the case mentioned in clause (b), such officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the Local Government, the fact that he will not investigate the case or cause it to be investigated.*

AMENDMENT.—In sub-section (1) the words "*if necessary to take measures*" make it clear that the police have a discretion in arresting a person accused in a cognizable case ; the rank of subordinate officer in this sub-section is now to be fixed by the Local Government. The addition made to the end of sub-section (2) provides that if the police do not investigate a complaint, the complainant shall be informed to that effect. It is left to the Local Government to prescribe the manner in which the communication shall be made.

SHALL FORTHWITH SEND A REPORT.—Reports relating to investigations by the police are : (1) report under S. 157, (2) report under S. 167, (3) report under S. 168 and (4) report under S. 173. The first, under this section is the preliminary report before commencing investigation and the one under S. 168 is the final report after completing the investigation. Report under S. 167 is sent when the investigation cannot be completed within 24 hours as prescribed by S. 61 or within the period specified in S. 167. The report under S. 173 is the completion report called the charge sheet. The report required by this section to be sent is the first report of an offence, what is generally called the *Occurrence Report*. The sending of the report is an essential preliminary to the commencement of an investigation, (1914) M. Y. N. 332—1 L. Y. 355—3 Cr. L. Rev. 235—15 Cr. L. J. 622, but it is left to the Magistrate to take action on it under S. 190 (b) or to drop the matter, *Weld II*,

119 ; omission to send a report under this section to a Magistrate is a serious neglect of duty liable to result in a failure of justice and will lay the police to grave suspicion of concoction of evidence. 11 Cr. L. J. 498—7 Ind. Cas. 601.

INFORMATION RECEIVED.—This section empowers a police-officer to take action when he has reason to suspect the commission of a cognizable offence from information received or otherwise. The expression "information received" undoubtedly refers to information furnished under S. 154, *supra*. A mere telegram giving information of the commission of an offence is not such an information. The words "or otherwise" are no doubt wide enough to cover the receipt of a telegram or even less definite or less satisfactory source of information, (1914) M.W.N. 382—1 L.W. 355—3 Cr. L. Rev. 245—15 Cr. L.J. 622 ; 15 C.W.N. 826. A police report submitted under this section entitles a Magistrate to proceed under S. 159, *infra*, 43 C. 1152.

OFFICER IN CHARGE OF A POLICE STATION.—Ss. 157—167 make it clear that a Station-house officer or his superior officer, within the limits of the local area of his jurisdiction is alone entitled to investigate an offence. A C. I. D. Inspector is therefore not legally competent to investigate and his evidence is inadmissible under S. 156, Indian Evidence Act. The power to investigate must be given to him by law, 33 M. 247 and 397.

158. (1) Every report sent to a Magistrate under section 157 shall, if the Local Government so directs, be submitted through such superior officer of police as the Local Government, by general or special order, appoints in that behalf.

Reports under S. 157 how submitted.

(2) Such superior officer may give such instructions to the officer in charge of the police-station as he thinks fit, and shall, after recording such instructions on such report, transmit the same without delay to the Magistrate.

Under S. 157 *supra* the officer in charge of the police-station shall forthwith send a report to the Magistrate empowered to take cognizance of the offence. The object of this provision is that the Magistrate who is primarily responsible for the condition of the District as regards responsible crimes should know of the occurrence as soon as possible and should watch the various steps taken by the Police and advise them in all cases whenever necessary. This section also emphasises that the report must be submitted without delay by the superior officer after recording the instructions he had given to the police-officer submitting the report. S. 159 *infra* indicates the procedure to be adopted by a Magistrate on receipt of a report.

159. Such Magistrate, on receiving such report, may direct an investigation, or, if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of, the case in manner provided in this Code.

Power to hold investigation or preliminary inquiry.

ON RECEIVING REPORT MAY DIRECT INVESTIGATION OR PRELIMINARY INQUIRY.—An inquiry can be made under this section only when a police report within the terms of S. 157 is submitted, i. e., a report before the completion of the police investigation or inquiry ; but when such report is submitted after investigation the Magistrate has no power to act under this section, In 4 C.W.N. 351 followed in 32 A. 80 on information laid before the Police charging a person with house trespass with intent to commit adultery, the Police reported the case to be one of criminal trespass disbelieving the intent with which the

trespass was committed. This report of the Police was not one coming under S. 157 *supra* and the Magistrate was therefore not entitled to act under this section, and his action not being a judicial proceeding, the direction of the Magistrate to prosecute the complainant under S. 211, I.P.C., was held bad. The object of the inquiry is to ascertain whether there are grounds for believing the accusation to be unfounded and when the Police after full inquiry report the commission of an offence, the Magistrate has no jurisdiction to hold a preliminary inquiry under this section or to make a further inquiry under S. 202, *infra*, 1898 A.W.N. 87; 32 A. 30; 17 C.W.N. 824; 43 C. 1152. This section will apply only when a police report is received, not when the complaint is made direct to a Magistrate in which case the Magistrate is bound to proceed under S. 200, *infra*, 30 C. 923; 10 M.L.T. 120=12 Cr. L. J. 463. When a Magistrate having taken cognizance of a case refers it to the police for inquiry and report, the police have no power to prefer a charge-sheet before another Magistrate and such other Magistrate has no jurisdiction to take cognizance of the case, 29 Ind. Cas. 98; 11 C.W.N. 832.

HAS REASON TO SUSPECT.—Compare the language of this section with that of S. 154, *supra*. Under the latter section every information relating to the commission of a cognizable offence must be reduced to writing. But under this section it is only when the information gives a reasonable suspicion as to the commission of an offence that compels the officer to take action. It can hardly be contended that every inquiry which a police officer makes must necessarily be an investigation under this section. Most investigations are initiated on information recorded under S. 154 and vouched for by the informant. But the police must frequently hear of alleged offences from less reliable sources, e.g., village gossip or the receipt of a telegram which so far as authenticity goes stands in no better position. In such cases it is discretionary with the officer to take action or not, before deciding as to the course he may adopt. He may frequently deem it well to make few preliminary and informal inquiries as to whether there is anything in what he has heard to render a formal investigation desirable and such action will not amount to an investigation under this section, (1914) M.W.N. 392=1 L.W. 355=3 Cr. L. Rex, 245=15 Cr. L.J. 622.

SHALL NOT INVESTIGATE.—As a rule every complaint of a cognizable offence should be investigated either at the station or by visiting the scene of alleged crime. Investigation should only be refused on the ground of (1) the severity of the offence (2) the absence of any procurable evidence in cases of a petty nature, mere suspicion that the evidence offered is false is no reason for non-investigation and whenever the complainant alleges the existence of any evidence the case should be inquired into. *Madras Police Manual*, Vol. 1, p. 311. By the addition now made in sub-section (2) it is provided that when investigation is refused the officer should forthwith give notice of this fact to the informant.

DEPUTE ANY SUBORDINATE MAGISTRATE TO PROCEED.—On receiving a police-report if a case is made over to a Subordinate Magistrate under this section, he is certainly required to dispose of it judicially, and if he holds a local inquiry and examines the accused he must be careful to observe the requirements of S. 164 and S. 364, *infra*; otherwise any statement so obtained may be inadmissible in evidence, 2 C.W.N. 702.

OTHERWISE DISPOSE OF THE CASE.—He may dismiss the complaint. If the police send a report that there is no sufficient ground for entering on an investigation the Magistrate may dismiss the complaint. But if a complaint is made to a Magistrate himself he is bound to proceed under S. 200, *infra*, 30 C. 923; (1911) 2 M.W.N. 74=10 M.L.T. 120=12 Cr. L.J. 463=11 Ind. Cas. 999.

160. Any police-officer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted

Police-officer's power to require attendance of witnesses.

with the circumstances of the case ; and such person shall attend as so required.

SCOPE OF THE SECTION.—This section does not authorise a police-officer to require the attendance of an accused person with a view to his answering the charge. The intention of the Legislature seems to have been only to provide a facility for obtaining evidence and for procuring the attendance of the accused who may be arrested at any time, if necessary, without a warrant. The police may order any person whom they believe to be in a position to give information to attend and do so and the person so ordered may decline to make any incriminating statement, but he cannot be summoned to answer the complaint, 7 M. 274 (F.B.); Weir II, 121; 33 C. 1023. Examination of women, especially of pardanashin ladies should be conducted in their own houses and not in the police station, 9 C.W.N. 139 = 2 Cr. L.J. 51; see 4 Bom. L.R. 614, where it was held that a police-officer had no power under this section to call upon the accused to produce any documents in his possession before him. Neither is a police-officer authorised to take a security bond for the production of any person before the police, 11 C. 77. Nor can a police-officer require a surety to attend the police-station to be examined and to give information as to the person for whom he stands surety, 1885 A.W.N. 43. Under this section a police-officer is not empowered to arrest or detain persons whose evidence is required for investigation, 7 W.R. (Cr.) 3 nor can he take a security bond for the production of any person before the Police 11 C. 77.

BY ORDER IN WRITING REQUIRE THE ATTENDANCE.—When the order is not in writing non-attendance is not punishable under S. 174, I.P.C., Weir I. 86; II, 123; 20 Cr. L.J. 48; a witness failing to attend before a police-officer making an investigation is liable to be prosecuted under S. 174, I.P.C., 24 C. 320, but a Magistrate is not competent to issue a warrant for the arrest and production of a person to be examined by the police.

161. (1) Any police-officer making an investigation under this Chapter or any police-officer not below such rank as *Examination of witnesses by police.* the Local Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

AMENDMENT.—The addition of the words in sub-section (1) "or any police-officer not below such rank as the Local Government may, by general or special order, prescribe in this behalf acting on the requisition of such officer" enables an investigating police-officer to examine witnesses. But it is left to the Local Government to prescribe the rank of such police-officer.

SCOPE OF THE SECTION.—This section makes a person interrogated by the police making an investigation bound to answer all questions relating to the case put to him by the police officer. The investigation dealt with by this section is limited to an investigation made under Chapter XIV of the Code which relates to information as to the commission of a cognizable offence but not to a merely threatened or contemplated offence—in which case action is to be taken under the preventive sections of the Code. It is possible to argue that the words 'every information relating to the commission of a cognizable offence' occurring in S. 154

supra may be held to cover information relating to the threatened commission of a cognizable offence. It would have been much better if the Code had contained a general power to Magistrates to refer any matter brought to their notice for investigation to the police without confining it to Chapter XIV. Petitions under S. 107, *supra* are habitually referred for investigation to police by Magistrates which is a great safeguard to the subject and no class of cases require more scrutiny from the very nature of the allegations made. Any allegation that a man has not committed an offence but contemplates committing one can obviously be made of recklessly. It will be well that the Code should be revised and that an express provision should be made conferring power in terms upon Magistrates to refer petition under S. 107 *supra* for investigation, 23 L.W. 327 referring to Weir II. 51.

MAY EXAMINE ORALLY.—The words previously were 'and reduce into writing any statements made by the persons so examined.' The reason for the change is that statements before the police may be hurriedly taken down on rough notes; the police-officer is not trained in taking evidence and the notes are often fairied out by another officer. They bear no resemblance to depositions and ought to have no weight as such attached to them. Ss. 164 and 364 do not apply to examination of witnesses under this section nor can the witnesses be put on oath, 15 A 11.

ANY PERSON.—These words are wide enough to include the person arrested or to be arrested. When a police officer has evidence before him sufficient to justify the arrest of the person accused he should not preliminary to the arrest examine such person and record a statement from him in writing under this section and then immediately afterwards arrest him, 4 C.W.N. 129 at 140.

SHALL BE BOUND TO ANSWER ALL QUESTIONS.—The word 'truly' which occurred previously has been omitted. The Select Committee in omitting the word observe "we have amended this clause by reverting to the law as it stood under the Code of 1861 and 1872 and a practice which had existed for nearly fifteen years has been deliberately departed from." The result is there is now no legal obligation on a witness to state the truth in police investigation and consequently a conviction for perjury in an alternative charge of making contradictory statements before the Police and the Magistrate can no longer be had, 23 M. 554. The Select Committee further observe, "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 had no opportunity of verifying. 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 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 Ss. 202 and 203, I.P.C. appear to us to afford sufficient safeguard against false information." The law as it now stands is in accordance with the rulings in 7 C. 121 (F. B.). In S. 175 *infra* the word 'truly' is still retained and every person summoned shall be bound to answer truly all questions put by the police-officer. A statement to questions put by a police-officer under this section is privileged and cannot be made the ground of a charge of defamation, 16 M. 235, nor will a civil action for damages lie, 28 C. 794. It is highly improper for a police-officer to obtain a statement from an accused person professedly under this section and reduce it to writing, 27 C 293. A refusal to answer questions asked by a police-officer under this section is not punishable under Ss. 176, 179 and 187, I.P.C. as a person legally bound to state the truth or by any express provision of law to state the truth, 23 M. 544; 7 C. 121 (F. B.). Answers to questions put by police-officer under this section do not amount to institution of criminal proceedings within the meaning of S. 211, I.P.C. nor does he thereby charge any person within that section, 6 M.L.T. 133-4 Ind. Cas. 1081; 31 M. 506; 20 M.L.J. 133; Weir I. 193. A statement made by witness to a police officer in the course of an investigation under this chapter and recorded by him under this section cannot be treated as information given to a police-officer under S. 154 *supra*, and therefore if false, cannot be punished under S. 182, I.P.C., 26 Cr. L.J. 1582-80 Ind. Cas. 316.

*162. (1) 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; nor shall any such statement or any record thereof, whether in a police-diary or otherwise, or any part of such statement or record, 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:*

Statements to police not to be signed; use of such statements in evidence.

Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination:

Provided further, that, if the Court is of opinion that any part of any such statement is not relevant to the subject-matter of the inquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of section 32, clause (1), of the Indian Evidence Act, 1872.

AMENDMENT.—This section has been redrafted. "There has been some conflict of authority as regards the bearing of S. 157 of the Indian Evidence Act, 1872 on S. 162 of the Code, as regards the use which may be made of a statement made by any person to a police officer in the course of an investigation. The amendment provides that when such a statement or any part of it is used to impeach the credit of the witness it may also be used to corroborate his evidence. Reference may be made to the decision in 36 C. 281."—*Statement of Objects and Reasons.* See 39 B. 58 at 66-67, where conflicting rulings of the various High Courts are collected and considered, and the new amendment is in accordance with the view expressed therein. *Shah, J.*, pointed out "that the anomaly, if any, can be remedied by the Legislature and the duty of the court plainly is to construe the section without straining the language used by the Legislature." The various rulings which held that the statements can be used only to impeach the credit of a witness *i.e.*, may be used as evidence for the accused and not against the accused are no longer law and need not be considered after the amendment.

SCOPE AND OBJECT OF THE SECTION.—This section plainly constitutes an exception to the ordinary rule of evidence, 32 B. 111 (F.B.). This section in no way concerns the giving of oral evidence of the statement either by the prosecution or defence. Both sides are at full liberty to give oral evidence of the statement made in accordance with the provision of the Evidence Act for impeaching credit or corroborating and to use the writing

for refreshing the memory of the witness. This section only prohibits the use of the writing as evidence under S. 35 of the Evidence Act and nothing more. The reason is plain enough "such statements are recorded by police officers in the most haphazard manner. Officers conducting an investigation not unnaturally record what seems in their opinion material to the case at the stage and omit many matters equally material and it may be of supreme importance as the case develops. Besides that in most cases they are not experts, of what is and what is not evidence. The statements are recorded often hurriedly in the midst of a crowd and confusion, subject to frequent interruption and suggestion from by standards. Over and above all, they cannot be in any sense trained depositions, for they are not prepared in the way of a deposition. They are not read over to, nor are they signed by the deponents. There is no guarantee, that they contain much more or much less than what the witness had said." 18 A. 207 at 208. See also the remarks of *Sir George Knox, J.* in 7 A.L.J. 468=6 Ind. Cas. 101 to the same effect. The provisions of this section are enacted in the interests of the accused and have the effect of ensuring that the statements contained in the document can only be proved by calling the officer to whom the statements were made and thus affording the accused an opportunity of cross examination. Had it been intended to rule out all reference to the statements themselves and to exclude wholly the operation of S.157 of the Indian Evidence Act the language of the section would have been different, 6 Pat.L.J. 241 at 245. This section excludes only written statements and not oral statements made to police officer and does not affect the operation of S. 27, Indian Evidence Act, 20 L.W.(Sh.N.) 47. The words 'such statement' occurring in different portions of the section emphasises the view that oral evidence is not excluded, 48 M. 640. It is quite clear that under this section as amended, it is not now permissible that statements to the police, whether oral or written to be put in in evidence to corroborate a prosecution witness or to contradict a defence witness. To this extent the rulings in 22 B. 596 and 39 B. 58 which ruled that evidence of the kind is permissible are superseded by the enactment of the Legislature. It is quite clear from the very strong terms of the present section that a statement to the police can only be used for one purpose and that is by the accused to contradict a prosecution witness in the manner provided by S. 145, Indian Evidence Act, 26 Cr. L.J. 223=83 Ind. Cas. 107. The application of the amended section as before is to the written record, but the new section gives the accused a right to have a copy of such written statement for the purpose of using it to contradict the witness for the prosecution, 48 M. 640. But see 30 C.W.N. 112=27 Cr.L.J. 222=92 Ind.Cas. 174; where it was held that the statement made to a police officer is inadmissible in evidence and the police officer cannot be examined to prove whether he examined certain witnesses called by the accused as defence witnesses who denied their presence at the scene of occurrence. See also 27 Cr. L.J. 263=92 Ind. Cas. 439. Statements to a police officer are inadmissible for any purpose save as provided by this section and the Judge is not entitled to use those statements confronting the witnesses, 27 Cr. L.J. 277=92 Ind. Cas. 453. It is quite true that under this section statements made to the police by witnesses can only be used by the defence for the purpose of contradicting a prosecution witness. But where after a witness had made some statement before a Magistrate he was asked if he had made that statement to the police and thereafter when the sub-Inspector of police was examined he was asked whether the witness had made that statement to him, neither the witness nor the sub-Inspector having been asked what statements they made and no statement being introduced into the evidence as having been made by the witness before the sub-Inspector, it was held this section did not prevent the prosecution after the witness has made a statement from asking him simply whether he made that statement to the police, or when a witness has made a statement in his evidence, from asking the sub-Inspector whether in fact the witness had made that statement to him, and in so doing there is no use of the statement recorded by the police during their investigation as the witnesses or the sub-Inspector are merely asked as to a certain fact, 4 Pat. 203 at 209. This section does not apply to an investigation by the Calcutta Police ordered by the Presidency Magistrate under S. 156 (3), *supra*. All investigation by the Police must be controlled in the Muffassil by this Code and in Calcutta by the Police Act or by Circular Orders issued and the Police have no inherent power in Calcutta beyond that conferred by the Police Act or circular orders. So the Police in Calcutta cannot take statements generally apart from the provisions of the Act and then put the statements so taken in evidence against

persons who made them. That would be to strike at the principles to preserve which the provisions of this section were enacted and would introduce a very dangerous principle, 53 C. 650 at 658. Judging from the cursory way in which these statements are recorded, this section aims at preventing undue importance being attached to the written record which would undoubtedly put too much power in the hands of the police. Oral evidence as to the statement made can be given and there is nothing in the language of the section preventing such a course, 35 M. 397 (F.B.), following the decision in 26 C. 281 and also the view taken by *Karamat Hussain, J.* in 7 A.L.J. 468-6 Ind. Cas. 101 and dissenting from the view taken by the Bombay High Court. The language used "nor shall such writing be used as evidence" also clearly supports the view that oral evidence as to what was stated to a police-officer can be given. Oral accounts of statements made by witnesses in the police investigation under S. 161, *supra* are admissible under S. 157, Indian Evidence Act to corroborate the statements of those witnesses at the trial although the written records of such statements are inadmissible under this section, 6 Pat. L.J. 241. See 39 B. 58; 32 B. 111; 9 Bom. L.R. 366; 35 C. 281; 26 Cr. L.J. 223-83 Ind. Cas. 1007. The old section was not an absolute bar to the admissibility of oral statements for certain definite purposes. The word "such statement" used in the amended section may be vague to include oral and written statements, but the whole design of the section implies otherwise. The provisos clearly apply only to written statement and exclude oral statements. If otherwise, the section would prevent an accused person using in his favour oral statements and the section did not intend such a result. When the section uses "such statement" it is clear that "such" means "if reduced to writing." The old section had nothing to do with statements not reduced to writing and was designed to prevent entries in police diaries from being used against accused persons. Considering the voluminous case law interpreting the whole section, if the new section was intended to be much wider to cover oral statements also it would have been unequivocally said so. The second proviso is meaningless if "such statement" means "oral statement." If the section is intended to prohibit the use of oral statements made to the police, an amendment of S. 27 of the Indian Evidence Act would have been made. Thus the new section is confined as the old section to written record. The new section was intended to confer on the accused a legal right which he did not possess before and as regards proof and use of oral statements the law is unaltered and is as it was before. All oral statements which were previously admissible under the Indian Evidence Act the use of which is not prohibited by this Code are still admissible and may be used, 48 M. 640 at p. 645-6. But a contrary view was taken in *Calcutta* in, 42 C.L.J. 524 and 528 where such statements were held inadmissible for all purposes except as provided in paragraph (2) of sub-section (1). The *Lahore High Court* has also taken a view different from that of the *Madras High Court* and held this section as it existed prior to the amendment of 1923 expressly prohibited the use of the record containing the statement to the police as evidence against the accused, and while the High Courts were at variance as to the admissibility of the oral evidence of such statements to corroborate the prosecution witnesses, they were unanimous that the writing could not be admitted in evidence against the accused. Even the controversy as to the admissibility of oral evidence has now been set at rest by the amendment in 1923 which substituted the words "nor shall any such statement or any record thereof be used for any purpose" for the words "nor shall such writing be used as evidence" which occurred prior to the amendment. The result is that not only the record of the statement of a witness taken under S. 161 *supra* is excluded from evidence, but also the proof of such statement by oral evidence for corroborating the testimony of prosecution witnesses, 6 Lah. 171 at p. 174 followed in 7 Lah. 264. See also 6 Lah. 24. The *Patina High Court* has pronounced in the clearest terms against the admissibility of oral evidence. "The effect of the Amending Act of 1923 which is very great has not yet been fully appreciated by the Subordinate Courts. The new Act has substituted a section which prohibits any statement (now covered by S. 32 (1), Indian Evidence Act) or any record of it, whether in a police diary or otherwise or any part of such statement or record for any purpose at any inquiry or trial. The expression "for any purpose" is very important and should be given full weight. If the Legislature means merely to prohibit the use of writing as evidence there is no point in amending the section or substituting the present stringent sub-section (1). It is not merely use as evidence of the statement or the

record thereof that is prohibited by sub-section (1) but use of it for any purpose unless such use comes within subsequent specific provisions of the Code. There is for all practical purposes no such provision except in the first proviso to sub-section (1) and in sub-section (2), for this section governs also S. 172 (2). Sub-section (2) excludes from the operation of the prohibition cases covered by S. 32 (1), Indian Evidence Act. The first proviso to the section makes an exception in favour of an accused but it is an exception most jealously circumscribed under the proviso itself. Any part of such statement reduced to writing may be used to contradict the witness who made it. The limitations are strict, (1) only the statement of a prosecution witness can be used; (2) only if it has been reduced to writing; (3) only a part of the statement recorded can be used; (4) such part must be duly proved; (5) it must be a contradiction of the evidence of the witness in Court; (6) it must be used as provided in S. 145, Indian Evidence Act, *i.e.*, it can be used after the attention of the witness has been drawn to it. Such a statement which does not contradict the testimony of a witness cannot be proved in any circumstances. Unquestionably the new sub-section has greatly enhanced the difficulty of trials by excluding what was previously admissible in evidence. It is unfavourable to the prosecution and to a less but still considerable extent to the defence. Experience points to the conclusion that the Courts do apply the provisions against the prosecution but fail to do so against the defence. It is not a sufficient ground for deviating from what is intended to be a rigid rule that such deviation will favour the accused. It is incumbent on Courts loyally to observe the prohibition of the Legislature in all cases where it is applicable. The Legislature has employed firm language palpably intended to make a clean sweep of the use at the trial any statement to police during investigation not only in evidence but for any purpose restricted to one exception. The danger of endeavouring to temper this provision in favour of the defence and to widen the exception is not warranted. 27 Cr. L.J. 362=92 Ind. Cas. 874. The *Rangoon High Court* in 4 Rang. 72 (F.B.) has also dissented from the Madras view and held that the words 'any such statements' in sub-section (1) apply both to oral statements and those reduced to writing. This section has nothing to do with statements not reduced to writing. When therefore a statement to the Police is not reduced to writing the police-officer may be questioned as to such a statement made to him as also any other person who may have heard it made. This section does not render such a statement inadmissible, 11 B.H.C.R. 120. There is nothing in this section which limits the prohibition of the use of the written statement recorded by a police-officer as evidence of the matter of the charge which is actually under investigation by the police-officer. When the statement is made, the prohibition extends also to the use of such written statement against the person who is alleged to have made the statement and such a written statement does not come within the description of a 'record' within the meaning of S. 35, Indian Evidence Act, 28 C. 318. It is clear that the actual wording of the section makes no exception in respect of statements made by accused persons. The words are "no statement made by any person" and must include statements by accused persons. There is nothing in the section as worded to suggest that they ought to be read as if they were "any person other than an accused person." 4 Rang. 72 at 86. No statement taken under this section during the police investigation should be used at the trial unless (1) the accused asks the Court to refer to the police record (2) the accused is furnished with a copy of the statement including portions not relevant to the trial or inexpedient or not essential to disclose to him (3) the statements have been duly proved when they may be used to contradict the witnesses, 4 Rang. 356. See also 27 Cr. L.J. 362 at 368=92 Ind. Cas. 874; 28 Bom. L.R. 965=26 Cr. L.J. 223=83 Ind. Cas. 1007.

NO STATEMENT BY ANY PERSON IF TAKEN DOWN IN WRITING SHALL BE SIGNED.—The statement of "any person" refers to the one made by a person examined as a witness during police investigation and not to statements of accused persons in respect of whom such investigation is being held. The section prohibits the use of the statement of a witness at the trial held in respect of some offence which was under investigation except for contradicting such witness as provided by S. 145, Indian Evidence Act. An accused's statement to the police not amounting to a confession is not *ipso facto* excluded from evidence, 26 Cr.L.J. 897=86 Ind.Cas. 961; 1926 Pat. 13=27 Cr.L.J. 753=95 Ind.Cas. 278; 5 Pat. 83; 27 Cr. L.J. 455=

—93 Ind. Cas. 248 following 26 Cr. L.J. 778—86 Ind. Cas. 410. 4 Rang. 72. Reading S. 161 and this section it is clear that the main object of the Legislature is to prohibit the use of the statement of prosecution witnesses as corroboration under S. 157, Indian Evidence Act. The general provisions of the law with regard to the admissibility of accused's statements like other admissions do not seem to be effected. If it were otherwise Ss. 27 and 28, Indian Evidence Act must be considered repealed. Such a contingency cannot have been the intention of the Legislature. It is important for the Court to know the defence set up by the accused at the earliest moment. If this section is given the meaning which is sought to be given, accused persons would be most seriously prejudiced and the only object of S. 163, *intra* would be to enable the police to get clues for the purpose of investigating the charge. If that were the case the Court would be deprived of much valuable material for testing the truth of the defence. To shut out corroborative evidence such as statements made by defence witnesses during investigation is prejudicial enough but unless compelled to do so, we should not add to the prejudice by shutting exculpatory statements by accused and if the new amendment does not operate to exclude such statements then S. 27 of the Evidence Act remains unrepealed. This section applies to the statements of witnesses examined by the police in the course of the investigation and not to the statement of the accused person and it does not override or modify S. 27 of the Indian Evidence Act. 7 Lah. 84 at 87; 5 Pat. 63. It is contrary to the policy of this section to prosecute a person for decaying his signature to a statement made before the Police as the law expressly prohibits the writing being signed by the deponent, 14 Cr. L.J. 302. It was apparently considered unsafe to assume that a police-officer making an investigation would correctly record statements made to him. It is therefore provided that the statements should not be signed by the witness and should not be admissible in evidence. At the same time it was regarded as proper to make the police-officer's record of such statements available to the accused for the purpose of cross-examining any witness called for the prosecution, 35 M. 397 at 440. The mere fact that the statements are signed contrary to the provisions of this section will not make them admissible under S. 154, *supra*, 25 Cr. L.J. 401—77 Ind. Cas. 481.

SUB-SECTION (1).—Two different constructions are possible of this sub-section. First is that the words "nor shall any such statements" mean and refer to a statement (a) made by any person to a police-officer and (b) in the course of an investigation under this Chapter. In this construction the words "if reduced into writing" only apply to the words "be signed by the person making it." The alternative construction, is that the words "nor shall any such statement" mean a statement made to a police-officer in the course of an investigation and reduced into writing. The words following however "nor shall any such statement—" seem to favour the former construction rather than the latter because if the words any such statement, were to be confined to written statement, there would seem to be no object in adding "or any record thereof"; the view taken in, 48 M. 640 at 645 accepting the second construction is unsound because in the provisions the context clearly shows that it is only statements reduced to writing that are referred to. If oral statements are to be excluded nothing would have been simpler for the Legislature to say "made by any person to a police-officer in the course of investigation under this chapter and reduced to writing." Instead of this it has used a hypothetical phrase which, in its ordinary grammatical sense might be taken only to apply and qualify the words be signed by the person making it. A comparison of the amended sub-section with the sub-section as it stood before the amendment makes this point clear. The words "such writing" has been dropped by the Legislature now. A statement reduced to writing might be presumed to be more accurate and reliable than an oral. If written statements are to be excluded it cannot be presumed that the Legislature intended to leave the less reliable oral statements admissible without any safeguard or limitation. 4 Rang. 72 (F.B.) at 80; See also 26 Bom. L.R. 865—26 Cr. L.J. 228—83 Ind. Cas. 1007; 6 Lah. 24 and 171; 7 Lah. 285; 4 Pat. 209; 6 Pat. 63; 27 Cr. L.J. 382—92 Ind. Cas. 874; 42 C.L.J. 524 and 528 but see 48 M. 640.

PROVISO (1).—The application of the amended section is confined, as before to the written record, but the new section gives the accused a right to have a copy of such written statement for the purpose of using it to contradict the witness for prosecution; 48 M. 640. This section provides for facilities to the accused to obtain copies of the police records, 3 Pat. L.J. 588; A.

Magistrate is not justified in referring to statements made to the police which are recorded in the police diaries unless and until the witness who had made the statements have been put in the witness box and confronted by those statements. 27 Cr. L.J. 607=94 Ind. Cas. 271. The right to obtain a copy before the amendment was entirely in the discretion of the court and it was only if the Magistrate considered it expedient in the interests of justice to grant copies of the statements made to the Police that the accused can obtain copies, 28 M.L.J. 182. The Code now gives an accused person a right to ask the Court to send for and peruse statements of witnesses and to have copies of statements furnished to him before the beginning of the preliminary enquiry unless the Court thinks that any part of such statement is irrelevant or opposed to public interest or not in the interests of justice. See also 4 Rang. 355. The words "if duly proved" clearly show that the record of the statement cannot be admitted in evidence straightway, but the officer before whom the statement was made should ordinarily be examined as to any alleged statement or omitted statement that is relied on by the accused for contradicting the witness and S. 67 Indian Evidence Act applies to this case as well as to any other similar case. If a particular police-officer who recorded the statement is not available any other means of proving the statement may be availed of, e.g., evidence as to the handwriting of that officer, 26 Bom. L.R. 965=26 Cr. L.J. 228=83 Ind. Cas. 1007. It is quite true that under this section statements made by witnesses to the police can be used by the defence for contradicting prosecution witnesses, but where a witness had made some statement before a Magistrate he was asked if he did so to the police and thereafter when the sub-Inspector of police was examined he was asked whether the witness made the statement to him, neither the witness nor the sub-Inspector having been asked what statements they made and no statement being introduced into the evidence as having been made by the witness before the sub-Inspector, it was held that this section did not prevent the prosecution after the witness has made a statement from asking him simply whether he made that statement to the police or when witness has made a statement in his evidence from asking the sub-Inspector whether in fact the witness had made that statement to him and in so doing there is no use of the statement recorded by the police during their investigation as the witnesses or the sub-Inspector are merely asked as to a certain fact. 4 Pat. 204 at 209. *followed in* 5 Pat. 348 where 27 Cr.L.J. 362=92 Ind. Cas. 874 is not followed.

The decision in 30 M. 466 is no longer law after the amendment. The right to obtain copies under this section is restricted entirely within the scope of this proviso. The accused according to this proviso is to satisfy the Magistrate that the investigating police-officer has taken down in writing a statement made to him by a witness or has entered it in his diary and this could be known only after the examination of the police-officer in most cases. The proper procedure is for the accused at the time the witness, whose statement is so recorded, appears before the court to ask the court to refer to such writing and furnish him with copies thereof. This is a practice, it is not difficult to carry out. It only requires a little adjustment of the time of the court in cases where the diaries do not happen to be in court or require translation, 33 C. 1023 at 1027. The amendment is in accordance with these observations. The wording of the section fixes the stages when the accused person is entitled to ask the court to furnish him with copies of the statement made. The words "when any witness is called for the prosecution" is significant and the purpose of furnishing the copy is to contradict the witness which implies that the witness has already made a statement which is open to contradiction and therefore the stage at which the copy is to be furnished is the stage when the witness has made a statement which lays him open to contradiction by his former statement to the police, and the contention that before cross-examination is opened at all, the accused is entitled to all statements made at the police investigation is untenable being in effect that he is entitled to a copy of the prosecution brief, 22 L.W. 784=27 Cr. L.J. 100=91 Ind. Cas. 532. See also 39 C.W.N. 808=27 Cr. L.J. 611=94 Ind. Cas. 593. When a Magistrate on the requisition of accused sent for statements made by certain witnesses before the Police during the investigation and entered in the special diary but passed an order that the statements in no way contradict the evidence given before him and returned them, and the Sessions Judge on appeal from the conviction without sending for the statements and considering the same confirmed the conviction held by the High Court

that the Sessions Judge should rehear the appeal after sending for the statements recorded by the Police, grant copies to the accused and give him an opportunity for further cross-examination of the witnesses, 36 C. 580.

FROYISO (2).—This is new and empowers the Court to exclude any part of the statement from the copy furnished to the accused on the ground of its being not relevant or on grounds of public policy after recording its opinion to that effect. The ruling in 26 M.L.J. 182 which held that the Magistrate when refusing copies is not bound to say that he considered it inexpedient to grant them is no longer law and the amendment is in accordance with, 36 C. 580.

SUB-SECTION (2).—S. 32, Evidence Act, deals with a statement by a person as to the cause of his death or to any of the circumstances which resulted in his death. The dying declaration of a deceased person must be taken in the presence of the accused. If not so taken, the writing cannot be admitted to prove the statement made. It may, however, be proved in the ordinary way by a person who heard it and the writing may be used for refreshing the witness's memory, 8 C. 211. Where the dying declaration was recorded by the police and attested by certain witnesses and the writing was sought to be admitted in evidence, it was held that it could not be so admitted, but the statement of the deceased might be proved by the persons who heard what was stated by the deceased, 8 C.W.N. 921; 16 Cr. L.J. 739; 38 C. 659; but to render the statement admissible under this section the accused must be on his trial for causing death, 25 B. 45. In 7 A. 335 (F.B.) it was held that signs made by the deceased in response to questions put as to the cause of his injury which resulted in his death are *verbal statements* within the meaning of S. 32 of the Evidence Act and therefore evidence of questions put and signs made by the deceased were admissible in evidence.

163. (1) No police-officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement threat or promise as is mentioned in the Indian Evidence Act, 1872, section 24.

No inducement to be offered.

(2) But no police-officer or other person shall prevent by any caution or otherwise any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will.

NO POLICE-OFFICER.—The term "Police-officer" should be read in its more comprehensive and popular meaning, 1 C. 207; 1 C.L.R. 21; 17 B. 488. A village headman in Madras is not a police-officer and therefore a confession made to him is not inadmissible in evidence, 7 M. 237. See the explanation to S. 26 of the Evidence Act which says that a Magistrate in that section does not include the head of a village in Madras or Burmah or elsewhere discharging magisterial functions unless such headman is a Magistrate exercising powers of a Magistrate under the Code.

PERSON IN AUTHORITY.—There is no definition of this expression in the Code or anywhere else. "The test would seem to be, had the person authority to interfere with the matter, and any concern or interest in it, would appear to be sufficient to give him authority"—per *Sargeant, C.J.*, in 9 B.H.C.R. 338 at 369. A Magistrate recording a confession, 10 C. 778; 3 A. 260; an Honorary Magistrate, 1 W.R. (Cr.) 24; a Village Magistrate, 26 M. 33; a panchayatdar, 11 C.W.N. 904; 9 C.W.N. 374 (*contra* 4 Bom. L.R. 785; 4 A. 46) have been held to be "persons in authority," but not a medical officer, 8 Bom. L.R. 607—4 Cr. L.J. 49.

SHALL OFFER ANY INDUCEMENT.—It was argued in 31 A. 592 (F.B.) that the provisions of this section were not merely *directory* but *imperative* and *prohibitive* and when there is nothing in the Code to show what will be the result of any disobedience of the law, the general rule that such illegality resulted in a nullification of all that followed or could be said

to follow directly from it ; but it was held that it is to the Indian Evidence Act and not to the Code of Criminal Procedure that we have to look as to whether the evidence in point is or is not admissible, the more so as the Code contains Chapter XLI entitled "*Special Rules of Evidence.*" Inducement must have reference in any charge against the accused, 4 A. 46. Mere caution, promise of secrecy, is not inducement, threat or promise within this section, 3 Bom L.R. 404. When there was any inducement held out to the accused to confess, such confession is inadmissible in evidence against him, 10 C. 775 ; but the discovery of some fact in consequence of the information so obtained from the accused may make it evidence in so far as it relates to that fact, 28 M. 38. An admission obtained from the accused by persuasion or promise of immunity by the police is inadmissible in evidence, 9 W.R. (Cr.) 16.

THREAT OR PROMISE.—All oppression and treachery in regard to obtaining confessions are to be avoided by the police under pain of the severest penalties and the practice of employing private individuals to worm out confessions from accused persons is strictly prohibited. Nothing so clearly shows want of detective tact, talent and resource and of patient industry in a police-officer as the resort to foul means to obtain confessions. The most ignorant and olumcy can make out a case, if he can torture the culprit till he tells him all about it. The detective talent and sagacity manifest themselves in patient and unremitting industry in weaving round the culprit such a net work of undoubted facts and damning circumstances gathered from a variety of sources that he cannot escape. *Madras Police Manual, Vol. I, p. 95.*

164. (1) *Any Presidency Magistrate, any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the Local Government may, if he is not a police-officer, record any statement or confession made to him in the course of an investigation under this Chapter or at any time afterwards before the commencement of the inquiry or trial.*

Power to record statements and confessions.

(2) Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

(3) *A 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 no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily ; and, when he records any confession, he 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."

Explanation.—It is not necessary that the Magistrate receiving and recording a confession or statement should be a Magistrate having jurisdiction in the case.

AMENDMENT.—The words in italics in sub-section (1) are new; third-class Magistrates are now not empowered to record confessions, and second-class Magistrates are to be specially empowered. In sub-section (3) the italicised words are new and are introduced to give better guarantee as to the genuineness of the confession and its voluntary character.

SCOPE AND OBJECT OF THE SECTION.—S. 162, *supra*, prohibits the written record of statements taken by the police in the course of an investigation being used as evidence, and therefore it is found necessary to have a *prima facie* correct record made by a Magistrate and which can, without danger, be admitted under S. 35 of the Evidence Act. This section may be regarded as supplementary to the preceding sections of the Code regulating the powers of the police to record statements. This section is not intended to make Magistrates the instruments of police for the purpose of recording statements at their desire. The Magistrate should abstain from recording the evidence of witnesses unless he has some assurance from the witnesses that they attend voluntarily and are making statements to him of their own accord. 7 C.W.N. 345; 4 C.W.N. 49. This section does not apply to a confession recorded in a Presidency-town in the course of a police investigation not held under the orders of a Presidency Magistrate under Ss. 155 and 156 (3), *supra*, 53 C. 67 following 15 C. 598 but see 27 Cr. L. J. 957-98 Ind. Cas. 509, where it was held distinguishing the Calcutta cases that the change in the law in 1923 was obviously made to allow a Presidency Magistrate to record a confession in the course of a police investigation, otherwise the amendment would be altogether meaningless and S. 1 of the Code bars the application of the section to the police and not to a Magistrate not being a police officer. This section is one of the exceptions to the main principles of evidence that a document recording the confession may not be given in evidence, when the witness to the statement can be produced and can prove it by oral testimony. This section is an exception to the well established rule of law and applying as it does to criminal proceedings its provisions must always be complied within the strictest possible manner. The essentials are, the Magistrate recording the confession shall, before doing so explain to the accused (1) that he is not bound to make a confession at all; (2) that if he does so it may be used as evidence against him and no Magistrate shall record a confession unless upon questioning the accused he has reason to believe the confession to be voluntary and the document when reduced to writing must contain at the foot of it a memorandum of the essentials as stated above. The provisions of this section as amended are somewhat fuller and two new provisions, *viz.*, that the person making it is to be warned that he need not make any confession at all and that if he does so it may be used as evidence against him. If the memorandum contains the proper note at the foot of it it shall be presumed that all the formalities referred to in the footnote have been complied with. Where however it is defective, under S. 533, the defect may be cured by examining the Magistrate as a witness who recorded the confession and if his evidence shows that the requirements have been complied with then the confession becomes admissible in evidence, 28 Cr. L.J. 1074-88 Ind. Cas. 18. Under S. 533 a defect in form is curable and a defect in substance is not. If the warning was given by the Magistrate, but he failed to embody the fact in the memorandum such a defect is curable. But if the warning had not in fact been given the defect cannot be cured, as the statement cannot be held to have been duly made, 27 Cr. L.J. 814-93 Ind. Cas. 978. Punctilliousness and care in the recording of a confession are of the utmost importance and it is essential that the Magistrate should satisfy himself in every reasonable way before recording it that it is made voluntarily. The Magistrate should question the person, to find out whether he is making the

statement voluntarily. Such questions must be directed to eliciting facts which will enable the Magistrate to judge of the character of the confession and not merely to repeat some formulae which the accused can scarcely appreciate, 26 Cr. L.J. 782-86 Ind. Cas. 414. The Magistrate ought to be satisfied before he proceeds to record the statement or confession that it is voluntarily made, 3 A. 253. The Magistrate cannot under this section require the attendance of any person and has no power to put questions to the witness except to make the meaning of the deponent clear. Nor can a police-officer compel a witness to go before a Magistrate to make a statement under this section, 29 C. 433; 6 C.W.N. 596. If a police-officer has reason to believe that the witnesses are likely to be gained over he should send without any delay the accused and the witnesses to the Magistrate having jurisdiction. This section was not intended to enable the police to obtain an incriminating statement from some person, and as it were to put a seal on that statement by sending in that person to a Magistrate practically under custody, to be examined before the judicial inquiry or trial, and therefore compromised in his evidence when judicial proceedings are regularly taken, 27 C. 295 at 300. This section only applies to statements recorded before inquiry or trial commences, 32 C. 1035; 16 M. 421; 8 Bom. L.R. 589. Under this section the Magistrate recording a confession is bound to record every question put to the person making the confession. It is of great importance that the provision of law should be obeyed. Otherwise it would be impossible to tell how far the deponent has deposed voluntarily and how far his statement was got out of him by cross-examining him by means of questions put to him, 26 Cr. L.J. 1209-88 Ind. Cas. 729.

ANY PRESIDENCY MAGISTRATE, ETC.—As to power of Presidency Magistrates to record confessions, see 27 Cr. L.J. 957-96 Ind. Cas. 509 *distinguishing* the cases in 52 C. 67 and 15 C. 593. All Magistrates are not empowered now. Third-class Magistrates have no power to record confessions and second-class Magistrates have to be specially empowered.

he explanation to this section makes it clear that neither the fact that a Magistrate has no jurisdiction to inquire into or try the case nor the fact that he will be the Magistrate who will have to try the case later on will disentitle him from recording a statement or confession under this section. In 3 C.W.N. 387 it was held that if after recording a confession under this section the same Magistrate holds the subsequent inquiry it will not make the confession inadmissible, see also 37 C. 457.

IF HE IS NOT A POLICE-OFFICER.—This expression is not defined in the Code. See S. 4 (1) (p) which defines officer in charge of a police station as including the police-officer above the rank of a constable. In 9 M. 97, it was held that there being no definition of the term "police-officer" in the Abkari Act, the definition of the General Police Act XXIV of 1859, S. 1, must be applied. The powers are to be exercised by Magistrates who are not police officers. Even a police officer cannot be employed as a scribe to take down a confession, 9 C.L.J. 58-10 Cr. L.J. 325-3 Ind. Cas. 625. Police officers having Magisterial powers are disqualified from recording statements or confession, 1 C. 207. A village *patel* in Bombay and village headman in Madras are not competent to record confession, 17 B. 435; 8 Mad. Jur. 149.

MAY RECORD ANY STATEMENT OR CONFESSION.—The statement which this section contemplates is the statement of a witness and not of an accused. Such a statement is admissible in evidence to corroborate the statement made by a witness before the Committing Magistrate and from which the witness resiles in Sessions Court, 45 M. 755. Sub-section (2) of this section requires that the statement contemplated by this section should be recorded in the manner provided by S. 364 and the mode prescribed for recording evidence (Ss. 355 to 368) can only relate to the statements of witnesses, while the manner provided by S. 364 relates to all statements of accused persons whether amounting to confession or not. If the section had intended the term "statement" as used in it to include statements of accused persons as well as those of witnesses it might have directed the former class of statements to be recorded in the manner prescribed in S. 364 instead of directing as it does, that statements within the meaning of the section are to be recorded in the manner prescribed in S. 364. The reason is that the section relates to a stage of the case, namely, the police investigation stage, at which statements of the accused which are other than voluntary confessions and which are to be elicited by his examination are not intended to be obtained from him. Ss. 209 and 342,

which are the only provisions of the Code authorising the examination of the accused clearly showing the object of the examination is not to obtain criminating statements from the accused, but is only to enable him to explain circumstances against him in the evidence adduced, 2 C. W.N. 702 at 715-716 ; 2 Lah. 129. There is a very clear and important distinction drawn in S. 164 ; a statement is to be recorded in one of the modes in which evidence is to be taken ; a confession in the manner required by S. 364. The taking of a "statement" appears to presuppose a charge or a reasonable suspicion against some person other than the person making such statement, 9 M. 224 at 238 ; 39 M. 877 at 979 ; see also 2 B. 543 ; 2 Lah. 129 and 3 C.W.N. 22. It is not obligatory under this section on a Magistrate holding an investigation or preliminary inquiry under S. 159, *supra* to record in writing a confession made to him by an accused, and such confession may be proved by oral testimony of the Magistrate to whom the confession was made, 35 M. 230, but see, 39 C. 167 ; where oral evidence was held inadmissible. Where an accused person makes a statement under this section before a Magistrate not being a confession but of an exculpatory character such statement is still admissible in evidence against the accused at his trial as evidence of a fact relative to the prosecution case. 4 Patna 327 where 39 C. 167 ; 2 C.W.N. 702 and 7 A. 646 ; are referred to. See also 26 Cr. L.J. 1279-88 Ind. Cas. 1085 where it was held that the word "statement" occurring in this section is not limited to a statement by a witness but includes also one made by an accused person not amounting to a confession.

IN THE COURSE OF AN INVESTIGATION OR AT ANY TIME AFTERWARDS BEFORE COMMENCEMENT OF THE INQUIRY OR TRIAL.—A confession by an accused person may be recorded in the course of an investigation before the commencement of the magisterial inquiry or trial or during an inquiry or trial and when the accused is examined. This section applies to the former, while S. 342, *infra* to the latter, and S. 364, *infra* is applicable to both. A confession may be made either (1) in the course of an investigation made under Chapter XIV, or (2) at any time afterwards before the commencement of the inquiry or trial. An investigation is defined in S. 4 (i), *supra* as including all proceedings under the Code for the collection of evidence by the police. There is nothing to show that investigation must necessarily terminate before the inquiry or trial begins. Both may be simultaneous. The condition requiring a confession to be prior to the commencement of the inquiry is only imposed when the investigation has ceased and not when it is made in the course of the investigation, 37 C. 467 at 496. An admission or confession made by a person complained against before a Magistrate holding an inquiry under S. 302, *infra* is not a statement recorded under this section or S. 364, *infra*. It is not recorded under this section because it is not made during the course of an investigation and it is not recorded under S. 364, *infra* because the person complained against is not an accused, he being not tried for an offence. The Code does not contemplate a statement on the examination of the petitioner, being recorded in such a proceeding, and therefore such a statement is inadmissible in evidence, 32 C. 1085 at 1089.

SUB-SECTION (2).—This sub-section deals with the manner of recording a confession. It was held in 29 M. 89, *following* 18 M. 321 that a Magistrate taking statements under this section is acting in discharge of duties imposed on him by law and he is empowered to administer an oath under Ss. 4 and 5 of the Oaths Act, and an investigation under Chapter XIV of the Code is a stage of a judicial proceeding, and a person making on oath a false statement in the course of such an investigation commits an offence under S. 193, I, P. C. ; see also 22 A. 115 and 2 B. 543. But this sub-section says that "*such statement shall be recorded in such of the manners hereinafter prescribed for recording evidence*" referring evidently to Chapter XXV of the Code which makes no reference as to putting the person on oath. Reading this sub-section with Chapter XXV of the Code there is no necessity to administer an oath. Moreover, with regard to the confessions, no oath could be validly administered to the person making the confession, and the confession so taken on oath is no confession, and is inadmissible in evidence. The object of the section as pointed out already is merely to secure a formal record of statements including confessions *prima facie* accurate, before a competent authority, so that they may be admissible in evidence, and for this purpose it is not quite necessary to administer an oath ; confessions are to be recorded

and signed in the manner provided in S. 364 and are to be forwarded to the Magistrate by whom the case is to be inquired into or tried. A confession duly recorded by a Magistrate in a Native State in proceedings under the provisions of the Code is admissible in evidence in a trial before a Magistrate in British India, 12 A. 595; 22 B. 235, but a confession made before a foreign Court cannot be used against an accused person unless it is sworn to, like confessions made to private individuals, Weir II, 125.

SUB-SECTION (3).—The provisions of this section read with S. 364, *infra* are imperative and S. 533, *infra* will not render a confession admissible when no attempt has been made to conform to its provisions, 9 M. 224; 39 M. 977; 17 C. 862; 39 Ind. Cas. 991; 40 Ind. Cas. 721. Failure to give the necessary warning to the accused that if he does make a confession it might be used as evidence against him would render the confession recorded inadmissible in evidence against the accused, 26 Cr. L.J. 1238—88 Ind. Cas. 854. Where the certificate appended to the record of the confession did not comply with the provisions of this sub-section, the defect can be cured by examining the Magistrate who had recorded the confession and then it becomes admissible in evidence, 6 Lah 58; 26 Cr. L.J. 1458—89 Ind. Cas. 1026. The questioning mentioned herein refers only to questioning the accused in order to find out whether the confession is made voluntarily or not, 1 Bom. L.R. 357. Where a Magistrate instead of asking the accused as to the voluntary character of the confession made in the beginning, asked him after the confession was recorded, it was held that the defect was merely one of form and not altering the character of the confession, 40 C. 873. This has no reference to the questioning of the accused as to the subject-matter of his confessions, and nothing in the nature of cross-examination of the accused is permissible; questions tending to make a person incriminate himself are highly improper, Weir II, 136; 45 A. 166; 23 B. 221, but where the confession was recorded not in the shape of questions and answers as required by S. 364, *infra*, but in a simple narrative form and there was nothing to show that the accused was prejudiced thereby, the error will not affect the admissibility of the confession, 8 C. 616; 14 C. 539; 5 A. 253 at 256; 45 A. 166; 23 B. 221. The exact words of the warning which under the provisions of this section must be given to a person making a confession are not very material, provided the Magistrate explains and the person making the statement clearly understands that he need not make the confession, 26 Cr. L.J. 1458—89 Ind. Cas. 1026. When a confession is taken down in a narrative form it is only an irregularity which could be cured by the examination of the Magistrate under S. 533. *infra*, 9 C.L.J. 55—10 Cr. L.J. 325—3 Ind. Cas. 625. In 13 C.W.N. 861; 9 C.L.J. 683; 10 Cr. L.J. 125—2 Ind. Cas. 631, it was held that there was no warrant or justification for the intervention of a third party as a questioner, directly or indirectly, of a confessing prisoner. To say the least, the practice is objectionable; nor can the police record a confession and give the same to the Magistrate to enable him to question the accused, 7 C.W.N. 220. It would be going too far to say that a Magistrate recording a confession should not put any question to the person making the confession. But it is equally certain that his position when recording such statement or confession is merely that of a recording Magistrate and that he is in no sense inquiring into the case and that he is in no sense an investigating officer, 23 A.L.J. 719. Under this section the Magistrate should make a serious attempt to satisfy himself that the confession he is to record is voluntary. The expression used is "has reason to believe". Unless the Magistrate is affirmatively satisfied as to the voluntary nature of the confession he ought not to record one, or give the certificate, 23 B. 168. Asking the accused about the voluntary nature of the confession at the end of the statement instead of at the beginning is only a defect in form and does not alter the character of the confession. The whole confession should not be rejected merely because it is partly bad, 15 Cr. L.J. 25—22 Ind. Cas. 169. Care and circumspection is to be exercised in recording a confession. Questions put to the accused to ascertain the voluntary nature of the confession should be recorded. An accused should be warned of the consequences if they falsely implicate themselves in the hope of release and should be asked if the police or any other subjected them to ill-treatment. It is not sufficient for a Magistrate to put one comprehensive question as to the nature of the confession. The Magistrate should conscientiously satisfy himself that the man is a free agent and his confession is voluntary, 25 Ind. Cas. 833. Where the committing Magistrate

who recorded a confession did not sign the certificate as required by this section and did not ask the accused whether the statement which he was going to make, was voluntary, but merely put the question whether he made the statement out of his free will, it was held that the evidence of the recording Magistrate saying that he had observed all the provisions of this section was sufficient to make the confession admissible and the question put by him whether the confession was made out of accused's free will was equivalent to asking him whether he made the confession voluntarily. 3 Patna 872; 24 Cr. L.J., 818—75 Ind. Cas 508.

Where the confession is made to a Magistrate during the course of a police investigation, there is a duty cast on the Magistrate to question the accused to satisfy himself, that the statement was made voluntarily and when such confession is subsequently retracted, the Court before admitting it in evidence must come to a definite conclusion as to its voluntary character, 23 Cr. L.J. 116—76 Ind. Cas. 180. The Magistrate should be particularly careful when the accused is produced before him from police custody. The first question which a Magistrate should put in such a case is how long has the accused been in police custody. 25 B. 543, and this fact and the length of time during which the police custody continued are to be considered as very material in judging whether a confession is voluntary or not, 13 C.W.N. 861—9 C.L.J. 663—10 Cr. L.J. 125—2 Ind. Cas. 681; 7 C.W.N. 457; 22 M. 15. A confession should be recorded in the actual words used by the accused, 4 A. 46. The memorandum under this section is quite distinct from the memorandum required under S. 264 (3). An English memorandum is not required in the case of a confession recorded under this section, 13 C. 539. The memorandum to be valid need not be written on the same day the confession is recorded, 5 B. 288, but a confession does not become inadmissible merely because the memorandum has not been written in the exact form prescribed, 3 A. 338; 22 M. 15. The memorandum need not be in the Magistrate's handwriting, 8 W.R. (Cr.) 85, but it must appear at the foot of the record and signed by him, 3 C.W.N. 387. When there is no memorandum at all the Court refused to admit the confession, in evidence, 2 C.W.N. 702; but oral evidence as to the confession may be taken when the Magistrate had not properly recorded a confession under this section, 2 B.H.C.R. 397. When a Magistrate inadvertently omits to certify the voluntariness of a confession recorded by him under this section, the defect may be cured by the evidence of the Magistrate as a witness, 12 Cr. L.J. 45—9 Ind. Cas. 148. See also S. 537 which cures defects of this sort; when a Magistrate who recorded a confession appended to it a certificate that he believed the confession was not voluntary, held that the confessional statement was inadmissible for want of a certificate under cl. (3) of the section, 7 Cr. L. Rex. 38. See also 9 Cr. L.J. 297—1 Ind. Cas. 444. There is nothing in this or any other section in the Code which prohibits the Magistrate from recording a statement if the accused chooses to make one before he is placed on his trial. Such a statement if proved to be voluntary is not only admissible, but is of the greatest value as a fact relevant to the probability or improbability of his guilt, 24 Cr. L.J. 723—73 Ind. Cas. 363.

EXPLANATION.—The explanation to this section was added in the Code of 1898 to meet the divergent views which existed in the Allahabad and Madras High Courts. Where a third-class Magistrate not empowered to commit for trial records a statement under this section in a case triable exclusively by a Court of Session the statement is not evidence in a stage of judicial proceeding within Ss. 191 and 193, I.P.C., and when such a statement is subsequently retracted before a Magistrate having jurisdiction, that will not furnish a basis for an alternative charge of giving false evidence in a judicial proceeding, 14 Bom. L.R. 783.

165. (1) Whenever an officer in charge of a police-station, or a police-officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place

Search by police-officer.

within the limits of the police-station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing, in any place within the limits of such station.

(2) *A police-officer proceeding under sub-section (1) shall, if practicable, conduct the search in person.*

(3) *If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may, after recording in writing his reasons for so doing require, any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing specifying the place to be searched and, so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.*

(4) *The provisions of this Code as to search-warrants and the general provisions as to searches contained in section 102 and section 103 shall, so far as may be, apply to a search made under this section.*

(5) *Copies of any record made under sub-section (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence and the owner or occupier of the place searched shall on application be furnished with a copy of the same by the Magistrate:*

Provided that he shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost.

AMENDMENT.—Sub-sections (1) and (2) of this section which deal with searches by police-officers have been redrafted in order to obviate the difficulties arising from the decisions of the Calcutta High Court in 12 C.W.N. 1016 and 15 C.W.N. 343. The amendment in sub-section (3) is only verbal and sub-section (4) applies to provisions of Ss. 102 and 103 as to searches made under a warrant to searches made under this section.—*Statement of Objects and Reasons.* Sub-section (5) is new.

SCOPE OF THE SECTION.—The power of search given under this section is incidental to the conduct of investigation into an offence which the police-officer is authorised by law to investigate, Ss. 155 and 156 *supra*. Therefore if he makes an investigation into a non-cognizable offence without the order of a Magistrate, he has no right to enter into a house to make a search under this section, 24 C. 691. Before the amendment the section authorised a search for a specific document or thing but now the power to search is very much wider. The section seems to authorise a general search but at the same time the object seems to be to discourage a general search by requiring as far as possible to specify the thing for which the search is to be made. Search warrants are a species of process exceedingly arbitrary in character and inasmuch as they are resorted to only for very urgent and satisfactory reasons, the rules of law which pertain to them are of more than ordinary strictness. In the first place, it is common learning that they are only to be granted in the cases expressly authorised by law and not generally in such.

cases until it has been shown before a responsible officer on oath that a crime has been committed and the officer has reason to believe that the offender or the property which is the subject or the instrument of crime is concealed in some specified house or place. The law clearly intends that evidence shall be given of such facts as shall satisfy the officer issuing the warrant that there is reason to believe that a house or room or place contains property which is the subject of the offence. Search warrants are always open to very serious objection and very great particularity is justly required by law in cases, where they are authorised before the privacy of man's premises is allowed to be invaded by the minister of the law. 80 C.W.N. 713—27 Cr. L.J. 920—86 Ind. Cas. 234. But the section requires two safeguards that a police-officer is to record in writing the grounds of his belief and give his reasons as required by this section and the thing to be searched should be specified as far as possible, see 23 A.L.J. 1037. This section requires, before it can be brought into operation, that there must be an offence which the police-officer is authorised to investigate. As soon as the police-officer suspected that a person is not producing the real thing there was in his opinion offence committed, and he could act under this section, but the suspicion that here is an offence committed and therefore a search is to be made, must be formed honestly, 27 B. 560 at 595. This section now authorises a general search on the chance that something may be found, differing from the view expressed in 38 C. 304; 16 C.W.N. 1078; 38 A. 14. In the Joint Committee's report we find that the amendment was made to counteract the effect of the Calcutta decisions only in 38 C. 304 and 12 C.W.N. 1016, which had created unnecessary difficulties, 43 A.L.J. 691. It was held in 41 C. 261 that this section authorises the search of the house of an accused person for specific documents and things necessary to the conduct of an investigation into an offence but now the words 'anything necessary for the purpose of an investigation into an offence' give much wider power of search.

ANYTHING NECESSARY FOR THE PURPOSES OF AN INVESTIGATION.—This section does not empower a police-officer to search for the purpose of discovering arms generally. The things searched for, must be necessary for the purposes of the investigation into any offence which he is authorised to investigate, 3 C.L.J. 75. Search is to be conducted only as a step in the investigation of a completed crime which he is authorised to investigate.

SUB-SECTION (2).—This sub-section does not mean that the investigating officer personally conducting the search must himself make the search, e.g., ransack boxes examine the roof, dig the floor, or otherwise seek for the property, nor is it necessary that these must take place under his very eyes. The meaning of the sub-section is that the officer should be present on the spot and should exercise a general supervision and in case he is unable to be present at the search, he is to depute in writing one of his subordinates to search in his stead under sub-section (3), 22 M.L.J. 448—(1912) M.W.N. 1111—13 Cr. L.J. 763—17 Ind. Cas. 75.

SUB-SECTION (3).—The object is to discourage general search by insisting that the officer should specify as far as possible the thing for which searches is to be made. Where the S.H. O. or the officer conducting the investigation is unable to conduct the search in person, he may depute a subordinate officer by a written order to conduct the search, 6 Cr. L.J. 105; 13 Cr. L.J. 763. An order in writing specifying the document or thing for which search is to be made should be delivered to the subordinate officer and a search conducted without such written order is illegal and any resistance is no offence, 38 A. 14; 13 A.L.J. 891; 6 C.L.J. 753; 7 N.W.P.H.C.R. 209; 7 B.H.C.R. (Cr. Cas.) 50; 13 Cr. L.J. 763. When an Inspector of Police acting under this section sent a constable to search the house, himself sitting outside, the accused asked for a list of articles he had come to search for and the list was not produced, whereupon the accused objected to the search and pushed the constable out *held* that no offence was committed by the accused as the Inspector should have himself conducted the search and was not justified in sitting outside and asking the constable to search without giving him a written order specifying the articles to be searched for, 17 M.L.J. 323. If a constable searches without a written order he does not exercise the power of a public servant under this sub-section and S. 99, I.P.O., has no application to such a case, 6 C.L.J. 753; see

also **36 C. 433**, where it was held that a public functionary authorised by statute to make a search must in exercising that authority act within the limits of the statute itself.

SUB-SECTION (4).—Before the amendment it was held in **23 M.L.J. 415** that the provisions of **S. 103 supra** did not apply to a search under this section but now the provisions of **Ss. 102 and 104 supra** are made applicable. See **Ss. 96, 98, 100, 105 and 153** as to search-warrants. For powers to search under Special laws see the **Arms Act XI of 1878**, **Excise Act**, **Opium Act**, **Gambling Act**, etc., which contain special provisions regarding searches. See also **S. 153 supra** as to inspection of weights and measures.

SUB-SECTION (5).—This is a new provision introduced in the Code by the Amending Act 1923 and it is obviously intended as an extra safeguard to protect individuals against general or roving searches. To hold that the omission to comply with the provisions of this sub-section did not affect the powers of search given to police officers under the Code would have the effect of rendering this sub-section in many cases a dead letter. It is essential that a police officer conducting a search under this and **S. 166, infra** should send forthwith to the nearest Magistrate copies of the record that he has prepared before conducting the search and when this is not done a conviction for resisting the police and deterring them from discharging their duty to search a suspected person's house cannot be sustained; **43 C.L.J. 184=27 Cr. L.J. 542=93 Ind. Cas. 1088**.

166. (1) An officer in charge of a police-station or a police-officer not being below the rank of Sub-Inspector making an investigation may require an officer in charge of another police-station, whether in the same or a different district, to cause a search to be made in any case, in which the former officer might cause such search to be made, within the limits of his own station.

When officer in charge of police-station may require another to issue search-warrant.

(2) Such officer, on being so required, shall proceed according to the provisions of section 165, and shall forward the thing found, if any, to the officer at whose request the search was made.

(3) *Whenever there is reason to believe that the delay occasioned by requiring an officer in charge of another police-station to cause a search to be made under sub-section (1) might result in evidence of the commission of an offence being concealed or destroyed, it shall be lawful for an officer in charge of police-station or a police-officer making an investigation under this Chapter to search, or cause to be searched, any place in the limits of another police-station, in accordance with the provisions of section 165, as if such place were within the limits of his own station.*

(4) *Any officer conducting a search under sub-section (3) shall forthwith send notice of the search to the officer in charge of the police-station within the limits of which such place is situate, and shall also send with such notice a copy of the list (if any) prepared under section 103, and shall also send to the nearest Magistrate empowered to take cognizance of the offence, copies of the records referred to in section 165, sub-sections (1) and (3).*

(5) *The owner or occupier of the place searched shall, on application, be furnished with a copy of any record sent to the Magistrate under sub-section (4).*

Provided that he shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost.

AMENDMENT.—Sub-sections (3), (4) and (5) are new, and added in certain circumstances to empower an S. H. O. to search or direct a search of places within the limits of another station.

Under this section if a theft is committed within the limits of a police-station and if the property is concealed within the limits of another station, the officer in charge of the station where the theft was committed can requisition the aid of the officer in charge of the station where the thief had secreted the property to cause a search to be made, 42 M. 448 at 448.

167. (1) Whenever *any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 61, and there are grounds for believing that the accusation or information is well founded,* the officer in charge of the police-station *or the police officer making the investigation if he is not below the rank of sub-Inspector shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.*

Procedure when investigation cannot be completed in twenty-four hours.

(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 in the whole. If he has not 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 no Magistrate of the third class, and no Magistrate of the second class not especially empowered in this behalf by the Local Government shall authorise detention in the custody of the police.

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) If such order is given by a Magistrate other than the District Magistrate or Sub-divisional Magistrate, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is immediately subordinate.

AMENDMENT.—The italicised words in sub-section (1) and the proviso to sub-section (2), are new.

SCOPE OF THE SECTION.—This section applies only to proceedings under Chapter XIV of the Code and not to those under S. 110 *supra*, where the Magistrate has no power to remand an accused person to custody, 39 M. 928. S. 344 contains a similar provision to remand but it refers to cases in which inquiry or trial has already begun by a Magistrate or is about to begin. 29 Cr. L.J. 732=8 Ind. Cas. 220; 23 B. 32; Under the section the accused is not before a Magistrate for inquiry or trial and the police are to complete if possible their investigation and place the accused before the Magistrate for an authorisation to detain the accused in their custody, see 11 M. 98.

ANY INVESTIGATION UNDER THIS CHAPTER.—This section in terms applies only to investigation under Chapter XIV of the Code and gives no power to a Magistrate to remand an accused person in custody under Chapter VII of the Code. 39 M. 928; 5 Bom L. R. 27; 8 C.W.N. 779.

SHALL FORTHWITH TRANSMIT TO THE NEAREST MAGISTRATE A COPY OF THE ENTRIES IN THE DIARY.—It is only when the investigation cannot be completed within the twenty-four hours prescribed by S. 61, *supra* that the police-officer is to transmit a report under this section. The nearest Magistrate may be one having jurisdiction or not. It is upon these entries in the special diary that the Magistrate is to decide and to form his opinion as to whether or not the accused is to be detained in custody. This must contain at least a summary of the statements made by the persons who had been examined under S. 161, *supra* by the police officer making the investigation. 19 A. 390 at 404. The Magistrate may, on a perusal of the entries in the diary relating to the case to which the accused has no access, from time to time, authorise the detention of the accused to custody for a term not exceeding 15 days on the whole. 13 C.W.N. 43.

IN THE DIARY HEREINAFTER PRESCRIBED.—*i.e.*, under S. 172 *infra*.

SHALL AT THE SAME TIME FORWARD THE ACCUSED TO SUCH MAGISTRATE.—The accused should be brought promptly before the Magistrate. No detention longer than is necessary of the accused is permitted by law. For the words "*accused if any*" the words "*accused if in custody*" have been substituted in consequence of the amendment in S. 157 *supra*.

MAY AUTHORIZE THE DETENTION OF THE ACCUSED IN SUCH CUSTODY.—*Detention* in police custody is different from *remand*. S. 344, *infra* contemplates a remand to custody in inquiries or trials. The remand is to Magisterial lock-up or to jail and not to police custody. This section contemplates custody during police investigation, whereas S. 344 refers to cases already on the file of the Magistrate in which the inquiry or trial has begun or is about to begin. The investigating police-officer may apply immediately to the nearest Magistrate for an order authorising detention of the accused in police custody. The Magistrate must be satisfied that there are substantial grounds for suspecting that the accused has committed a definite offence and his remaining in the custody of the police is really necessary, 7 C.W.N. 487; 11 C.W.N. 554.

FOR A TERM NOT EXCEEDING FIFTEEN DAYS ON THE WHOLE.—The words "on the whole" were introduced in the 1898 Code. The sum total of the periods of detention in custody must not exceed 15 days, 11 M. 98; 23 B. 32; 51 C. 402 and the term must be limited as much as possible, 11 C.W.N. 554. The intention of the Legislature is that an accused person should be brought before the Magistrate competent to try or commit for trial with as little delay as possible, 51 C. 402; 6 M. 63. The law as laid down in the section of the Code *vis.* S. 61, this section, S. 169 and S. 170 seems to be this, that after the expiration of the maximum period of 15 days' detention of an accused person and the additional time necessary to bring him before the Magistrate allowed under S. 61 and this section, an accused person must either be released by the police under S. 169, *infra*, security for his appearance, if and when so required being taken, or the Magistrate empowered in that behalf must either take cognizance, if he has before him a police report (which ordinarily be a report in the form laid down in S. 173) and which he thinks makes out a *prima facie* case or he must release

him, 28 C.W.N. 390 at 392. The power to remand given under this section, is to detain the accused person in custody while the police make their investigation and in a proper case to commence the inquiry. But the period of detention is limited to 15 days on the whole, the custody contemplated by S. 344 *infra* is quite different and is intended for under-trial prisoners. Detention after a police report that there was no evidence against the accused is illegal unless there is a re-arrest of the accused under S. 55 *supra*, 33 A. 186 ; 41 A 383.

PROVISO.—This proviso is new. Third-class Magistrates and second-class Magistrates unless specially empowered, are not entitled to authorise detention in police custody now.

SHALL RECORD HIS REASONS.—The section requires that before a Magistrate remands an accused person to custody the accused must first be produced before the Magistrate and he must also record his reasons for so remanding, 16 C.W.N. 135—13 Cr. L.J. 65—13 Ind. Cas. 721.

168. When any subordinate police-officer has made any investigation under this Chapter, he shall report the result of such investigation to the officer in charge of the police-station.

Report of investigation by subordinate police officer.

This section directs that a subordinate police-officer who has made any investigation shall report the result of such investigation to the officer in charge of a police-station. The report of the result of an investigation cannot be said to be an act or record of an act of a public servant, 20 M. 189 (F.B.) at 195. The report made under this section is not a public document within the meaning of S. 74 of the Evidence Act and consequently an accused person is not entitled before trial to have copies of such report, 20 M. 189 (F.B.); See S. 173 (4) which enacts that the accused is entitled to such copies before the commencement of the trial.

169. If, upon an investigation under this Chapter, it appears to the officer in charge of the police-station or to the police-officer making the investigation that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence of a police-report and to try the accused or commit him for trial.

Release of accused when evidence deficient.

AMENDMENT.—The words "to the officer making the investigation" have been newly added and this gives power to such an officer to release an accused person on bail if there is not sufficient evidence against him. This is in accordance with paragraph 156 of the *Report of the Police Commission*.

RELEASE ACCUSED ON EXECUTING BOND.—The power of a police-officer to admit to bail is only provisional, and when the Magistrate determines that there is a *prima facie* case of non-bailable offence, the accused should be re-arrested and forwarded to the Magistrate, Ratanlal 121. But a police officer cannot entertain an application for withdrawal of the complaint or for compounding the offence, which is a judicial act, the exercise of which is for the Magistrate under S. 248 and 345, *infra*. The power under this section may be exercised by a superior police-officer under S. 559, *infra* although such superior officer may not have made the investigation himself. The liability of a surety is strictly conditioned by the terms of his bond and if he binds to produce the accused at a particular time and place and does so, his liability is discharged, and he cannot be held liable for subsequent non-appearance of the accused, 23 Cr. L.J. 68—65 Ind. Cas. 420, For form of bond see form No. 25 of Sch. V.

IF AND WHEN SO REQUIRED.—The use of the word 'if' is significant as in most cases the Magistrate will not require the appearance of the person released under this section, Where, however, his appearance is required an order fixing a day for appearance is to be made as in the next section, without which there cannot be any forfeiture of the bond for any failure to comply with its terms.

170. (1) If, upon an investigation under this Chapter, it appears to the officer in charge of the police-station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police-report and to try the accused or commit him for trial or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.

Case to be sent to Magistrate when evidence is sufficient.

(2) When the officer in charge of a police-station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the circumstances of the case as he may think necessary, to execute a bond to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused.

(3) If the Court of the District Magistrate or Sub-divisional Magistrate is mentioned in the bond, such Court shall be held to include any Court to which such Magistrate may refer the case for inquiry or trial, provided reasonable notice of such reference is given to such complainant or persons.

(4) *Repealed by Act II of 1926, S. 2.*

(5) The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report.

SHALL FORWARD THE ACCUSED UNDER CUSTODY, ETC.—When the police investigation discloses a *prima facie* case against the accused he should at once be sent in custody to the Magistrate having jurisdiction; if the offence is bailable and if the accused is able to furnish security then the police-officer shall take security for his appearance before the Magistrate on a particular day.

SHALL TAKE SECURITY.—This is the only section which empowers a police-officer to take security for the appearance before a Magistrate, but for exercising this power the investigation must be complete and a substantial case is to be made out against the accused.

For form of bond, see Sch. V form No. 25.

EMPOWERED TO TAKE COGNIZANCE OF THE OFFENCE UPON POLICE REPORT.—Having regard to these words, it was contended that S. 190 (1) (b) *infra* can only refer to non-cognizable offences and not to cognizable offences, and that in the case of cognizable offences by the clear words of this section a Magistrate can only take cognizance upon a police report as contemplated by S. 173, *infra* and upon no other report. But the contention was overruled and it was held that a Magistrate is empowered by S. 190 (1) (b) to take cognizance of both cognizable and non-cognizable offences upon a police report, 28 S.W.N. 490. See in this connection the Full Bench ruling in 49 M. 525.

SUB-SECTION (2).—This sub-section and S. 173, *infra* refer only to witnesses for the complainant and cannot refer to the witnesses of the accused. S. 171 expressly refers to complainant's witnesses who can be detained in custody under special circumstances. Further Ss. 121, 244 and 527 assume that when the case is heard by the Magistrate, witnesses for the accused will not generally be present.

For form of bond, see Sch. V form No. 26.

SUB-SECTION (3).—The report referred to herein is the report contemplated by S. 173, *infra*.

Complainants and witnesses not to be required to accompany police-officer.

171. No complainant or witness on his way to the Court of the Magistrate shall be required to accompany a police-officer,

Complainants and witnesses not to be subjected to restraint.

or shall be subjected to unnecessary restraint or inconvenience, or required to give any security for his appearance other than his own bond :

Provided that, if any complainant or witness refuses to attend or to execute a bond as directed in section 170, the officer in charge of the police-station may forward him in custody to the Magistrate, who may detain him in custody until he executes such bond, or until the hearing of the case is completed.

Recusant complainant or witness may be forwarded in custody.

SCOPE OF THE SECTION :—This section refers to the sending up of the complainant and his witnesses under S. 170 (2) for recording their evidence in the inquiry or trial and does not justify taking a bond or sending up in custody a witness, whose statement the police wish to have recorded under S. 164, *supra*. In 4 C.W.N. 49 at 54. *Prinsep and Hill, JJ.* observed "there is no warrant for the police to subject a witness to any unnecessary restraint whatsoever. The law enables the police to send a witness, who shows an indication of unwillingness to attend the Court, to custody but beyond that they have no power over such persons. The control admittedly exercised over *Koshila* was, in our opinion, an unnecessary restraint or inconvenience in direct disregard of S. 171 and certainly not justified under the explanation given by the police and accepted by the Sessions Judge. It is impossible to accept the evidence so obtained as that of a witness speaking voluntarily, and if it be said that the witness did not speak voluntarily before the Magistrate, but under the influence of the police, it is impossible to say how far any of the statements can be accepted as true. It would be impossible to convict the appellants solely on such evidence." There is however nothing in the section preventing the complainant and the witnesses from going with the police-officer, especially when they have to go through wild and uninhabited tract, to the court, and the escort of the police and their protection will be quite welcome to them.

172. (1) Every police-officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time

Diary of proceedings in investigation.

at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

(2) Any Criminal Court may send for the police-diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police-officer who made them, to refresh his memory, or if the Court uses them for the purpose of contradicting such police-officer, the provisions of the Indian Evidence Act, 1872, section 161 or section 145, as the case may be, shall apply.

OBJECT OF THE SECTION.—The object of case diaries under this section is that as the early stages of the investigation which follows the commission of a crime must necessarily in the vast majority of cases be left to the police until the honesty, the capacity, the discretion and judgment of the police can be thoroughly trusted, it is necessary for the protection of the public against criminals, for the vindication of the law and for the protection of those who are charged with having committed a criminal offence that the Magistrate or Judge before whom the case is for investigation or for trial should have the means of ascertaining whether the information was true false or misleading which was obtained from day to day by the police-officer investigating the case and what were the lines of investigation upon which the police acted. 16 C.W.N. 145 at p. 179=13 Cr. L.J. 65=13 Ind. Cas. 721, relying on 19 A. 390 at 397.

SHALL DAY BY DAY ENTER HIS PROCEEDINGS IN A DIARY.—The diary kept under this section is generally known as the *special or case diary* in which the police-officer is required to enter his proceedings day by day, and it does not, in the list of matters to be entered therein, appear to allow any oral statement of witnesses to be recorded.

It is strictly privileged and may only be used by the Court, not as evidence in the case but to aid in the inquiry or trial, neither the accused nor his agents shall be entitled to call for such diaries, nor shall they be entitled to see them merely because they are referred to by the Court; but if they are used by the police-officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police-officer, the provisions of S. 161 or S. 145 of the Indian Evidence Act shall apply, 33 C. 1023 at 1026; 19 A. 390 (F.B.); 44 C. 876; 10 C.W.N. 600; 21 A. 159; but whether the statements of witnesses should be entered in the special diary or not, there is a conflict of opinion. Diaries prepared prior to the commencement of the investigation into an offence are not part of the special diary and the provisions of this section do not apply to them, 14 C.W.N. 1114. See the observations of Edge, C.J. in 19 A. 390 at 397-98 as to the object of the case diaries: "any one of the public may be the victim of a crime or may be unjustly charged with the commission of a crime. The early stages of the investigation which follows on the commission of a crime must necessarily in the vast majority of cases be left to the police, and until the honesty, the capacity, the discretion and judgment of the police, can be thoroughly trusted. It is necessary for the protection of the public against criminals, for the vindication of the law, and for the protection of those who are charged with having committed a criminal offence that the Magistrate or judge before whom the case is for investigation or for trial, should have the means of ascertaining what was the information, true, false, or misleading, which was obtained from day to day by the police officer who was investigating the case, and what were the lines of investigation upon which such police officer acted. A properly

kept special diary would afford such information, and such information would enable the Magistrate or judge to determine whether persons referred to in the special diary, but not sent up as witnesses by the police, should be summoned to give evidence in the interest of the prosecution or of the accused. It must be also remembered that it is the duty of the Magistrate or of the judge before whom a criminal case is, to ascertain if possible on which side the truth is, and to decide accordingly. It must happen that a police officer, who is investigating a criminal case, receives some true information, some false information, some misleading information and it must happen that such police-officer forms no doubt sometimes prematurely, a theory about the case to which having committed himself, he probably adheres. An ordinary knowledge of the infirmities of human nature and a knowledge of what does in fact take place in some cases teaches that in many cases the inclination of a police-officer, who in his early investigation of a criminal case has committed himself honestly or dishonestly to a theory as to the case, is to work the case so as to support the theory whether the vindication of justice is to be the result or not. It is consequently essential that the magistrate or Judge who has to hold the scales of justice evenly between the Crown and the accused, should have some means of ascertaining what was the information obtained by the police-officer each day in the course of the investigation and what were the lines upon which the investigation proceeded". It is repugnant to all principles of criminal law to compel a person to give evidence in the very matter in which he is accused or liable to be accused and then base a charge on such evidence and use such evidence at the trial to prove his guilt. 50 B. 56 at 61.

SETTING FORTH THE TIME, PLACE AND A STATEMENT OF CIRCUMSTANCES.—This section does not contain an exhaustive list of the matters which may with propriety be entered in the diary. There is much which may tend to the furtherance of the objects for which the diary has been instituted which would not fall within the language of the section but which may with great advantage be entered in the diary and when so entered be protected from disclosure for reasons of public policy, 19 A. 390 at 413.

SUB-SECTION (2).—The Court may send for the special diary and may use the same to assist it in the inquiry or trial by suggesting means of further elucidating points which need clearing up and which are material for the purpose of doing justice between the Crown and the accused, 23 Cr. L.J. 281, but entries in the special diary cannot by themselves be taken as evidence of any date, fact or statement contained therein. The Court cannot make a general order for the production of police diaries in all cases coming before it, as the law nowhere empowers the Court to issue such a general order, but it has power only to call for the diaries when used as required in each particular case. The special diary may also be used by the Court for the purpose of contradicting the police-officer who made it, and it may be used by the police-officer who made it for refreshing his memory, but no other witness is entitled to use the same for that purpose. Ordinarily the accused is not entitled to see the contents or to have a copy, but if the diary is used by the police-officer for refreshing his memory or by the Court to contradict his evidence, then the accused shall be entitled to be furnished with a copy unless the Court thinks it inexpedient in the ends of justice. See 19 A. 390 F.B. The facts stated in the diary must be proved by oral evidence, Weir II. 142 and 143; 1883 A.W.N. 145; 27 C. 295; 15 C.W.N. xlvii. See also 10 C.W.N. 600, where it was held that facts and statements appearing in the diary cannot be used as materials to help the Court in a criminal trial to come to a finding on the evidence in the case, and what the Court should do, is to call for necessary evidence to have the matter legally proved when some matter of importance bearing upon the case is discovered from a perusal of the diary, but notes of seditious speeches made by a police-officer may be allowed to become part of the record in a trial under S. 124A, I.P.C., 32 M. 8; 25 Cr. L.J. 409—77 Ind. Cas. 489.

173. (1) Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer in charge of the police-station shall—

Report of police-officer.

(a) forward to a Magistrate empowered to take cognizance of the offence on a police-report a report, in the form prescribed by the Local Government, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused (*if arrested*) has been forwarded in custody, or has been released on his bond, and, if so, whether with or without sureties, and

(b) *communicate in such manner as may be prescribed by the Local 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.*

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

(3) 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.

(4) *A copy of any report forwarded under this section shall, on application, be furnished to the accused before the commencement of the inquiry or trial :*

Provided that the same shall be paid for unless the Magistrate for some special reason thinks fit to furnish it free of cost.

AMENDMENT.—Sub-section (1) has been redrafted and the principal change effected is to prescribe that the police shall communicate the result of their investigation to the person by whom the first information was given. Sub-section (4) is new and provides for a copy of the report or charge-sheet being furnished to the accused before the commencement of the inquiry or trial.

SCOPE OF THE SECTION.—This section deals with the final report by the Police after the completion of their investigation and is known as the 'charge-sheet.' The other reports dealt with in this chapter are (1) occurrence report under S. 157, (2) report under S. 166 for extending remand of accused by transmitting the case diary, if investigation cannot be completed, (3) report under S. 168 stating the result of the investigation held. The final report under this section is to be made after full investigation and if in the opinion of the investigating officer reasonable grounds exist for initiating proceedings against the person reported against before a Magistrate.

EMPOWERED TO TAKE COGNIZANCE OF THE OFFENCE UPON A POLICE REPORT.—By reason of the provisions of S. 190 (1) (b) a Magistrate is justified in taking cognizance of *any offence* upon a police report in writing made by a police officer. Notwithstanding the use of the word "police report" in this section, S. 190 (1) (b) cannot be restricted merely to non-cognizable offences and a Magistrate is empowered to take cognizance of both cognizable and non-cognizable offences upon a police report such as is mentioned in S. 190 (1) (b), 28 C.W.N. 490 at 492—93; See also 49 M. 525 (F.B.),

A REPORT SETTING FORTH THE NATURE OF THE INFORMATION.—A Police report under this section should set forth (1) the names of the parties (2) the nature of the information (3) the names of the persons who appear to be acquainted with the circumstances of the case, 26 Cr. L.J. 181—83 Ind. Cas. 885. The report referred to in this section is the one made by a police-officer after completing his investigation of the case and ascertaining the facts and coming to a conclusion that there are sufficient grounds to justify the forwarding of the person reported against to the Magistrate, 12 Cr. L.J. 92—9 Ind. Cas. 492; 13 Cr. L. J. 752—17 Ind. Cas. 64. It is of paramount importance that at the initial stage it should appear what the nature of the information is; when a Magistrate took cognizance of an offence upon a "police report" under this section which did not set forth "*the nature of the information*", the proceedings were set aside by the High Court, 37 C. 49. A report under this section is a police report within the meaning of S. 190. (1) (b), 21 Cr. L.J. 269—55 Ind. Cas. 285; 40 C. 554; 36 B. 150; 11 A.L.J. 331.

SUB-SECTION (4).—This sub-section is new; it was held by the full bench decision in 20 M. 189, that an accused person is not entitled to have a copy of the charge sheet before the commencement of the inquiry or trial as the charge-sheet was held to be not a public document within the meaning of S. 70, Indian Evidence Act. This worked as a great hardship to accused persons but this new sub-section specially provided for a copy of the charge sheet being furnished to the accused on his application before the commencement of the inquiry or trial free of cost at the discretion of the Magistrate.

174. (1) The officer in charge of a police-station, or some other police-officer specially empowered by the Local Government in that behalf, on receiving information that a person—
- (a) has committed suicide, or
 - (b) has been killed by another, or by an animal, or by machinery, or by an accident, or
 - (c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence,

shall immediately give intimation thereof to the nearest Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the Local Government, or by any general or special order of the District or Sub-divisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any) such marks appear to have been inflicted.

(2) The report shall be signed by such police-officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Sub-divisional Magistrate.

(3) When there is any doubt regarding the cause of death, or when for any other reason the police-officer considers it expedient so to do, he shall, subject to such rules as the Local Government may prescribe in this behalf, forward the body, with a view to its being examined, to

the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the Local Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

(4) In the Presidencies of Fort St. George and Bombay, investigations under this section may be made by the head of the village, who shall then report the result to the nearest Magistrate authorised to hold inquests.

(5) The following Magistrates are empowered to hold inquests, namely, any District Magistrate, Sub-divisional Magistrate or *Magistrate of the first class*, and any Magistrate especially empowered in this behalf by the Local Government or the District Magistrate.

AMENDMENT—The addition of the words "or Magistrate of the first class" in sub-section (5) empowers all Magistrates of the first class to hold inquests.

SOME OTHER POLICE OFFICER SPECIALLY EMPOWERED.—Local Government are empowered to appoint special police-officers to hold inquests. Officers in charge of police-stations often find it difficult to hold inquests in consequence of other pressing work or from local considerations. Hence the necessity to appoint special police-officers for this purpose.

UNLESS OTHERWISE DIRECTED BY GENERAL OR SPECIAL ORDER OF DISTRICT MAGISTRATE ETC.—This section gives a discretion to the District or Sub-divisional Magistrate who may order the police officer to dispense with a formal investigation in any particular case or classes of cases chiefly for the purpose of saving time.

IN THE PRESENCE OF TWO OR MORE RESPECTABLE INHABITANTS.—These persons are generally called *inquest panchayatdars* and their attendance may be enforced when necessary under S. 175, *infra*, the persons so summoned are bound to attend and answer truly all questions put to them.

DRAW UP A REPORT.—An inquest report is generally written up and completed at the spot where the inquest is held in the presence of the inquest panchayatdars and invariably handed over to the constable who takes the corpse for *post mortem* examination to be handed over to the Magistrate. It contains the injuries noted on the corpse at the inquest, the statements of blood relations of the deceased and the other witnesses who speak to the cause of death, the names of the persons who are suspected and the apparent cause of death in the opinion of the panchayatdars, etc. The inquest report must be confined to the point specified in this section. There is nothing in the Code to prevent statements of witnesses being recorded in full. A verbatim report of such statements may be of great help to the Court in testing the value of the evidence subsequently given in Court, 9 M.L.T. 321 = (1911) 1 M.W.N. 138 = 13 Cr. L.J. 124 = 9 Ind. Cas. 730. An accused person on a charge of murder is entitled to a copy of the statements made by the witnesses at the inquest inquiry under this section. If the report was not in Court the Magistrate has power under S. 94, *supra* to call upon the police to produce the same and then grant a certified copy to the accused, 20 L.W. 745.

SUB-SECTION (3).—This sub-section enables the Local Government to appoint a qualified medical officer not in Government employment for the purpose of holding a *post mortem* in special cases.

SUB-SECTION (4) permits that the investigation under this section may be made by the heads of villages in the Presidencies of Fort St. George and Bombay. S. 13 of Madras Regulation XI of 1816 lays down the procedure to be followed by the heads of villages on

discovery of dead bodies, and the procedure to be followed by them when the nearest police-officer fails to appear to conduct the inquiry after due notice given to him of the discovery of the dead body. If the police officer arrives in time he must resign the superintendence of the inquiry into his hands. If he does not arrive in time, the head of the village must cause the *kurnam* to take down in writing, the evidence of the persons who may be examined and record the necessary particulars as to the appearance of the body and frame a report of the procedure which must be signed by the village headman and two or more inhabitants present at the investigation and by the *kurnam* also. The entire records are to be submitted to the police-officer of the district. The village headman has the powers of a police-officer under S. 175, *infra*, 8 M.L.T. 198—11 Cr. L.J. 500—7 Ind. Cas. 557. See also S. 11 of Bombay Village Police Act VIII of 1867 which authorises police *Patels* to hold inquests in cases of sudden or unnatural death.

175. (1) A police-officer proceeding under section 174 may, by order in writing, summon two or more persons as aforesaid for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case. Every person so summoned shall be bound to attend and to answer truly all questions other than questions the answers to which would have a tendency to expose him to a criminal charge, or to a penalty of forfeiture.

(2) If the facts do not disclose a cognizable offence to which section 170 applies, such persons shall not be required by the police-officer to attend a Magistrate's Court.

The word "truly" has been retained in this section but omitted in S. 161, *supra*. See p. 214. A person not summoned but voluntarily comes forward to give evidence is not bound to answer truly. 23 Cr. L.J. 82—65 Ind Cas 434.

SCOPE OF THE SECTION.—This section is not applicable to the town of Madras where the office of the Coroner was abolished by Act V of 1889. S. 4 of the said Act enacted with certain modifications, Ss. 174 175, and 176 of the Code. The information under S. 174 is to be given to the *Commissioner of Police* and the investigation is to be made in the presence of five or more respectable inhabitants and the report is to be forwarded to the *Commissioner of Police*. Special rules are made when the deceased person is an European or East Indian to the effect that the *Commissioner* himself may discharge the functions of an S.H.O., or depute an officer not lower than the rank of an *Inspector of Police* who is himself a European or East Indian. It is repugnant to all principles of criminal law to compel a person to give evidence in the very matter in which he is accused or liable to be accused and then base a charge on such evidence and use such evidence at the trial to prove his guilt. The spirit of the *Coroner's Act* is that all persons acquainted with the circumstances and cause of death of a person excepting persons directly implicated should be examined on oath by the *Coroner*. But if by an inadvertence a person accused of an offence is examined on oath the moment the mistake is found out, it should be struck off the record; 50 B. 86. But statements made voluntarily and after due warning, by persons suspected of the crime and in *Police* custody is admissible in evidence at the subsequent trial. The *Coroner's Act* distinctly contemplated that such a person might make a statement and S. 20 provided that the *Coroner* should be deemed to be a *Magistrate* for the purposes of S. 26 of the *Indian Evidence Act*, and when the statement is entirely voluntary it is admissible either as a confession under S. 26 of the *Indian Evidence Act* or the statement of a party to a proceeding under Ss. 18 and 21 of the same Act. 50 B. 111.

BY ORDER IN WRITING.—The words also occur in S. 160, *supra*, empowering a police officer to enforce attendance of witnesses at the investigation. Issuing a summons or a warrant for enforcing attendance of witness is a prerogative of the Court or Magistrate only.

SHALL BE BOUND TO ATTEND.—S. 174 I.P.C. makes disobedience to the order issued under this section punishable with simple imprisonment for one month or fine of Rs. 500, or both. But refusal to sign at the inquest is not an offence. 8 M.L.T. 198—11 Cr. L.J. 800—7 Ind. Cas. 537.

TO ANSWER TRULY ALL QUESTIONS.—S. 179 I.P.C. makes punishable, a refusal to answer questions put by a police officer under this section with simple imprisonment for 6 months or fine of Rs. 1,000 or both. The word “truly” is retained in this section although it is omitted in S. 161 *supra*, which refers to an investigation under this chapter *vis.*, Chapter XIV of the Code which includes this section also and there is no special reason for omitting the word in S. 161 and retaining it in this section. The Legislature could not have intended to make any distinction between an investigation under this section and one under S. 161 *supra*. The use of the word “under this Chapter” in S. 161, *supra* negatives any such distinction being present in the mind of the Legislature when retaining the word “truly” in this section. In 2 Cr. L.J. 890, a nice distinction is drawn between S. 161, *supra* and this section. It is this. S. 161 *supra* refers to investigations into offences whereas this section applies only to investigation in the nature of inquests, investigations as to the apparent cause of death, and in such cases the witnesses are bound to speak truly. Such an investigation ceases where the cause of death is ascertained, *i.e.*, when it is determined whether death is natural, suicidal, homicidal, or accidental. In the case of homicidal death investigation, as to the guilt of the person concerned, becomes an investigation under S. 161 *supra*.

SUB-SECTION (2).—S. 170 *supra* refers to investigation into a cognizable offence by a police officer and his report upon completing the investigation to a Magistrate. If the facts did not disclose a cognizable offence the witnesses shall not be required to attend the Magistrate's Court. This sub-section refers only to those witnesses who have been examined at the inquest and not to witnesses who may be examined long after in connection with the investigation into the offence by the police.

176. (1) When any person dies while in the custody of the police, the nearest Magistrate empowered to hold inquests shall, and, in any other case mentioned in section 174, clauses (a), (b) and (c) of sub-section (1), any Magistrate so empowered may hold an inquiry into the cause of death, either instead of, or in addition to, the investigation held by the police-officer, and, if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence. The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any of the manners hereinafter prescribed according to the circumstances of the case.

Inquiry by Magistrate into cause of death.

(2) Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the Magistrate may cause the body to be disinterred and examined.

Power to disinter corpses.

When a person die in police custody the inquiry as to cause of death is imperative but in other cases mentioned in S. 175 (1) (a), (b), and (c) it is discretionary with the Magistrate to

enquire. The evidence is to be recorded by the Magistrate under Chapter XXV but there is nothing in the section which makes it imperative on the Magistrate to make a report or to come to a definite finding on the evidence recorded by him. See 3 C. 742.

This section is not applicable to the town of Madras. See S. 4 of Act V of 1889 which enacts that inquiry is to be held by the Chief Presidency Magistrate or such Presidency Magistrate as he deposes in this behalf and power to disinter bodies is given to the Commissioner of Police or a Presidency Magistrate. S. 435 (3) which enacted that orders under this section are not proceedings within the meaning of S. 435 *infra*, has now been repealed and therefore they can be revised. If a Magistrate not empowered by law to hold an inquest under this section does so his proceedings are not void, S. 529 (c), *infra*.

PART VI.

PROCEEDINGS IN PROSECUTIONS.

CHAPTER XV.

OF THE JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS.

A.—Place of Inquiry or Trial.

177. Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed.

Ordinary place of inquiry and trial.

SCOPE OF THE SECTION.—This section lays down that every offence shall *ordinarily* be inquired into or tried where it was committed. The use of the word "*ordinarily*" indicates that this rule is subject to any special provisions of law which may qualify it, and the rule is relaxed or modified in several succeeding provisions of the Code. This section lays down the general law and which again has been repeated in and made part of the special provisions in S. 191 (2), *infra*, which applies to a case of criminal breach of trust and not S. 179, 26 Cr. L.J. 725—86 Ind. Cas. 213; 23 Cr. L.J. 490—88 Ind. Cas. 26.

The special provision contained in S. 197 (2) of the Code, *vis.*, the power of Government to determine the person by whom and to specify the Court before which the trial of public servants is to be held, overrides the general rule contained in this section. The provisions of this section are subject also to the power of the High Court to transfer cases under S. 526 *infra*. The fact that the place where an offence was committed by an Indian British subject was transferred to a native state will not deprive the Sessions Court of the place where the offence was committed of its jurisdiction to try the offence especially when the offender, an Indian British subject resided in British India. 34 A. 451. The High Court has also power to direct that a trial should take place in one or the other district, 25 Cr. L.J. 81—76 Ind. Cas. 17.

EVERY OFFENCE SHALL ORDINARILY BE TRIED.—For definition of the word "offence", see S. 4 (1) *supra* and S. 40, I.P.C. The word "offence" will include also neglect or refusal to maintain wives and children, as such neglect or refusal is punishable under the Code, 13 A. 348. The proper Court to take cognizance of an application for maintenance under S. 488, *infra* is the Court within whose jurisdiction the accused neglected or refused to maintain, but S. 489 (8) makes a special exception and says that the accused may be proceeded against in any district where he resides or is, or where he last resided with his wife or as the case may be the mother of the illegitimate children. When two offences are committed in the course of the same transaction, they should be tried by a Magistrate having jurisdiction to try both, the offences and not by different Magistrates. Welr II, 145.

WITHIN THE LOCAL LIMITS OF WHOSE JURISDICTION IT WAS COMMITTED.
—All crime is local and the jurisdiction over the crime belongs to the country where the crime

is committed—*per* Lord Halsbury, L.C. in 1891 A C. 455 at 458. The fundamental principle laid down in this section is to the effect that the competency of a forum to take cognizance of an inquiry into, and trial of an offence as defined in S. 4, *supra* is determined by the place in which the offence is committed, 9 B. 40 at 45. The provisions of the Code are also applicable as *lex fori*, 17 B. 369 at 371. Though the commitment of an accused by a wrong Court may be an irregularity a commitment made to a wrong court is illegal and liable to be quashed, 38 M. 387. But if the trial is proceeded with and a decision arrived at, the defect is cured, 42 M. 791, See notes under S. 531. The accused a recruiter induced a person at Cawnpore to go to Fiji to work, but on the way, at Arrah where they stopped the accused induced him to proceed to Sylhet and sent him there with another man in contravention of S. 104 of the Assam Labour and Emigration Act, *held*, that the accused was rightly tried at Arrah and no offence under the Act was committed at Cawnpore. 37 C. 27. It is the Court which has territorial jurisdiction at the place where a bigamy was committed that can try the offence under S. 424 I.P.C. The offence of abetment of bigamy can be tried by the court within whose territorial jurisdiction the abetment takes place, 3 Pat. 417. Similarly a charge of misappropriation under S. 403 I.P.C. can be tried only at the place where the sum was misappropriated by the accused. 25 Cr. L. J. 377=77 Ind. Cas. 425.

See S. 531 *infra* which validates proceedings had in a wrong local area. No finding, sentence or order regularly passed by a Court in the case of an offence committed outside its local area can be set aside, when no failure of justice has taken place, 30 M. 94 ; 42 M. 791. Ss. 177, 179, 180, 181 and 183 must be read together with S. 531, *infra*. As a rule the plea of want of jurisdiction must be taken before the trial Court, but want of jurisdiction may be taken in the High Court for the first time, 16 W.R. (Cr.) 79 ; 32 C. 22.

Various special Acts make express provision for place of trial of offences created by those Acts, *e.g.*, Act IX of 1890 (Railway), S. 134 ; Act X of 1899, (Indian Posts), S. 60 (1) Act II of 1899 (Stamp), S. 72 ; Act XIV of 1895 (Pilgrim Ships) ; Act XIV of 1887 (Indian Marine), Ss. 44 and 48. See also S. 549 *infra* as to delivery of military offenders to be tried by Court-martial.

178. Notwithstanding anything contained in section 177, the Local Government may direct that any cases or class of cases committed for trial in any district may be tried in any sessions division:

Power to order case to be tried in different sessions divisions.

Provided that such direction is not repugnant to any direction previously issued by the High Court under section 15 of the Indian High Courts Act, 1861, or section 107 of the Government of India Act, 1915, or under this Code, section 526.

SCOPE OF THE SECTION.—Under this section the Local Government is empowered to direct that any case or classes of cases committed for trial in any district, shall be tried in a specified sessions division but it cannot direct that a case should be tried by a particular Court as such a direction is beyond the scope of this section. It was held in 10 C. 543 that the Local Government has no power to transfer for trial to a Court of a Commissioner a case duly committed for trial to the Court of the Recorder of Rangoon who exercises all the powers of a Court of Session to the Sessions division of Pegu. S. 267 *infra* lays down that in all criminal cases transferred to a High Court under this Code, or under the Letters Patent of any High Court, established under the Indian High Courts Act, 1861, trial may, if the High Court so directs, be by jury. See S. 527 *infra* which empowers the Governor-General in Council to transfer criminal cases and appeals from one High Court to another, or from any Criminal Court subordinate to one High Court to any other Criminal Court of equal or superior jurisdiction subordinate to another High Court for the ends of justice or for general convenience of parties.

PROVISO.—The proviso to the section was relied on in 28 C. 709 at 717-718 for transferring proceedings under S. 145 *supra* as clearly indicating that the High Court has power to make an order of transfer either under S. 526 of the Code or under S. 15 of the Charter Act.

179. When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued.

Accused triable in district where act is done or where consequence ensues,

Illustrations.

(a) A is wounded within the local limits of the jurisdiction of Court X, and dies within the local limits of the jurisdiction of Court Z. The offence of the culpable homicide of A may be inquired into or tried by X or Z.

(b) A is wounded within the local limits of the jurisdiction of Court X, and is during ten days within the local limits of the jurisdiction of Court Y, and during ten days more within the local limits of the jurisdiction of Court Z, unable in the local limits of the jurisdiction of either Court Y or Court Z to follow his ordinary pursuits. The offence of causing grievous hurt to A may be inquired into or tried by X, Y or Z.

(c) A is put in fear of injury within the local limits of the jurisdiction of Court X, and is thereby induced, within the local limits of the jurisdiction of Court Y, to deliver property to the person who put him in fear. The offence of extortion committed on A may be inquired into or tried either by X or Y.

(d) A is wounded in the Native State of Baroda, and dies of his wound in Poona. The offence of causing A's death may be inquired into and tried in Poona.

SCOPE OF THE SECTION.—This section is controlled in respect of certain offences by S. 181, *infra* 25 Cr. L.J. 928. But see 27 Cr. L.J. 992—96 Ind. Cas. 656, where it was held that this section is in no way modified by the provision of S. 181 (2). *infra*. This section does not apply to questions of jurisdiction of Courts to try the offence of criminal breach of trust, 26 Cr. L.J. 126—83 Ind. Cas. 698; 25 Cr. L.J. 410—77 Ind. Cas. 490; 16 Cr. L.J. 775—31 Ind. Cas. 375; 26 Cr. L.J. 725—86 Ind. Cas. 213.

COMMISSION OF OFFENCE BY REASON OF ANYTHING DONE.—The word "act" will include illegal omission also, see S. 4 (2) *supra*. The act must be one constituting an offence. This section only applies when a person is accused of the commission of any offence by reason of anything which he has done. In a case of falsification of accounts under S. 477A, I.P.C., the offence is complete when accounts are falsified with intent to defraud, and it is not apparent how a person accused of falsification of accounts can be said to be accused by reason of any consequence which has ensued within the meaning of the section, 3 M.L.T. 481; 41 C. 305; 35 A. 29. Where a petition under the Income-tax Act, S. 21 was verified at a place in Tanjore District but presented in Ramnad District and on a complaint for an offence under S. 177, I.P.C. and S. 40 of the said Act was filed in Ramnad. *held*, as the offence was committed in Tanjore District, the Ramnad Magistrate had no jurisdiction to entertain the complaint, 43 M.L.J. 475—16 L.W. 335. A carrying on business at Gaya gave a cheque to B, which was dishonoured at Calcutta and on further correspondence the crucial letter which disclosed that B was cheated, was received at Buxar by B who filed his complaint of cheating at Buxar; it was held that the Buxar court had jurisdiction to entertain the complaint. 25 Cr. L.J. 81—78 Ind. Cas. 17.

ANY CONSEQUENCE WHICH HAS ENSUED.—The words "and of any consequences which has ensued" in this section embrace only such consequences as modify or complete the act alleged to be an offence, 1909 A.W.N. 115—5 A.L.J. 333. The word "consequences

means a consequence which forms a part and parcel of the offence and not a consequence which is not such a direct result of the act of the offender as to form no part of that offence. 34 A. 487. The words "any consequence" mean a consequence which must be one of the facts to be proved to establish the offence and will not include remote consequences arising from the offence having been previously committed and not forming an integral part of the offence, 10 Cr. L.J. 86—2 Ind. Cas. 316. Where a remarriage and adultery against the accused took place at B, a trial of the accused held by the Sessions Judge of S. is invalid where the consequence of the offence of remarriage and adultery ensued at the place S. i.e. the complainant being kept deprived of his wife from the time she went into the keeping of the accused, 21 A.L.J. 155 at 160. This section can be applied only to cases in which the consequence necessary to constitute the offence ensues, in some place other than that in which the accused's act is done, 33 M. 576 at 578. When the act constituting the offence was complete outside British India and no ingredient of the offence had ensued within British India as a consequence of anything done outside British India, the accused could not be tried in British India. In the illustration (d) to this section it will be seen that until A died in Poona of the injuries received at Baroda the offence was not complete till his death. Causing grievous hurt was complete outside before the complainant came to British India for treatment, 8 Bom. L.R. 313 at 316. Where the accused on false representation induced complainant to part with money at Meerut, and the complainant on discovering the fraud practised on him at Agra charged the accused at Agra for offences under Ss. 420 and 265, I.P.C. held, that the Magistrate at Agra had no jurisdiction, as both the offences were committed at Meerut and the section did not apply inasmuch as the discovery of the fraud after delivery of the article was not a consequence which had ensued within the meaning of this section, 13 A.L.J. 1067. But in the next case the accused, a trader in Salem, in the Madras Presidency, deceived a trader in Dhulia in Bombay Presidency by leading him to believe that he was buying clean ground-nut oil when as a matter of fact he was buying a mixture of ground-nut oil with rook oil, and the Dhulia trader was induced by the deceit to pay the price agreed upon on the understanding that it was pure oil, held, that the complainant was deceived in Dhulia and the Courts at Dhulia had jurisdiction to hear the case, 17 Bom. L.R. 389. See also 46 B. 641 which dissented from 38 M 639 and followed 35 A. 29; 41 C. 305; 44 C 912; 23 Cr. L.J. 743—69 Ind. Cas. 631.

The offence of criminal breach of trust is completed by the misappropriation or conversion of the property dishonestly. It is the intention which is essential, and whether wrongful gain or loss actually results is immaterial. It is a consequence but not an essential part of the offence, and a person is not accused of the offence by reason of it. Where the accused who were brothers living in Bombay were charged with criminal breach of trust at Erode in respect of certain *Hundis* sent from there for encashment by the complainants, and the *Hundis* were cashed in Bombay and the proceeds misappropriated at Bombay, it was held that this section did not give the Erode Magistrate jurisdiction to try the case, 38 M. 639; 44 C. 912; 23 Cr. L.J. 743—69 Ind. Cas. 631; 1 Rang. 56. But see 46 B. 641 where it was held that "consequence" bears its ordinary grammatical meaning not restricted to a consequence which is the necessary ingredient of the offence. Where the accused who was the Agent of the complainants' firm at Nandyal for sale of oil sold goods and failed to account for the sale proceeds and absconded, a complaint was preferred to the Presidency Magistrate of criminal misappropriation and breach of trust. held, that the Madras Court had no jurisdiction to try the case, the conversion and loss having occurred at Nandyal, the offence of breach of trust is constituted by dishonest conversion and loss which ensues as its consequence, and the loss ensues immediately on the conversion, 39 M. 876. But in this case their Lordships dissented from the view held in 38 M. 639 that the existence of the dishonest intention and not the ensuing loss that was the essential element of the offence of breach of trust and that there was no question of consequence or of the application of this section. See also, on this question, 35 A. 29; 34 A. 487; 32 A. 397; 26 C. 746; 1 Rang. 85. It was held in 38 M. 779 that when offence of criminal breach of trust was committed outside British India by a British subject, the entrustment having taken place in British India, and the consequent loss ensues in British India the accused

could be tried in British India and no certificate of the Political Agent was necessary under S. 188 *infra*. Falsification of accounts is an offence complete when accounts are falsified, with intent to defraud and the person cannot be said "by reason of any consequence which has ensued" within the meaning of this section. Therefore only that Court within whose jurisdiction the accounts are falsified is competent to try, 4 M.L.T. 481-9 Cr. L.J. 92-1 Ind. Cas. 796; 18 M.L.T. 25. Where a defamatory letter was posted in Madras addressed to Tinnevely, it was held that the offence could be tried either in Madras or in Tinnevely, 44 M.L.J. 638-32 M.L.T. 164.

ILLUSTRATION.—The illustration are not exhaustive and to hold that the consequences prescribed in the section as conferring jurisdiction are *ejusdem generis* with the consequences specified in the illustrations is not warranted by the language of the section, 8 Cr. L.J. 76. Illustrations to section do not strictly form part of the Act, 1 A. 34 at 38; they are not to be construed as limiting the right given by the section, 28 M. 57. They furnish some indication as to intentions of Legislature, 15 B. 491 at 496; 43 C. 390. In 21 Bom. L. R. 558 (P.C.) it was held that illustrations are to be taken as part of the statute.

180. When an act is an offence by reason of its relation to any other act which is also an offence or which would be an offence if the doer were capable of committing an offence, a charge of the first-mentioned offence may be inquired into or tried by a Court within the local limits of whose jurisdiction either act was done.

Place of trial where act is offence by reason of relation to other offence.

Illustrations.

(a) A charge of abetment may be inquired into or tried either by the Court within the local limits of whose jurisdiction the abetment was committed, or by the Court within the local limits of whose jurisdiction the offence abetted was committed.

(b) A charge of receiving or retaining stolen goods may be inquired into or tried either by the Court within the local limits of whose jurisdiction the goods were stolen, or by any Court within the local limits of whose jurisdiction any of them were at any time dishonestly received or retained.

(c) A charge of wrongfully concealing a person known to have been kidnapped may be inquired into or tried by the Court within the local limits of whose jurisdiction the wrongful concealing, or by the Court within the local limits of whose jurisdiction the kidnapping, took place.

SCOPE OF THE SECTION.—This section is subject to the provisions of S. 188, *infra*, 8 M.L.T. 54- (1910, M.W.N. 143-11 Cr. L.J. 306-6 Ind. Cas. 308 and provides for place of trial where act is an offence by reason of its relation to any other act which is also an offence. This section provides for an alternative jurisdiction in regard to related offences such as abetment in relation to a principal offence or offences like receiving or retaining stolen property in relation to theft or concealing persons in relation to kidnapping etc. The words of the section clearly exclude from its scope cases where the offences constituted by abetment of a contemplated act which if done would have been an offence but which was not in fact done.

ILLUSTRATION (a).—When a foreign subject resident in foreign territory instigated the commission of an offence which in consequence was committed in British territory, it was held that the instigation not having taken place in any district created by the Code, he could not be tried in British India, 10 B.H.C.R. 356, but where a foreigner in foreign territory initiates an offence which is completed in British territory, he is liable to be tried by the British Court within whose jurisdiction the offence was completed, 14 Bom. L.R. 147; Weir I, 185. When a person instigates another to commit an offence by means of a communication sent through post, the offence of abetment is complete as soon as the contents of the letter

becomes known to the addressee, and such offence may be tried at the place where the communication is received, 16 A. 389.

ILLUSTRATION (b).—Where the accused was found in possession of stolen property at a place outside British India, the theft having taken place in British India, and he was placed on his trial before the Court in British India where the theft took place, it was held that British Courts had no jurisdiction to try him for an offence under S. 411, I.P.C., committed at a place beyond British territory with regard to stolen properties, 18 C.W.N. 1173, but see 8 M.L.T. 84; where theft took place in a Native State a trial of the accused whether British subject or otherwise could be had for retaining stolen property in British India, as the definition of stolen property in S. 410 includes property stolen outside British India, 6 C. 307; 10 B. 186; 23 A. 372; 1 B. 80; 25 M.L.J. 233 The decisions in 1 M. 171; 5 B. 338; Weir II, 145 are no longer law.

ILLUSTRATION (c).—Persons who committed an offence under S. 368, I.P.C. (concealing a kidnapped person) in *Saharanpur* sessions division could be tried in the *Moradabad* sessions division where the primary offence under S. 366 (kidnapping) was committed, 18 A 350.

181. (1) The offence of being a thug, of being a thug and committing murder, of dacoity, of dacoity with murder, of having belonged to a gang of dacoits, or of having escaped from custody, may be inquired into or tried by a Court within the local limits of whose jurisdiction the person charged is.

Being a thug or belonging to a gang of dacoits, escape from custody, etc.

(2) The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed.

Criminal misappropriation and criminal breach of trust.

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

Theft.

(4) The offence of kidnapping or abduction may be inquired into or tried by a Court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted or was conveyed or concealed or detained.

Kidnapping and abduction.

AMENDMENT.—The amendment in sub-section (3) is of a verbal character eliminating "stealing" and substituting the word "theft."

This section provides for the place of trial of offences of being a thug, belonging to a gang of dacoits, criminal misappropriation, breach of trust, theft and kidnapping and abduction.

SCOPE OF THE SECTION.—This section is intended to regulate the jurisdiction of Courts in British India in respect of offences committed in British India and cannot vary or abrogate the ordinary rule that no foreign subject can be tried in British India for an offence committed outside British India, 28 A. 372; 2 Bom. L.R. 337. Ordinarily the provisions of this section should receive effect unqualified by the provisions of S. 179.

SUB-SECTION (1).—See S. 310, I.P.C., as to the definition of a thug. Being a thug is punishable under S. 311, I.P.C., Gangs of persons habitually associated for the purpose of decoying and murdering travellers to take their property, etc., are designated as thugs. Escape from custody is punishable under S. 224 I.P.C., A convict escaping from custody should be tried for the offence under S. 224 I.P.C. in the district in which he escaped and a Magistrate of another district has no jurisdiction to try him, 1 B.H.C. R 136. The word "is" after the word "charged" occurring in this sub-section gives the Magistrate jurisdiction whether the accused has come within his jurisdiction, of his own accord or has been brought there by force, 12 Cr. L.J. 113—9 Ind. Cas. 677 where 25 C. 20; 6 B. 622 are referred to; see also 25 M. 124; 35 B. 225. A foreigner who is not a servant of the Queen within S. 188 *infra* cannot be tried in British territory for having committed dacoity in a Native State, but he could be convicted for retaining stolen property in British territory under S. 412, I. P. C., 1 B. 50; 6 C. 307; 10 B. 186; 28 A. 372.

SUB-SECTION (2).—For place of trial in cases of criminal breach of trust and misappropriation, see note under S. 179, *supra*. This sub-section does not in any way modify the provisions of S. 179; *supra*. Under this sub-section an offence of criminal misappropriation or breach of trust may be inquired into where the offence was committed but where the breach of trust was committed in the Native State of Bhopal and in consequence money was taken out of the pocket of a British subject in British India, the offence can be said to have been committed in both the places and the accused can be tried in either place. There is no divergence as there cannot be in such an excellent Code as the Cr. P.C., between Ss. 179 and 181 (2), 27 Cr. L.J. 992—96 Ind. Cas. 656. An offence under S. 409 I.P.C. can be tried by a Magistrate within whose jurisdiction the property was received or retained, 4 M.L.T. 481—9 Cr. L.J. 92—1 Ind. Cas. 796. A firm doing business in Calcutta employed an agent in Singapore, and prosecuted him at Calcutta for breach of trust committed at Singapore, but accountable for the moneys at Calcutta. *Held*, that the Court in Calcutta had jurisdiction to entertain the complaint, 26 C.W.N. 175 where 26 C. 745 and 44 C. 912 are referred to; see also 1 Rang. 55. This sub-section only applies as between Courts of different local areas whose jurisdiction has been limited by S. 12, *supra* and to which the Code applies. A British Magistrate cannot take cognizance of a breach of trust committed in a Native State merely because part of the property is retained within his jurisdiction, 21 M. L.J. 451—13 Cr. L.J. 530—16 Ind. Cas. 802 but see 38 M. 779. The jurisdiction of a Court to try an offence of criminal misappropriation or breach of trust is governed by this sub-section and not by S. 179, *supra*. The resulting loss, though a normal result in such cases is not an ingredient of those offences and cannot therefore be described as a consequence within S. 179, *supra*, 25 Cr. L.J. 410—77 Ind. Cas. 490. When the accused is under a liability to render accounts at a particular place and fails to do so by reason of having committed criminal breach of trust which is alleged against him, the Court within the local limits of whose jurisdiction that place is situate may inquire into and try the offence under this sub-section and S. 179, *supra* has no application to the case, 41 C.L.J. 80—29 C.W.N. 432—26 Cr. L.J. 725—86 Ind. Cas. 213. followed in 27 Cr. L.J. 900—86 Ind. Cas. 212.

SUB-SECTION (3).—A British Magistrate has no jurisdiction to try a person who is the subject of a Native State and not a subject of the Crown for the offence of theft committed in that State, 2 Bom. L.R. 337. This sub-section as amended means that the offence of being in possession of stolen property may be inquired into either in the district where it was stolen or where it was found to be dishonestly possessed. This, indeed, is expressly stated in Illustration (b) to S. 180, *supra*. It must be conceded that the language of this sub-section as amended is open to objection. The context requires that the words "such offence" in this section

should mean the offence of theft whereas grammatically they should mean any offence of possession. An accused can be tried for retention of a stolen bullock at Alighar when the theft took place at Mattra, 24 A.L.J. 148.

SUB-SECTION (3).—This was introduced in the Code of 1898 and was intended to provide for the case of an offender proceeding from one local jurisdiction to another in British territory. The decisions in 18 A. 350; 27 C. 1041; 2 C.W.N. 81 and 1883 A.W.N. 185 are no longer law. A person charged with having committed the offence of kidnapping in a Native State cannot be tried by a Court in British India within the local limits of which the person kidnapped may be conveyed or concealed or detained. The operation of the Code cannot be extended beyond British territory and allow a case to be tried within British dominion for an offence committed in a State beyond British India, 20 C.W.N. 62; 18 C.W.N. 1178—20 Ind. Cas. 599. It is to be noted that the offences of kidnapping and abduction are not continuing offences, and become complete the moment the person is removed from the keeping of the lawful guardian or enticed away. See 5 Patna 538; 38 A. 664; 12 A.L.J. 91; 26 M. 454; 2 C.W.N. 81; 27 C. 1041 (F.B.).

182. When it is uncertain in which of several local areas an offence was committed, or where an offence is committed partly in one local area and partly in another, or where an offence is a continuing one, and continues to be committed in more local areas than one, or where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

Place of inquiry or trial where scene of offence is uncertain or not in one district only; or where offence is continuing, or consists of several acts.

SCOPE OF THE SECTION.—This section in reality intends to provide for the difficulty which would arise where there is a conflict between different areas in order to prevent an accused person getting off entirely, because there may be some doubt as to what particular Magistrate has jurisdiction to try the case. See 45 C. 490. Each portion of the section refers to this conflict, 16 C. 667 at 678. The provisions of this section go to show that the policy of the law is to authorise more Courts than one to try offences in cases of uncertainty, 2 C.W.N. 450 at 452, but certainly the balance of convenience should be taken into consideration. This section relates to cases of offences only, that is, acts which are punishable by law and a case under S. 145 is not a case relating to an offence, 3 C.W.N. 148 at 150.

LOCAL AREA.—The expression "local area" in this section means a local area over which this Code has application. It does not include a local area in foreign country or a portion of the British Empire to which this Code has no application; 16 C. 667. S. 632 *infra* clearly shows that a sessions division, district or sub-division is within the meaning of the Act, and is intended to be included in the term local area, 23 C. 853; 12 A.L.J. 1022. If a conspiracy is entered into in district A and acts are committed in pursuance of that conspiracy in District B the Magistrate of District A can try offence of conspiracy, but cannot try the accused in the same trial for offences committed outside his district, 23 C.W.N. 975 See 24 Cr. L.J. 309—72 Ind. Cas. 69, as to defamatory letter sent by post.

183. An offence committed whilst the offender is in the course of performing a journey or voyage may be inquired into or tried by a Court through or into the local limits of whose jurisdiction 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.

Offence committed on a journey.

WHILST THE OFFENDER IS IN THE COURSE OF PERFORMING A JOURNEY OR VOYAGE.—This section applies to offences committed while the offender is in the course of performing a *journey or voyage*, but it is not necessary that the person injured or the subject-matter of the offence should be on a voyage or journey. The words *journey or voyage* referred to herein do not include a voyage on the high seas or in a foreign territory, but are confined in their meaning to a journey or voyage within the territories of British India, as down the Ganges or Buckingham Canal, 5 M. 23 ; 24 Cr. L.J. 879. The words "on a journey or a voyage" must, we think, be read as if the provision had been, whilst a journey or voyage or any part of it is being performed by a ship or carriage without particular reference to the terminus ; and so, read together with the language of the rest of the section, the proper construction and effect of the enactment is that if a person is accused of an offence committed whilst a journey or voyage going on he may be tried in any of that part of the journey or voyage during which the offence of which the person is accused is, alleged to have been committed is within the local limits of the Court's jurisdiction." 1 M.H.C.R. 193. Where a box containing money was missed during a halt at S. in T. district from a boat which was on its way to C district the question arose whether the charge of theft due to the loss of the box could be tried in T or C district. *held* the journey was not broken by the halt at S. and that under this section the case could be tried in C district, the place of destination. 25 W.R. (Cr.) 45. Where the complainant and accused travelled in a boat from Bombay to Honawar, and during the journey the accused threw overboard a box of the complainant within 9 miles of Janjira State and reaching Honawar the complainant charged the accused before the Honawar Magistrate of having committed mischief it was held that the Magistrate at Honawar, through whose jurisdiction the accused passed on his journey had jurisdiction to try the offence, Ratanlal 181. The *journey* spoken of is a continuous journey from one terminus to an other regard being had for the purpose of estimating the continuity to all the ordinary incidents affecting journeys of the particular kind which may be under consideration, 13 B.L.R. Appx. 4 = 21 W.R. (Cr.) 86 ; 25 W.R. (Cr.) 45. The journey referred to is the journey which the offender is performing and the words "*that journey*" at the end of the section refer to the same journey. Where therefore a *Sarang* was charged for rashly navigating under S. 280, I.P.C., the only Courts which have jurisdiction to try him are the Courts through or into the local limits of whose jurisdiction, he in the course of the journey passed, 1 C.L.J. 331. See also 24 Cr.L.J. 288 as to the trial of an offence committed on a railway journey in which it was held that it was immaterial at what point the offence was committed in the course of a journey.

184. 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.

Offences against
Railway, Telegraph,
Post-office and
Arms Acts.

Provided that the offender and all the witnesses necessary for his prosecution are to be found within such town.

This section applies to the trial of offences against Railways, Telegraph, Post office and Arms Acts in the presidency-town, irrespective of the place where the offence was committed. See for Railways Act IX of 1890, Telegraph Act XIII of 1885, Post Office Act VI of 1890, Arms and Ammunition Acts of 1878.

High Court to decide, in case of doubt district where inquiry or trial takes place.

185. (1) *Whenever a question arises as to which of two or more Courts subordinate to the same High Court ought to inquire into or try any offence, it shall be decided by that High Court.*

(2) *Where two or more Courts not subordinate to the same High Court have taken cognizance of the same offence, the High Court within the local limits of whose appellate criminal jurisdiction the proceedings were first commenced may direct the trial of such offender to be held in any Court subordinate to it, and if it so decides all other proceedings against such person in respect of such offence shall be discontinued. If such High Court, upon the matter having been brought to its notice, does not so decide, any other High Court, within the local limits of whose appellate criminal jurisdiction such proceedings are pending may give a like direction, and upon its so doing all other such proceedings shall be discontinued.*

AMENDMENT.—This section is redrafted and the conflict of decisions in 40 M. 833 and 44 C. 595 is set at rest. The Madras view is accepted as correct, and it is now made clear that one High Court cannot by implication or otherwise transfer a case to itself from a Court subordinate to another High Court, and *vice versa* or decide which of two High Courts or Courts subordinate thereto should try a case. A High Court could give directions only to a Court subordinate to it.

WHENEVER A QUESTION ARISES.—This section is not restricted to a case in which there is a doubt as to whether one Court or other has jurisdiction, which is dealt with by S. 182, *supra*. The section will include the case of a choice on the ground of public convenience, 9 Cr. L. J. 381=2 Ind. Cas. 361. See also 17 C.W.N. 761=14 Cr. L. J. 398=20 Ind. Cas. 222; 44 C. 595. The doubt contemplated by this section is only as to the Court by which an offence is to be inquired into or tried and may be founded on a question of law or of fact. The doubt cannot, for example, refer to the competency of a Magistrate to commit the accused for trial to a Court of Session. This section has absolutely nothing to do with transfer, or High Courts power of transfer, 40 M. 833. This section refers to those cases only where some offence is being inquired into or tried. The term "offence" is defined in S. 4 (h) *supra*. Proceedings under Chapter XII of the Code are not proceedings relating to any offence, and this section has therefore no application. 12 A.L.J. 390=15 Cr. L. J. 520=24 Ind. Cas. 608.

This section does not warrant interference by the High Court merely upon the ground of convenience. The decision of the High Court within the local limits of whose appellate jurisdiction the offender actually is, can only be sought when a doubt arises as to the Court by which an offence should be inquired into or tried, 9 Cr. L. J. 381=2 Ind. Cas. 361; 44 C. 595. When two Courts are equally competent to exercise jurisdiction in a matter there is no doubtful question to decide for the High Court, 41 C. 305 at 308; 21 C.W.N. 320 (F.B.); 24 Cr. L. J. 929=73 Ind. Cas. 353 and 40 M. 833.

186. (1) When a Presidency Magistrate, a District Magistrate, a Sub-divisional Magistrate, or if he is specially empowered in this behalf by the Local Government, a Magistrate of the first class, sees reason to believe that any person within the local limits of his jurisdiction has committed without such limits (whether within or without British India) an offence which cannot, under the provisions of sections 177 to 184 (both inclusive), or any other law for the time being in force, be inquired into or tried within such local limits, but is under some law for the time being in force triable in British India, such Magistrate may inquire into the offence as if it

Power to issue summons or warrant for offences committed beyond local jurisdiction.

had been committed within such local limits, and compel such person in manner hereinbefore provided to appear before him, and send such person to the Magistrate having jurisdiction to inquire into or try such offence, or, if such offence is bailable, take a bond with or without sureties for his appearance before such Magistrate.

(2) When there are more Magistrates than one having such jurisdiction and the Magistrate acting under this section cannot satisfy himself as to the Magistrate to or before whom such person should be sent or bound to appear, the case shall be reported for the orders of the High Court.

OBJECT OF THE SECTION.—The object of the inquiry by the Magistrate contemplated by this section is only to satisfy himself that there are *prima facie* grounds for sending a person believed to have committed the offence to a Magistrate having jurisdiction to inquire or try the same, *Ratanlal 849*. Such inquiry is to be conducted in accordance with Chapter XVIII of the Code.

SPECIALLY EMPOWERED IN THIS BEHALF.—When a Magistrate finds he has no power to act under this section, he can decline to exercise jurisdiction, *Ratanlal 849*. If a Magistrate not empowered by law to issue process under this section for the apprehension of a person, erroneously in good faith does so, his proceedings shall not be set aside merely on the ground of his being not so empowered, *S. 529 (d), infra*.

MAY INQUIRE INTO THE OFFENCE.—The inquiry contemplated herein is for the purpose of satisfying that there are *prima facie* grounds for believing the person accused of having committed an offence for sending him to a Magistrate having jurisdiction and such inquiry is to be conducted in the manner prescribed by Chapter XVII, *infra*.

COMPEL SUCH PERSON IN MANNER HEREINBEFORE PROVIDED TO APPEAR BEFORE HIM.—See Chapter VI, *supra* relating to process to compel appearance. It is not necessary for the validity of the process issued that the Magistrate issuing the same should be at the time of issuing it, within his local jurisdiction. *1 B. 340*.

SUB-SECTION (2).—Where an application is made to the High Court by the complainant under S. 29 of the Letters Patent for a direction that the case against the accused should be investigated by the Presidency Magistrate and committed to the High Court Sessions for trial, it was held that where special provision is made in certain circumstances namely under this section, the procedure must be governed by the special provision and not by the general provision contained in S. 21 of the Letters Patent, which must be resorted to in cases of an extremely exceptional character. The High Court dismissed the application remarking that it will be for the Magistrate to proceed under this section. *Weir II, 148*.

187. (1) If the person has been arrested under a warrant issued under section 186 by a Magistrate other than a Presidency Magistrate or District Magistrate, such Magistrate shall send the person arrested to the District or Sub-divisional Magistrate to whom he is subordinate, unless the Magistrate having jurisdiction to inquire into or try such offence issues his warrant for the arrest of such person, in which case the

Procedure where warrant issued by subordinate Magistrate.

person arrested shall be delivered to the police-officer executing such warrant or shall be sent to the Magistrate by whom such warrant was issued.

(2) If the offence which the person arrested is alleged or suspected to have committed is one which may be inquired into or tried by any Criminal Court in the same district other than that of the Magistrate acting under section 186, such Magistrate shall send such person to such Court.

Liability of British subjects for offences committed out of British India.

188. When a Native Indian subject of Her Majesty commits an offence at any place without and beyond the limits of British India, or

when any British subject commits an offence in the territories of any Native Prince or Chief in India, or

when a servant of the Queen (whether a British subject or not) commits an offence in the territories of any Native Prince or Chief in India,

he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found :

Provided that *notwithstanding anything in any of the preceding sections of this Chapter* no charge as to any such offence shall be inquired into in British India unless the Political Agent, if there is one, for the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in British India ; and, where there is no Political Agent, the sanction of the Local Government shall be required :

Provided, also, that any proceedings taken against any person under this section which would be a bar to subsequent proceedings against such person for the same offence if such offence had been committed in British India shall be a bar to further proceedings against him under the Foreign Jurisdiction and Extradition Act, 1879, in respect of the same offence in any territory beyond the limits of British India.

AMENDMENT.—The opening words of the first proviso “provided that notwithstanding anything in any of the preceding sections of this Chapter” have been added as certain decisions seem to make it doubtful whether this section was subject to the provisions of Ss. 179 to 181.

SCOPE OF THE SECTION.—This section has been amended in 1898 so as to conform exactly with the statutes empowering the Indian Legislature. The first paragraph corresponds to the Indian Councils Act, 1869, the second paragraph with the Government of India Act, 1865, and the third paragraph with the Indian Councils Act, 1861. Exactly similar amendments were made in S. 4 of the Indian Penal Code by Act IV of 1898. Again the Foreign Jurisdiction and Extradition Act of 1879 has been repealed. Its legislative

enactments have been produced in the Indian Extradition Act XV of 1903, while the extra-territorial powers of the Governor-General in Council are now more appropriately declared by the Indian Foreign Jurisdiction Order in Council. The amendment of the proviso to S. 188 seems to have been made with a view to the judgment in 13 B. 147 and in order to avoid a conflict of jurisdiction with the Courts of Foreign Sovereigns and the Courts established by the King by an Order in Council under; Ss. 53 and 54 Victoria, Chapter 37, 14 Cr. L.J. 298—19 Ind. Cas. 364. This section does not mention the word 'certificate' at all and there is no direction for the signing of a certificate by any particular person, 7 Lah. 468. No certificate is necessary for offences committed in the High Seas which is not part of the territory of any state. This section refers only to territories of any native prince or chief in India. 12 Cr. L.J. 198—10 Ind. Cas. 703.

NATIVE INDIAN SUBJECT.—The expression means native subject *de jure* and not *de facto* and occasional residence in British territory cannot be taken to render a person who is not *de jure* a subject, for the purpose of criminal jurisdiction being exercised over him for an act committed by him in foreign territory which if committed within British territory would have been an offence cognizable by Municipal Courts, 1885 P.R. (Cr. J.) 1. The mere fact of non-residence will not divest a person of his nationality, 2 A. 218 (F.B.); 6 B. 622.

ANY BRITISH SUBJECT.—The expression is by no means synonymous with the expression "European British subject" as defined in S. 4 (1) (i) *supra*. Its ordinary meaning is that of a person who owes allegiance to the British Crown as opposed to a foreigner. In the Code the expression "British subject" is used evidently in a limited sense in antithesis to a "Native Indian subject."

WHERE A SERVANT OF THE QUEEN, ETC.—This clause was introduced for the first time in the 1898 Code to meet the decision in 16 B. 178 which held that a native accused who was not an *Indian subject* even though he was a servant of the Queen was not within the section as it stood before the amendment. Corresponding change was made in S. 4, I.P.C. also.

AT ANY PLACE AT WHICH HE MAY BE FOUND.—The words "in any place" include high seas within its ambit, 41 B. 667. The words "at which he may be found" must be taken to mean not where the person was discovered but where he is actually present, 6 B. 622; 13 B. 147; 2 A. 218. "Where a man is in the country and is charged before a Magistrate with an offence under the Penal Code it will not avail him to say that he was brought there illegally from a foreign country. This appears very clearly from Lord Chief Justice Cockburn's charge to the Grand Jury in *The Queen v. Nelson and Brand*. The principle upon which the English cases are based underlies also S. 188 of the Code," 35 B. 223. The Court which tries an accused has nothing to do with the mode by which he has been brought before the Court, 26 M. 124.

FIRST PROVISIO.—The opening words "notwithstanding anything in any of the preceding section of the Chapter" have been added as certain decisions, especially in 38 M. 779, seem to make it doubtful whether this section is subject to the provisions of S. 179 to S. 188, *supra*, and, to clear this up, the words were added. This proviso is universal in its application and is not restricted to Native States in India and was intended to avoid a conflict of jurisdiction with the Courts of Foreign Sovereigns and the other Courts established by the King by an order in Council under Ss. 53 and 54 Victoria, Chapter 37, 14 Cr. L.J. 298—19 Ind. Cas. 364.

NO CHARGE SHALL BE INQUIRED INTO UNLESS POLITICAL AGENT CERTIFIES.—For meaning of the term "Political Agent" see S. 3 (40), General Clauses Act X of 1897. The obtaining of a certificate is a preliminary requisite to the holding of the inquiry. The want of a certificate is an absolute bar to the trial, of the accused for an alleged offence committed outside British India, 17 A.L.J. 480—20 Cr. L.J. 278—60 Ind. Cas. 184, following 19 A. 109; 17 A.L.J. 1085—20 Cr. L.J. 700—52 Ind. Cas. 668. The defect cannot be cured by S. 537 *infra*, 24 A. 236; 19 A. 109; 13 M. 423; 24 B. 267. See 27 Cr. L.J. 218—82 Ind. Cas. 170 and the defect cannot be cured by producing a certificate subse-

quently but it was held in 12 Bom. L.R. 667 that there is nothing in the language of the proviso making illegal the obtaining of the certificate after the complaint has been filed and before the inquiry has begun; see 8 Bom. L.R. 507 where it was held that a commitment made was good where the certificate was obtained after examining some of the prosecution witnesses. See also 7 Lah. 468 where 23 A. 286 is distinguished. When certificate has once been granted at the request of the accused who wanted to be tried in British India it cannot be subsequently cancelled by the Political Agent on the ground that the Chief wanted the case to be tried in his own Court, 14 Bom. L.R. 377; 13 Cr. L.J. 537=15 Ind. Cas. 809. The certificate granted under this section in respect of a certain set of facts will cover every charge which the facts disclosed in the proceedings will suffice to sustain. The certificate is granted on the allegation of certain facts which constitute the charge against the accused and the Magistrate is not restricted to the section which is mentioned in the certificate but at the utmost to the facts." 33 A. 314 at 516. A commitment of the accused on a charge not specified in the certificate of the political Agent granted for the trial of the accused in British India of the offence charged is good and valid. 8 M.L.T. 203=11 Cr. L.J. 531=7 Ind. Cas. 802.

SANCTION OF THE LOCAL GOVERNMENT.—Where there is no Political Agent the sanction of the Local Government must be obtained before proceedings are taken against the accused. Where the accused, a native Indian subject of the King, was charged with an offence of criminal breach of trust committed at *Las Palmas* in Spain and objection was taken that he could not be tried in British India without the sanction of the Local Government, S. 537 *infra* could not be applied at an intermediate stage of the case so as to allow the error to remain uncorrected, 14 Cr. L.J. 298=49 Ind. Cas. 954. It is to be noted that the certificate required under this section is not mentioned in S. 537. *infra* and that section cannot apply to a case under this section and want of such certificate renders the trial void.

FOR THE TERRITORY IN WHICH THE OFFENCE IS COMMITTED.—The words "territory" used in the first proviso to this section refers only to territories of any Native Prince or Chief in India, and it cannot include the high seas since they are no part of the territories of any State, 12 Cr. L.J. 198=10 Ind. Cas. 705.

189. Whenever any such offence as is referred to in section 188 is being inquired into or tried, the Local Government may, if it thinks fit, direct that copies of depositions made or exhibits produced before the Political Agent or a Judicial Officer in or for the territory in which such offence is alleged to have been committed 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.

COURT MIGHT ISSUE A COMMISSION FOR TAKING EVIDENCE.—See Ss. 503 to 508 *infra* as to issue of commissions for examination of witnesses.

B.—Conditions requisite for Initiation of Proceedings.

190. (1) Except as hereinafter provided, any Presidency Magistrate, District Magistrate or Sub-Divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence

Cognizance of offences by Magistrate.

(a) upon receiving a complaint of facts 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.

(2) The Local Government, or the District Magistrate subject to the general or special orders of the Local Government, may empower any Magistrate to take cognizance under sub-section (1), clause (a) or clause (b), of offences for which he may try or commit for trial.

(3) The Local Government may empower any Magistrate of the first or second class to take cognizance under sub-section (1), clause (c) of offences for which he may try or commit for trial.

SCOPE OF THE SECTION.—This section deals with the ordinary ways in which a Magistrate may "*take cognizance*" of an offence. This section only says, "*may take cognizance*" and it was held by the Allahabad High Court in 1899 A. W. N. 201, that when the matter comes to his notice under cl. (1) (c) of this section by a communication received through post a Magistrate is not bound to act *judicially*. The use of the term "*may take cognizance of any offence*" does not make it optional with a Magistrate to hear the complainant. It refers to the action of the Magistrate in taking cognizance of an offence in either of three specified courses in which the facts constituting an offence may be brought to his notice. It is not competent for him to refuse to take cognizance of an offence on receipt of a complaint of facts constituting an offence but he is rather bound to examine the complainant, 13 C. 334 at 336. When a case comes by transfer from one Magistrate to another no question of taking cognizance ever arises as the case must have been taken cognizance of by a Magistrate before it could be transferred to the file of another Magistrate. The object of the Code is that before proceedings are started against an accused, such as would bring him to a Court of Justice, a Magistrate must have before him knowledge independent of his own knowledge based either upon a complaint or upon a police-report, 11 A. L. J. 331.

EXCEPT HEREINAFTER PROVIDED.—See Ss, 195, 198, 476, 480, 485, 561 etc. An offence under S. 211 I.P.C. is a non-cognizable one and the police are not empowered to investigate into it of their own accord and to prefer a charge in respect of it. 28 Cr. L.J. 1550-90 Ind. Cas. 398.

MAGISTRATE SPECIALLY EMPOWERED IN THIS BEHALF.—See S. 201, *infra* for procedure where the Magistrate to whom a complaint is made is not competent to take cognizance of the case. In such cases the Magistrate shall return the complaint for presentation to the proper Court with an endorsement to that effect. Sch. IV shows that provincial Magistrates are to be empowered to take cognizance of offence under the three clauses of sub-section (1) of this section and S. 529 (e) *infra* says that if any Magistrate not empowered to take cognizance of an offence under sub-section (1), clause (a) or (b) erroneously in *good faith* does anything, his proceedings shall not be set aside merely on the ground of his being not so empowered. S. 350 (b) *infra* says that if any Magistrate not empowered by law takes cognizance under S. 190, sub-section (1), clause (c) of an offence, his proceedings shall be void.

MAY TAKE COGNIZANCE OF ANY OFFENCE.—The word "may" is used purposely. A Magistrate is not bound to act *judicially* whenever any information is given to him. See also S. 200 *infra* which enacts that if cognizance is taken he shall at once examine the complainant on oath. The terms of the section show that the Magistrate has to take cognizance before he examines the complainant under S. 200 *infra*, 19 L.W. 481. Taking cognizance is

not a judicial act, 30 C.W.N. 276. The expression any offence occurring in this section includes cognizable as well as non-cognizable offences and even a non-cognizable offence can be taken cognizance of by a Magistrate on the report of a police officer, 49 M. 525 (F.B.) The use of these words does not make it optional with a Magistrate to hear the complainant. They refer to the action of the Magistrate in taking cognizance of an offence in either of the three specified courses in which the facts constituting an offence may be brought to his notice, 13 C. 333 at 336. A Magistrate cannot decline to take cognizance of an offence when a complaint is presented to him if he is competent to take cognizance, 12 B. 161. There is no provision in the Code preventing a Magistrate from taking cognizance of an offence because another Magistrate had previously taken cognizance. This only prevents a person being tried twice for the same offence. But there is no provision that if cognizance is taken by two different Magistrates at different times the trial can be before one of them only. Multiplicity of trials can always be prevented by acting under the sections of the Code providing for transfer of cases, 50 C. 482 at 486. Where a Magistrate refused to take cognizance on the ground that the accused had been improperly arrested and brought before him, it was held that he was bound to take cognizance of the offence as the question of the legality of the arrest did not affect the question whether the accused were guilty or not of the offences charged, 26 M. 124; 35 B. 225. For a Magistrate to take cognizance of an offence, the complaint made to him must contain distinct allegations of any specific offence, Weir I, 720, II, 149. The expression "to take cognizance" has not been defined in the Code and it is difficult to ascertain at what precise stage of a case cognizance is said to be taken, 17 C.W.N. 795; 41 M. 246; 19 B. 51. The expression occurs constantly in the Code. See for example Ss. 191, 193, 194, 195, 196, 196A, 197, 198, 198 and 199 *infra*. Power to "take cognizance" is distinct "from to inquire or to try", S. 204, *infra* lays down that a Magistrate who has power to "take cognizance" may issue process for the appearance of the accused but if he has no jurisdiction to "inquire or try" he must order the appearance of the accused before a Magistrate having jurisdiction to inquire or try, and S. 201 *infra* deals with the case where the Magistrates are not empowered to take cognizance at all. Again cases are conceivable where a Magistrate who is not ordinarily taking cognizance of an offence, say a third-class Magistrate, gets jurisdiction to inquire or try if a case duly transferred to him. "Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence." 37 C. 412 at 416. See also 39 C. 119. 31 M. 246; 19 B. 51; 27 C. 798 and 4 C.W.N. 825. Once a Magistrate takes cognizance of an offence upon complaint it is competent for him to take cognizance of any offence that is disclosed by the evidence before him 27 Cr. L.J. 669—34 Ind. Cas. 717. The expression is not equivalent to cognizance of any offender, for the definition of complaint under the code includes a complaint that some person unknown has committed an offence. 15 Cr. L.J. 359—23 Ind. Cas. 737; 11 Ind. Cas. 583; 12 Cr. L.J. 399; 21 C.W.N. 950.

SUB-SECTION (1) (a) : Complaint.—The term "complaint" has been defined in S. 4 (1)(h) *supra*. The definition expressly excludes the report of a police-officer which is dealt with in cl. (b) of this sub-section; *complaint* is distinct from *information* which is dealt with in cl. (c) of this sub-section. The requisites of a valid complaint are—(1) the facts alleged should *prima facie* constitute an offence; (2) the facts should be brought to the notice of a Magistrate with a view of taking action, 14 C. 707; 6 C.W.N. 926; 15 Cr. L.J. 369—23 Ind. Cas. 737; 49 M. 525 (F.B.) where 22 L.W. 209—(1923) M.W.N. 317 is overruled and 46 C. 807; 11 A.L.J. 331; 6 M.L.T. 259 and 256; 26 B. 115 are referred to. An order by a District Judge to a subordinate Magistrate to try an accused could not be held to be a complaint, 23 Cr. L.J. 757—68 Ind. Cas. 481. If a Magistrate takes cognizance upon *information* the accused can claim a transfer or commitment under the next section. Where a police-officer files a complaint in a non-cognizable case regarding an offence which it is not his duty to report, such complaint comes within S. 4 (a) *supra* and is not a police-report, 32 M. 3; 26 B. 150 (F.B.). The complaint must disclose facts constituting the offence. There is no authority for the proposition that a complainant himself should be a witness of the facts. Every member of the public has a right to set the law in motion by a complaint, 13 B. 600; 15 Cr. L.J. 369 and 446; 18 A. 465; 10 Cr. L.J. 18—2 Ind.

Cas. 453 ; 11 C.W.N. 170 ; 21 Cr. L.J. 346. If the complaint did not contain any allegation of any specific offence as defined in S. 4 (1) (c) *supra* having been committed a Magistrate has no jurisdiction to take cognizance and proceed with the case. **Wetz I, 723, II, 149.** When a complaint presented is not a complaint of facts as contemplated by this sub-section and no objection having been taken at the earliest stage and no prejudice being shown to the appellant, it was held that the appellant could not have the benefit of the objection taken for the first time in appeal, **16 C.W.N. 1105.** A complaint is not defective because it did not set out speeches or alleged seditious words which form the subject-matter of the subsequent charge and even if such omission is a defect it is an irregularity which will be cured by S. 537 (a) *infra* unless it has occasioned a failure of justice, **32 M. 3,** where **22 B. 112 at 150** is distinguished. Where in the course of a trial of S. for the theft of a pony the evidence disclosed that A who was present in custody in court on another charge, was also involved in the theft the Magistrate was justified in putting A in the dock along with S. and proceeding with the trial against both after re-examining the witnesses. The Magistrate in such a case takes cognizance under this clause and not under cl. (c), **11 Cr. L.J. 439-7 Ind. Cas. 461** see also **14 Cr. L.J. 290 = 19 Ind. Cas 946.**

CLAUSE (b) ; POLICE REPORT.—The provisions of this section extend to any offence and notwithstanding the use of the word "police-report" in S. 173 *supra* this section cannot be restricted merely to non-cognizable offences and a Magistrate is empowered by this section to take cognizance both in cognizable and non-cognizable offences upon a report such as is contemplated in this section, **23 C.W.N. 487-26 Cr.L.J. 68-83 Ind.Cas. 628.** See also **49 M. 525 (F.B.)** under this section as amended a Magistrate can take cognizance of an offence upon a report made by any police officer, but the report must state facts which constitute the offence. A mere assertion that an offence has been committed is not sufficient, **51 C 402; 26 Cr. L.J. 441-85 Ind. Cas. 87.** The term "police report" in this clause is not limited to a report mentioned in S. 170, *supra* and the preceding section of the Code, *viz.*, Ss. 155, 157, 159, **11 A.L.J. 331-14 Cr. L.J. 218 = 19 Ind. Cas. 314.** In order that a police-report may be acted upon it must set forth the nature of the information against an accused person, **37 C. 43.** The Madras Abkari Act is not a self-contained Act in the matter of procedure in the investigation of offences under S. 55. In such a case the procedure laid down in this Code in S. 5 (2) *supra* is to be followed, the offence having been committed in accused's shop would fall under S. 31 and not S. 34 of the Abkari Act, and the police would have authority to send the accused direct before a Magistrate. It is therefore a case in which the section will apply and the Magistrate has jurisdiction to dispose of the case. **48 M.L.J. 603-28 Cr. L.J. 1556-90 Ind. Cas. 436.** Report of a Sanitary Inspector of Municipality is not a police-report, **18 Cr. L.J. 641.** It includes any information given by a police-officer to a Magistrate, oral information sent by police officer through a private messenger amount to a police-report within the meaning of this section, **29 C. 317,** but a report by a police-officer in a non-cognizable case was held to be a complaint within S. 4 (1) (h) *supra* falling under cl. (a) and not a police-report within this clause, **28 B. 150 (F.B.) ; 46 C. 807 ; 32 M. 3.** Police-Report in this section includes report made by the police in non-cognizable offences. The section speaks of "any offence" so, to limit the application of the section, to one particular class of offences is not warranted by the language used. This section authorises certain Magistrates to take cognizance of any offence upon a report in writing of facts which constitutes such offence, made by any police-officer and S. 200 (aa) *infra* provides that where a public servant acting or purporting to act in the discharge of his official duties makes a complaint of any offence nothing shall require the Magistrate to examine him before taking cognizance of the offence. **49 M. 525 (F.B.)** where (1925) **M.W.N. 317 = 22 L.W. 209 = 26 Cr. L.J. 1530-80 Ind. Cas. 398.** is overruled and **46 C. 807, 11 A.L.J. 331, 6 M.L.T. 259 and 23 B. 150 followed.** When an appellate Magistrate reverses the finding and sentence under appeal and makes up his mind to try the offender himself, the offence being ordinarily triable by him, he takes cognizance of the offence under this clause as he has before him the police charge-sheet stating all the facts, and not under cl. (c), **30 M. 228.** A case is not legally instituted upon a police-report if the report under S. 173, *supra* did not set forth the nature of the information and where the first information under S. 154 *supra* was also defective, **37 C. 43.**

not a judicial act, 30 C.W.N. 276. The expression any offence occurring in this section includes cognizable as well as non-cognizable offences and even a non-cognizable offence can be taken cognizance of by a Magistrate on the report of a police officer, 49 M. 525 (F.B.) The use of these words does not make it optional with a Magistrate to hear the complainant. They refer to the action of the Magistrate in taking cognizance of an offence in either of the three specified courses in which the facts constituting an offence may be brought to his notice, 13 C. 334 at 338. A Magistrate cannot decline to take cognizance of an offence when a complaint is presented to him if he is competent to take cognizance, 12 B. 161. There is no provision in the Code preventing a Magistrate from taking cognizance of an offence because another Magistrate had previously taken cognizance. This only prevents a person being tried twice for the same offence. But there is no provision that if cognizance is taken by two different Magistrates at different times the trial can be before one of them only. Multiplicity of trials can always be prevented by acting under the sections of the Code providing for transfer of cases, 50 C. 482 at 486. Where a Magistrate refused to take cognizance on the ground that the accused had been improperly arrested and brought before him, it was held that he was bound to take cognizance of the offence as the question of the legality of the arrest did not affect the question whether the accused were guilty or not of the offences charged, 26 M. 124; 35 B. 225. For a Magistrate to take cognizance of an offence, the complaint made to him must contain distinct allegations of any specific offence, Welr I, 720, II. 149. The expression "to take cognizance" has not been defined in the Code and it is difficult to ascertain at what precise stage of a case cognizance is said to be taken, 17 C.W.N. 795; 41 M. 246; 19 B. 51. The expression occurs constantly in the Code. See for example Ss. 191, 193, 194, 195, 196, 196A, 197, 198, 198 and 199 *infra*. Power to "take cognizance" is distinct "from to inquire or to try". S. 204, *infra* lays down that a Magistrate who has power to "take cognizance" may issue process for the appearance of the accused but if he has no jurisdiction to "inquire or try" he must order the appearance of the accused before a Magistrate having jurisdiction to inquire or try, and S. 201 *infra* deals with the case where the Magistrates are not empowered to take cognizance at all. Again cases are conceivable where a Magistrate who is not ordinarily taking cognizance of an offence, say a third-class Magistrate, gets jurisdiction to inquire or try if a case duly transferred to him. "Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence." 37 C. 412 at 416. See also 39 C. 119, 41 M. 246; 19 B. 51; 27 C. 798 and 3 C.W.N. 825. Once a Magistrate takes cognizance of an offence upon complaint it is competent for him to take cognizance of any offence that is disclosed by the evidence before him 27 Cr. L.J. 869=84 Ind. Cas. 717. The expression is not equivalent to cognizance of any offender, for the definition of complaint under the code includes a complaint that some person unknown has committed an offence. 15 Cr. L.J. 339=23 Ind. Cas. 737; 11 Ind. Cas. 583; 12 Cr. L.J. 399; 21 C.W.N. 950.

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Cas. 333; 11 C.W.N. 170; 21 Cr. L.J. 338. If the complaint did not contain any allegation of any specific offence as defined in S. 4 (1) (c) *supra* having been committed a Magistrate has no jurisdiction to take cognizance and proceed with the case. **Wair I, 720, II, 149**. When a complaint presented is not a complaint of facts as contemplated by this sub-section and no objection having been taken at the earliest stage and no prejudice being shown to the appellant, it was held that the appellant could not have the benefit of the objection taken for the first time in appeal, 16 C.W.N. 1105. A complaint is not defective because it did not set out speeches or alleged seditious words which form the subject-matter of the subsequent charge and even if such omission is a defect it is an irregularity which will be cured by S. 537 (a) *infra* unless it has occasioned a failure of justice, 32 M. 3, where 22 B, 112 at 150 is distinguished. Where in the course of a trial of S. for the theft of a pony the evidence disclosed that A who was present in custody in court on another charge, was also involved in the theft the Magistrate was justified in putting A in the dock along with S. and proceeding with the trial against both after re-examining the witnesses. The Magistrate in such a case takes cognizance under this clause and not under cl. (c), 11 Cr. L.J. 439-7 Ind. Cas. 361 see also 14 Cr. L.J. 290-19 Ind. Cas 946.

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CLAUSE (c) : INFORMATION.—This is a provision of law for enabling a public official to take care that justice may be vindicated notwithstanding that the persons individually aggrieved are unwilling or unable to prosecute, 5 B.L.R. 274. This clause deals with cases where there has been neither a formal complaint nor a police-report and independently of these, the Magistrate takes the initiative upon information received from any person other than a police-officer, or upon his own knowledge or suspicion, 41 C. 1013 at 1020. Information on which a Magistrate takes cognizance under this sub-section must be recorded and the Magistrate is bound to disclose to the accused the information on which he acts and issues warrant, 10 C.W.N. 775 = 3 Cr. L.J. 473 followed in 35 C. 1076 at 1082 and 37 C. 221. In the latter case it was said: "It is nowhere laid down and it is probably impossible to state in general terms how much the accused is entitled to have recorded in such cases." Where a Magistrate is given wide powers to take cognizance of an offence on suspicion, it would be disregarding the express language of the Legislature to say that he cannot act if the suspicion or knowledge is based on facts which come within his cognizance or in another capacity, viz., the President of a Local Board. The exercise of such power may in some cases work considerable hardship, but, when the language of the section is clear, the Court has no business to lay down limitations which are unwarranted, 43 M. 709. It is obviously most desirable that a Magistrate should when taking cognizance under this section place on record the ground on which he is taking action, and this, not only in fairness to the person against whom action is so taken and who is entitled to know for what reason he is being arrested but also for his own protection, but omission to do so does not necessarily vitiate the proceedings, 27 Cr. L.J. 413 = 93 Ind. Cas. 77. Where a Magistrate acting on the facts disclosed in the prosecution evidence recorded by him adds a charge in respect of an act alleged to have been done in pursuance of an alleged conspiracy contained in a complaint presented to him it cannot be said that he is acting on his own knowledge or suspicion within this sub-section. The action taken by the Magistrate is on the original complaint made to him and justified by the provisions of S. 235, *infra*. 27 Cr. L.J. 639 = 93 Ind. Cas. 717 where 49 C. 573, is referred to. A communication received through post is an information coming within this clause and may be acted upon by the Magistrate if he chose but he is not bound to deal with it judicially, 1889 A.W.N. 201. It is competent to a Magistrate to receive and take action upon petition relating to a crime when sent to him by post. It frequently happens that information of a valuable character in regard to a crime thus reaches a Magistrate which, if not so conveyed, would be withheld altogether and it would be in most cases inadvisable to shut out such information altogether, whereas in other cases it would be highly indiscreet to take action upon it. A Magistrate in such cases must act upon his own discretion, Weir II, 149. A Magistrate may take cognizance on an anonymous communication, 3 C.W.N. 65. S. 351 *infra* is self-contained and complete in itself and is independent of this clause and S. 191 *infra*. 10 Cr. L.J. 303 = 3 Ind. Cas. 568 where 3 C.W.N. cclxix is followed 1 C.W.N. 105 not followed 4 C.W.N. 367.

UPON HIS OWN KNOWLEDGE OR SUSPICION.—The power of a Magistrate to proceed under this clause is intended to be used where a Magistrate has good reason to believe that there has been a serious infringement of the law but is unable to take action in the ordinary way because the party aggrieved is either unwilling or unable to prosecute, 2 Pat. L.J. 657. A belief founded on private and anonymous information is not knowledge within the meaning of this section, 4 B.L.R. Appx. 1. The knowledge must be either personal or derived from testimony legally given, 5 B.L.R. 274 at 289. Where a Public Prosecutor files a complaint, cognizance is not taken by the Magistrate under this clause, 15 Cr. L.J. 369. A Magistrate taking action against a witness in a case which is pending before him upon the facts disclosed by the evidence of another witness does so under this section and not under S. 351 *infra*, 1 C.W.N. 108; 1907 A.W.N. 93. When a Magistrate takes cognizance under this clause upon his own knowledge or suspicion, he has no power to refuse to transfer the case, 13 A. 345, but he does not deprive himself from all jurisdiction to hear and determine the case which in fact had been instituted upon his peculiar knowledge of the facts. He may hold a preliminary inquiry preparatory to commitment, 20 Cr. L.J. 47; 26 C. 786; 21 A. 109; 22 M. 148. In such cases S. 191 *infra* enables the accused to apply for a transfer

of the case and the Magistrate shall also inform the accused that he is entitled to have the case tried by another Court, but unless the accused exercises that privilege, the jurisdiction of the Magistrate to institute, hear and determine the particular case is unquestionable, 1893 A.W.N. at p. 79.

191. When a Magistrate takes cognizance of an offence under sub-section (1), clause (c), of the preceding section the accused shall, before any evidence is taken, be informed that he is entitled to have the case tried by another Court, and if the accused, or any of the accused if there be more than one, objects to being tried by such Magistrate, the case shall, instead of being tried by such Magistrate, be committed to the Court of Session or transferred to another Magistrate.

Transfer or commitment on application of accused.

OBJECT OF THE SECTION.—The object is that before proceedings are to be taken against an accused such as would bring him before a Court of Justice, a Magistrate must have before him information independent of his own knowledge based either on complaint, or a police-report, 11 A.L.J. 331. As stated in the well-known English case of *Sargeant v. Dale* the principle underlying this section is to clear away everything which might engender suspicion and distrust of the tribunal and to promote the feeling of confidence in the administration of justice which is so essential to social order and security. The principle of this section is applicable to security proceedings though the section is confined to offences. 4 Pat. L.J. 7 ; 27 A. 172. Under this section a Magistrate when he takes cognizance under sub-section (1) (c) of S. 190 *supra* is not precluded from holding a preliminary inquiry and committing the case to the court of sessions. 21 A. 109.

TAKES COGNIZANCE OF AN OFFENCE UNDER S. 190 (1) (c).—The expression "taking cognizance of an offence" is not defined in the Code ; it is not equivalent to taking cognizance of the offender. It is difficult to ascertain at what precise stage cognizance is taken. When a Magistrate on receipt of police-report makes over the cases to another Magistrate for inquiry, and the latter issues process to the accused, the latter and not the former can be said to take cognizance, 17 C.W.N. 795. After taking cognizance of an offence the Magistrate has jurisdiction to inquire into the case of all persons whom the evidence shows as offenders, 21 C.W.N. 950. This section and S. 190, *supra* only apply to "offences" and need not necessarily govern proceedings under Chapter VIII of the Code dealing with security proceedings, but the principle contained in this section was applied in 29 C. 392 and 4 Pat. L.J. 7 ; on the ground that no man ought to be a judge in his own case and case was transferred to another Court, but in 27 A. 172 at 174 *Sir George Knox, J.*, held otherwise, "no authority has been shown to me for this and I am not prepared without authority to apply the provisions of S. 190 and limit by them the wide and unfettered language used in Ss. 110 and 119, Cr. P.C."

ACCUSED SHALL BE INFORMED THAT HE IS ENTITLED.—These words are mandatory and the competency of a Magistrate to try the accused person for an offence which he has taken cognizance of under S. 190 (1) (c) *supra* is dependant upon the strict observance of the provisions of this section, and failure to comply with the imperative provisions of law contained herein is a defect which invalidates the proceedings, 41 A. 183 ; 13 Cr. L.J. 52 —13 Ind. Cas. 388 ; 21 A.L.J. 89—24 Cr. L.J. 886—73 Ind. Cas. 576 ; 27 Cr. L.J. 325—82 Ind. Cas. 731 ; 13 A. 335 ; 17 C.W.N. 793 ; 27 Cr. L.J. 1037—96 Ind. Cas. 989. The Magistrate has no discretion in the matter and he cannot refuse to *transfer or commit*, and any trial held after such refusal is not by a Court of competent jurisdiction and the irregularity cannot be cured by S. 537 *infra*, 13 A. 335 at 337. The right view appears to be that the accused are only entitled to object to the trial by the Magistrate when he has taken cognizance under S. 190 (1) (c), *supra*. On the objection being raised to a trial by the particular Magistrate, he is not bound to transfer the case ; he may elect to commit the case to

the Court of Session, 22 M. 138 at 139 ; 7 Bom. L.R. 637 ; 26 C. 736. This section does not disqualify a Magistrate who has jurisdiction from holding a preliminary inquiry. What the section provides is that if the Magistrate takes cognizance of an offence under S. 190 (1) (c) and if, before evidence is taken, the accused objects to being tried by such a Magistrate, he may either transfer the case to another Magistrate or commit the case to the Court of Session. He is thus empowered to make a commitment in a case within his cognizance, and he cannot make a commitment without holding a preliminary inquiry, 21 A. 109, or the Magistrate may discharge the accused if no *prima facie* case was made out, and in deciding which of the three courses he will adopt the Magistrate should exercise a sound judicial discretion. Failure on the part of the accused to take objection to the trial is of no avail. An obligation is imposed on the Magistrate to inform the accused of his right to have the case tried by another Court, 3 C.W.N. ccxxx referred to in 41 C. 1013 at 1020, and failure to inform the accused that he is entitled to have his case tried by another Court is a ground for having the proceedings set aside, Weir II, 151. There cannot be any waiver of right by an accused in a criminal trial, 46 M. 117 at 120 ; 18 M.L.J. 330 ; 6 C.W.N. 202 ; 21 A.L.J. 39 ; 25 Cr. L.J. 88=75 Ind. Cas. 980 but if the accused after being informed of his right does not choose to exercise it the Magistrate has jurisdiction to try the case, 1893 A.W.N. 79. All that the accused is entitled to is to have the case tried by another Court and the section gives no right to the accused to select or determine by which other Court his case is to be tried, 7 Bom. L.R. 637. The desirability imposed by this section equally applies to the hearing of an appeal by a Magistrate who originally took cognizance of the case under S. 190 (1) (c) as a subordinate Magistrate, 12 C.W.N. 438, but a contrary view was taken by the Allahabad High Court in 1899 A.W.N. 74. When a Magistrate in the course of the trial of one person has reason to believe another person guilty and institutes proceedings against him, he acts still under S. 190 (1) (a) and the accused is not entitled to have the case tried by another Court; when an appellate Court reverses the finding and sentence of the first Court, and the offence is ordinarily triable by it, and makes up its mind to try the accused, the appellate Court takes cognizance of the offence not under cl. (c) of S. 190 (1) but under cl. (a), 30 M. 228. See S. 351 *infra*. In a case contemplated by S. 351 the accused is not placed under any liability to combat with the effect of the suspicious circumstances operating in the mind of the Magistrate and influencing his judgment, and he has full information as to the source and particulars of the materials upon which the Magistrate acts.

192. (1) Any Chief Presidency Magistrate, District Magistrate or Sub-divisional Magistrate may transfer any case, of which he has taken cognizance, for inquiry or trial to any Magistrate subordinate to him.

Transfer of cases by Magistrates.

(2) Any District Magistrate may empower any Magistrate of the first class who has taken cognizance of any case to transfer it for inquiry or trial to any other specified Magistrate in his district who is competent under this Code to try the accused or commit him for trial; and such Magistrate may dispose of the case accordingly.

SCOPE OF THE SECTION.—This section provides for the distribution of work among Magistrates. It empowers superior Magistrates to transfer any case of which they have taken cognizance, for inquiry or trial to subordinate Magistrates. But after a Magistrate has proceeded under S. 202 *infra* he cannot make an order of transfer under his section for the purpose of the case being dealt with under S. 203, 25 Cr. L.J. 990=87 Ind. Cas. 528. This section deals with transfer of cases for administrative reasons, especially for distribution of work among Magistrate by superior Magistrate to whom a general power of transfer is given by S. 528, *infra*. This section can be invoked only after taking cognizance of the offence.

CHIEF PRESIDENCY MAGISTRATE.—All Presidency Magistrates are subordinate to the Chief Presidency Magistrate and so the latter has power to withdraw any case from any one of them and refer the same for inquiry or trial to any other Magistrate. 1 Bom. L. R. 347.

MAY TRANSFER ANY CASE.—Taking cognizance under S. 190 *supra* is a condition precedent to act under this section, 12 A.L.J. 277; 38 A. 166; 7 M.H.C.R. Appx. 33. The words "any case" are wide enough to include miscellaneous proceedings under Chapter VIII and Chapter XII of the Code, 21 A. 181; 35 C. 243 at 256; 31 C. 350; 22 C. 898; 38 C. 370 10 C.W.N. 1093; 20 A.L.J. 216; 26 M. 188, but this section does not authorise a District Magistrate to transfer for trial a case to a subordinate Magistrate who is not competent to try it either under S. 28, *supra* or under some special or local law, 23 C. 442. A transfer under this section operates as a transfer of the whole case and not the case against a particular accused, 7 C.L.J. 219; 27 C. 379. This sub-section empowers a transfer for inquiry or trial but its provisions cannot be availed of simply for the purpose of considering the report of an investigation already ordered under S. 201, *infra*, 28 Cr. L.J. 990—87 Ind. Cas. 526. But a Sub-divisional Magistrate to whom a District Magistrate transferred a particular case for trial cannot transfer the case again to a Magistrate subordinate to him and such transfer is *ultra vires*, 38 A. 166.

FOR INQUIRY OR TRIAL.—A District Magistrate is not competent to direct a subordinate Magistrate to dispose of a case pending in the Court of the latter in a particular manner, *e.g.*, by commitment, Weir II, 152. The words "for inquiry" cannot mean a preliminary inquiry under Chapter XVIII, 4 M.H.C.R. Appx. xl. The effect of a transfer is that the superior Magistrate becomes *functus officio* unless he again recalls the case, 32 C. 783; 30 C. 449; 27 C. 975; 46 C. 854; 23 Cr. L.J. 89—85 Ind. Cas. 441; 4 C.W.N. 560.

NOTICE.—When a case is transferred under this section immediately after a complaint is received it is not essential to give notice to the parties. It stands on the same footing as a transfer made for administrative purposes which is an exception to the rule that no order to the prejudice of a party is to be made without giving him an opportunity to show cause, 24 M. 317. All the High Courts agree in holding that notice to the parties ought to be given before a case is transferred under S. 538. 39 M.L.J. 714; 6 M.L.T. 14; 8 M.L.T. 223. Weir II 691 and 192; 22 B. 639; 27 B. 279; 31 Bom. L.R. 276; 6 Bom. L.R. 856; 8 C. 893; 7 C.W.N. 114 and 87; 8 C.L.J. 241; 28 A. 421; 3 A. 711; 13 Cr. L.J. 32—13 Ind. Cas. 224; 22 Cr. L.J. 199. The provisions of this and S. 202, *infra* are separate and distinct; the powers conferred by the one is not curtailed by the other, 46 C. 854.

193. (1) Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf.

(2) Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the Local Government by general or special order may direct them to try, or as the Sessions Judge of the division, by general or special order, may make over to them for trial.

OBJECT OF THE SECTION.—The object is to secure a preliminary inquiry which has the effect of giving the accused especially in serious cases some information of the case he has to answer and also to find out whether the case is a fit one to be tried by a Court of Session, 3 M. 351; 4 M. 227.

EXCEPT AS OTHERWISE EXPRESSLY PROVIDED BY THE CODE.—In this connection see Ss. 195, 351, 436, 471, 476 to 478, 480 to 482, 485, 532 wherein special provisions are made in the Code.

AS A COURT OF ORIGINAL JURISDICTION.—This section provides that except as otherwise expressly provided no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in this behalf. The only section which expressly empowers a Court of Session to commit an accused person by itself is S. 477, *infra* and S. 480 empowers a Court of Session to take cognizance of offences mentioned in that section without a commitment by a Magistrate. Except these two sections there is no other provision in the Code which empowers a Court of Session to take cognizance of an offence as a Court of original jurisdiction. Under S. 423 (1) (b) a Court of appeal may order an accused to be committed for trial which means that a Court of appeal may direct a Magistrate competent to commit, to commit the accused to the Court of Session for trial. S. 423, *infra* must be read with this section and reading the two sections together it is manifest that except in cases where the Court of Session is expressly empowered to take cognizance, to do so, unless the accused is validly committed to it. 1907 A.W.N. 178=6 Cr. L.J. 7; 23 C. 50. The rule that a Sessions Court cannot take cognizance as a Court of original jurisdiction is also subject to the provisions of Ss. 226 and 227, *infra*; the added charge must be for an offence made out by the evidence recorded before the committing Magistrate or by the evidence recorded before the Sessions in the course of trial under S. 227 if charge is altered, 8 B. 200. As the Sessions Court is not competent to take cognizance as a Court of original jurisdictions the preliminary inquiry is to be held by a Magistrate, and at that inquiry the accused must have information of the case he has to meet. 3 M. 351; 9 A. 525; 4 M. 227.

UNLESS THE ACCUSED HAS BEEN COMMITTED TO IT BY A MAGISTRATE.—The object of this restriction was presumably to secure in the case of a person charged with grave offence a preliminary inquiry which would afford him the opportunity of becoming acquainted with the circumstances of the offence imputed to him, and enable him to make his defence, 3 M. 351 at 353; see also 4 M. 227, at 223 where it was observed that the law contemplates "that in serious cases of which a Sessions Court may take cognizance, the accused should have some information of the case he has to answer." Trial of persons by a Court of Session without a valid commitment to such Court is invalid as the defect is one of substance and not of form, 15 M. 352; 22 C. 50. Where an approver recited in the Sessions Court from the deposition he gave before the committing Magistrate and was immediately put on trial with the other accused by the Sessions Court it was held that the conviction was bad for want of a commitment. 10 W.R. (Cr.) 10; 19 W.R. (Cr.) 43; 23 B. 493.

A MAGISTRATE DULY EMPOWERED IN HIS BEHALF.—See Ss. 205, 213, 215 and 532, *infra*.

ADDITIONAL SESSIONS JUDGES AND ASSISTANT SESSIONS JUDGES.—For definition of these terms see Ss. 9 (3) and 17 (3), *supra*. There can only be one Sessions Judge for each sessions division, but there may be more than one Sessions Judge for such Sessions Court. When an Additional Sessions Judge is appointed his Court will not be an Additional Sessions Court but the Sessions Court, 1 M.L.J. 397 (F.B.). An Additional Sessions Judge has jurisdiction to hear a reference under S. 123, *supra* transferred to him by the Sessions Judge, 50 C. 229.

TRY SUCH CASE.—The word "case" used in this section cannot be extended to appeals or other matters. A Sessions Judge has therefore no power to transfer an appeal filed in his Court to an Assistant Sessions Judge, 27 A. 286 where 3 B. 165, 7 A. 661 and 2 A.L.J. 578 are followed.

194. (1) The High Court may take cognizance of any offence upon a commitment made to it in manner herein-after provided.

Cognizance of offences by High Court.

Nothing herein contained shall be deemed to affect the provisions of any Letters Patent granted under the Indian High Courts Act, 1861, (or the Government of India Act, 1915) or any other provision of this Code.

(2) (a) Notwithstanding anything in this Code contained, the Advocate-General may, with the previous sanction of the Governor-General in Council or the Local Government, exhibit to the High Court, against persons subject to the jurisdiction of the High Court, informations for all purposes for which Her Majesty's Attorney-General may exhibit informations on behalf of the Crown in the High Court of justice in England.

(b) Such proceedings may be taken upon every such information as may lawfully be taken in the case of similar informations filed by Her Majesty's Attorney-General so far as the circumstances of the case and the practice and procedure of the said High Court will admit.

(c) All fines, penalties, forfeitures, debts and sums of money recovered or levied under or by virtue of any such information shall belong to the Government of India.

(d) The High Court may make rules for carrying into effect the provisions of this section.

This section deals with cognizance of offences by the High Court; see S. 4 (f) for definition of the term "The High Court."

UPON COMMITMENT MADE IN MANNER HEREINAFTER PROVIDED.—In this connection see Ss. 206, 213, 247, *infra*. Sub-section (2) deals with information by the Advocate-General. For definition of the term "Advocate-General" see S. 4 (1) (a) *supra*; clauses (a), (b) and (c) of this sub-section correspond to S. 144 of the High Court Criminal Procedure Act X of 1875, which section was repealed by the Code of 1898. See Ss. 213, 214, 478 etc. as to manner hereinafter provided.

ATTORNEY-GENERAL MAY EXHIBIT INFORMATION.—The Attorney-General is the principal law officer of the Crown and the head of the Bar in England. It is his duty among other things to prosecute on behalf of the Crown, to file *ex-officio* information in the name of the Crown. Such information is a formal suggestion on behalf of the King of a misdemeanour committed, filed by the King's Attorney-General in the King's Bench Division of the High Court of Justice without the invention of a Grand Jury. It lies at common law for misdemeanour only and not for treason or felony.....The usual objects of information *ex-officio* are properly such enormous misdemeanours as, peculiarly tend to disturb or endanger the King's Government or to molest or affront Him in the regular discharge of His Royal functions, such for instance, as seditious, blasphemous writings or speeches, seditious riots not amounting to high treason, libels upon the King or his Ministers, the Judges or other high officers, etc., reflecting upon their conduct in the exercise of their official duties, libels upon Foreign Sovereigns or their ambassadors, obstructing public officers in the discharge of their duties, obstructing King's officers in the collections etc. of revenues, bribery at Parliamentary elections, bribery, corrupt, or oppressive conduct or neglect of duties by Magistrates and public officials outside Great Britain, *Arch. Cr. Pl. & Pro. p. 125 (25th Ed.)*

195. (1) No Court shall take cognizance—

(a) of any offence punishable under sections 172 to 188 of the Indian Penal Code, except on the complaint *in writing* of the public servant concerned, or of some *other* public servant to whom he is subordinate ;

Prosecution for contempt of lawful authority of public servants.

(b) of any offence punishable under *any of the following sections of the same code, namely, sections 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211, and 228*, when such offence is *alleged to have been* committed in, or in relation to, any proceeding in any Court, except on the complaint *in writing* of such Court or of some other Court to which such Court is subordinate ; or

Prosecution for certain offences against public justice.

(c) of any offences 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 by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint *in writing* of such Court, or of some other Court to which such Court is subordinate.

Prosecution for certain offences relating to documents given in evidence.

(2) In clauses (b) and (c) of sub-section (1) the term " Court " includes a Civil, Revenue or Criminal Court, but does not include a Registrar or Sub-Registrar under the Indian Registration Act, 1877 [1908].

(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 a 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), with reference to the offences named therein apply also to *Criminal conspiracies to commit such offences and to the abetment of such offences, and attempts to commit them.*

(5) *Where a complaint has been made under sub-section (1) clause (a), by a public servant, any authority to which such public servant is subordinate may order the withdrawal of the complaint and, if it does so, it shall forward a copy of such order to the Court and, upon receipt thereof by the Court, no further proceedings shall be taken on the complaint.*

AMENDMENT.—The term “sanction” in connection with these prosecutions has been purposely omitted, and a Court or public servant, when of opinion that the interests of justice require an inquiry should be made, a complaint is to be made in writing in the same way as a private individual. No cognizance is to be taken by any Court of the offences specified herein, except upon such complaint, and the procedure to be followed is that prescribed by S. 476. The practice of keeping a sanction granted to a private individual over the head of an accused for six months has frequently been utilised for blackmail. Therefore the prosecution is to be launched by the Court or public servant only, by preferring a complaint in writing when the interests of justice require a prosecution, and no limit of time is prescribed. Sub-sections (4), (5) and (6) have therefore been omitted. Sub-section (7) is numbered as sub-section (3), and sub-section (3) as sub-section (4). Sub-section (3) dealing with subordination of Courts is now made clearer. Sub-section (5) is new and provides for withdrawal of the complaint made by a public servant on the direction of his superior. The effect of the amendment is only an alteration in the procedure, 47 M. 334.

SCOPE AND OBJECT OF THE SECTION.—The section as it stood before the amendment imposed a statutory bar to the law taking its usual course by insisting on a sanction being obtained before a prosecution is initiated, 41 C. 446; 11 Bom. L.R. 1163; and to prevent prosecutions by private persons on their own motion to satisfy their private spite by requiring sanction of a Court before instituting proceedings. But now private parties have no *locus standi*. All provisions relating to grant or revocation of sanction on the application of the parties have been taken away. Private persons are no longer permitted to prosecute for offences connected with administration of justice. The law forbids any prosecution being instituted now, upon sanction granted to a private party, 48 M L.J. 274. After the amended Act XVIII of 1923 came into force on the 1st of September 1923 sanctions to prosecute were abolished; any sanction granted after that date is illegal and no criminal Court could take cognizance of offence alleged on the strength of such illegal sanction. Such a valueless and illegal sanction cannot be treated as a good “complaint” under this section or S. 476 *infra*. In a criminal case involving the liberty of a subject it is not for a criminal appellate court to take a course which will turn it into something which it is not, to get over the difficulty which has occurred by reason of the alteration of the law or to remand the case with a direction that the lower Court do consider whether on the fact it should make a complaint under S. 476. For in the latter case the lower Court might take the order of the High Court as an information to him as to the course it should adopt accordingly, 51 C. 652 at 655-656; 28 Cr. L.J. 448-82 Ind. Cas. 64. The new Code envisages an entirely different state of things and for all practical purposes it abolishes sanction entirely. It provides a substitute for the condition precedent not a sanction, but a complaint of Court in writing by the Court before which such proceeding as the matter arose out of is, tried, or by the Court to which the Court is subordinate, 48 M. 620 (F.B.); 47 M. 384; 2 Rang. 374. Where a sanction granted before the new Act came into force was revoked by the superior Court after the coming into force of the new Act, it was held that the superior Court acted within its jurisdiction in revoking the sanction as the invoking of the aid of the superior Court is a substantive right and not one of procedure only, which cannot be taken away by any change in the law unless a clear intention to that effect is manifested by the new Act, 48 M. 620 (F.B.) followed in 27 Cr. L.J. 181-91 Ind. Cas. 997; 26 Cr. L.J. 90-82 Ind. Cas. 650.

By the recent amendment of the Code the necessity for sanction as a prerequisite to start a prosecution has been done away with altogether and in its

place a complaint in writing by the Court has been substituted. 2 Rang, 374. The procedure prescribed by the new Act must be adopted for all prosecutions launched after the new Act came into force, 19 L.W. 463=31 M.L.T. 333; 37 M. 334. See also 7 Lah. 108. A prosecution can be started only on the complaint in writing of a public servant or of a Court, and a large number of rulings of the various High Courts relating to sanction and principles which should guide Courts in granting sanction to private individuals are of little help in construing this section. By the amendment the procedure of grant of sanction to a private party is abrogated. Instead it is enacted that no Court shall take cognizance of certain classes of offences except on the complaint in writing of a public servant or of the Court, 26 Cr. L.J. 751=86 Ind. Cas. 287. A sanction granted after the amendment of the Code in accordance with the old procedure is of no avail and cognizance cannot be taken on such sanction, 26 Cr. L.J. 443=85 Ind. Cas. 64; 51 C. 652. Where no complaint had been filed in pursuance of a sanction obtained before the amended Code came into force, no prosecution can be instituted subsequently on the strength of such previous sanction. The new section lays down that a prosecution can only be instituted on a complaint of the Court concerned. 26 Cr. L.J. 383=84 Ind. Cas. 863. When sanction for prosecution was obtained by a party under the old Code and a complaint was also filed before the new Code came into force, held that the case was governed by the old Code and the restriction as to jurisdiction of the Court under the new Code did not apply. 7 Lah. 99 where 6 Lah. 41 and 26 Cr. L.J. 142=83 Ind. Cas. 702 are followed. The provisions of this section cannot be evaded by a device of charging a person with an offence to which this section is not applicable and then convicting him of an offence to which it does apply on the ground that the latter offence is a minor offence of the same character, 47 A. 114. The Court is concerned only where there has been a voluntary obstruction or attempted obstruction of the course of justice in a proceeding before it. The Magistrate has two paramount interests in the eyes of the Legislature; (1) he must protect the administration of justice; (2) he must prevent unnecessary prolongation of the suits, and the whole scheme of the section is based on these two principles, [1920] Patna 137. The object is to ensure that a prosecution is to be instituted against a person after mature consideration by a public servant or Court when it is of opinion that public justice require such a prosecution. The responsibility is cast entirely on the Court or public servant in initiating proceedings. The object of the section is also to protect parties and witnesses resorting to Court against vexatious prosecutions. Such protection is offered by prescribing the necessity of a complaint by the Court before which the alleged offence is committed. The section provides the means of bringing offenders against public justice to book, by empowering the officer or Court to lay a complaint in writing such cases. A *prima facie* case must be made out, 38 M. 471; 26 M. 193; 43 M. 1; 17 M.L.T. 15; 37 C. 280; Ratanlal 374; 13 A.L.J. 1111; 7 Bom. L.R. 732; 8 A. 871; 12 M.L.J. 332; 6 A. 114. There should also be a reasonable probability of a conviction. 37 C. 250; 12 C.W.N. 8; 1 C.W.N. 400; 26 M. 116; 37 M. 564; 23 M. 210; 7 A. 871; 6 A. 114; 1900 A.W.N. 149; 12 M.L.J. 392 and 408; 26 M. 193; Weir II, 188 and 166; 15 C. L.J. 337=13 Cr. L.J. 291=14 Ind. Cas. 755; 13 Cr. L.J. 331=17 Ind. Cas. 575.

No public servant or Court will be justified in making a complaint under this section, unless a *prima facie* case is made out, and there are reasonable grounds for believing that the alleged offences in respect of which such complaint is made has been committed in or in relation to any proceeding. The Court should see also before making a complaint whether there are good grounds for thinking that a prosecution is necessary in the interests of justice, 1 C.W.N. 400; 10 M.L.T. 117; 37 C. 13; 20 Cr. L.J. 337=50 Ind. Cas. 817; 13 C.L.J. 337; 63 M.L.J. 545; 32 M.L.J. 84; 37 M. 564; 35 M. 471. Want of complaint of Court under this section vitiates the entire proceedings and S. 537 cannot cure such a defect, 27 Cr. L.J. 989=95 Ind. Cas. 821.

The right to file a complaint of an offence under S. 186 I.P.O. is restricted to public servant concerned, or some public servant to whom he is subordinate. That does not include any Court nor does it include a Subordinate Judge, to whom a process-server is not subordinate. The complaint in such a case could be filed by the Nazir, or the District Judge who is the executive superior of a process-server, 27 Cr. L.J. 1010=96 Ind. Cas. 866.

SUB SECTION (1) (a).—Ss. 172 to 188, I.P.C., deal with contempt of the lawful authority of public servants, and S. 21, I.P.C., defines a public servant. The public servant is to complain in writing in respect of these offences, or some other public servant to whom he is subordinate. In most cases the public servant concerned or his superior may not be a judicial officer or an officer exercising judicial functions. It cannot be said that every offence under Ss. 172 to 188 cannot be taken cognizance of without the complaint of a public servant. Where the order disobeyed was the one promulgated by Government, e.g., under the Epidemic Diseases Act III of 1897, this clause cannot apply as it cannot be said that the Municipal Chairman (the public servant) promulgated the order, 23 M. 70. Even before the amendment a public servant himself, concerning whose lawful authority contempt was committed, may make a complaint against the person who committed the contempt and action contemplated by S. 476 was distinct from such complaint, 32 M. 49 at 57-58. The complaint must be in writing of the public servant concerned, and S. 200 (a) provides that the examination of the public servant as complainant shall be dispensed with but the postponement of the issue of process can be made as S. 202 (1) proviso (b) says only that when a complaint has been made by a Court no such direction shall be made. The new sub-section (5) provides for the withdrawal of the complaint made under this sub-section at the instance of the superior officer. The aggrieved party is given an opportunity to question the legality, propriety and correctness of the action taken against him. The decisions which held that a complaint once made cannot be questioned as in 23 M. 205; 7 C.W.N. 233; 6 Cr. L.J. 25 are no longer law. A head constable was held to be subordinate to an Inspector, 11 W.R. (Cr). 22. Although the police-officers in a district are generally subordinate to the District Magistrate, the subordinate contemplated by this clause is not such subordination. That subordination contemplates some superior officer of police, 27 C. 452, but see 32 C. 180, where the District Magistrate was treated as head of Railway Police, and see also 27 A. 292 and 45 A. 135. The Registrar of a Presidency Court of Small Causes was held to be subordinate only to the Chief Judge of the Court, 27 B. 130. Prosecutions for various offences committed in relation to proceedings before public servants are still punishable, but these proceedings are to be initiated on complaints by the public servants concerned *suo motu* or set in motion by the party aggrieved, 46 M.L.J. 274 and the remedy of a person against whom a complaint is so made by a public servant is that specified in sub-section (5) i.e. to move the authority to which such public servant is subordinate for an order directing the withdrawal of a complaint. If two offences are even remotely connected by the relationship of cause and effect, the first may be said to have been committed "in relation to the second within this section. 5 Patna 33.

SUB-SECTION (1) (b).—Ss. 193 to 211 and 228, I.P.C., occur in Chapter XI of the Indian Penal Code—of false evidence and offences against public justice. The object of this clause seems to be to save the time of Criminal Courts being wasted, and accused persons being needlessly harassed, by safeguarding against rash, baseless and vexatious prosecutions for the offences specified. It aims at doing so by providing that where prior to the institution of a criminal prosecution, a properly constituted judicial tribunal has placed itself in a position to determine whether the facts constituting the offence really exist, the Criminal Court should decline cognizance unless that tribunal has in effect certified that in its opinion the complaint is one worthy of investigation. There is no reason why this safeguard should be limited to cases where the offence is committed *pendente lite* and should not extend to cases of fabrication of false evidence in advance. Its desirability is just as great in the one case as in the other. It is of course necessary that "proceedings in Court" referred to in this clause should be actually instituted before the Criminal Court is asked to take cognizance of the offence, and once the Court has lawfully taken cognizance of the case its jurisdiction is not affected by the subsequent coming into existence of a circumstance which would have barred its jurisdiction if it had existed at the time of its institution, 33 M. 677 at 679. The offences referred to in this clause fall under two heads, (1) some of them, e.g., those under S. 205, I.P.C., and the following sections are such as can be committed only in, or, in relation to legal

proceedings ; (2) there are others which may be committed irrespective of any legal proceedings and it is only in regard to offences under the latter head that the qualification "*when such offence is committed in or in relation to any proceeding*" can have any force. Again some of the offences falling under the second head are such that the accused must have legal proceedings in contemplation, and in such cases legal proceedings must have already been commenced at the time of the commission of the offences, 39 M. 677 at 632, 683. This clause and cl. (c) agree in some respects, but differ in this, that the offence is identified in this clause by reference to the fact that it has a direct connection with some proceeding in Court, *vis.*, having been (i) committed in, or (ii) in relation to the proceeding ; whereas in cl. (c) the offence has to be connected not with the proceeding, but (i) with a document produced or given in evidence and (ii) by the fact that the document has been produced or given in evidence by a party to a proceeding. In the one case it suffices if the offence has reference to a proceeding ; in the other it must have reference to a party to a proceeding and to a document produced or given in evidence by the party. When a complaint was dismissed under S. 203, *infra* without examining the complainant as required by that section there is no legal disposal of the complaint and no action can be taken directing the prosecution of the complainant under S. 192 or S. 211, I.P.C., 48 B. 360. Where A after filing a complaint of dacoity before a Magistrate against certain persons repeats his charge before the police who, after investigation found the complaint to be false, he could not be put on his trial for an offence under S. 211, I.P.C. at the instance of the police because the offence had already been committed in or in relation to any proceeding in Court and a complaint of Court is necessary for initiating prosecution, 24 A.L.J. 816, where 46 A. 43 and 905 are distinguished. See also 27 Cr. L.J. 1014=95 Ind. Cas. 870 where it was held that where a person filed his complaint in Court before he made a statement to the police officer it was not competent for a police officer to proceed against him, and he cannot be tried for an offence under S. 211 I.P.C. without a complaint of Court. When a complaint is dismissed under S. 203 as false and the Magistrate is of opinion that the complainant ought to be prosecuted for an offence under S. 211, I. P. C. the proper procedure for him to adopt is to make a complaint of Court and not to hold an inquiry himself and then commit the complainant to the Court of Session, 27 Cr. L.J. 937=95 Ind. Cas. 651. No Court can take cognizance of the offence of perjury except on the complaint of a public servant and such complaint should be produced on the date of the prosecution, 23 A L J. 33. Assignments of perjury should be clearly stated especially with regards to statements contained in a long deposition, 18 A. 203 ; 9 W.R. (Cr.) 53 ; 10 W.R. (Cr.) 31 ; 17 W.R. (Cr.) 52 ; 19 B. 362 ; 26 C. 808 ; 30 W.N. 35 ; (1925) M.W.N. 740=23 Cr. L.J. 1539=90 Ind. Cas. 661. Mere denials in pleadings cannot be considered as perjury, 6 M.L.T. 316=19 M. L.J. (Sh. N.) 33. Before taking action under this section for perjury the Court should bear in mind, (1) whether the statement alleged to be false are intentionally false, 6 M.L.T. 91 ; (2) whether the statements were material (3) whether they affect the credibility of the witness, 2 A.L.J. 836. Where two apparent contradictory statements in a deposition whose materiality is remote, the Court ought not to take action for perjury, 37 M. 334. It would be a dangerous doctrine to hold that every case where a comparison of the two depositions given by the same witness, one before the committing Magistrate and the other before the Sessions Court discloses contradiction, action should be taken to prosecute the witness for perjury especially where there were indications to show that the witness gave a false story before the Magistrate under police influence, 37 C. 618. In considering whether a prosecution for perjury in the alternative based on two contradictory statements it is necessary every possible presumption in favour of reconciliation of the two statements should be made, 15 Cr. L.J. 488=24 Ind. Cas. 676.

COMMITTED IN OR IN RELATION TO ANY PROCEEDING IN ANY COURT.—

The definition of "Court" is wider now. Court includes a Civil, Revenue or Criminal Court, sub-section (2), and not 'means' Civil, Revenue or Criminal Court as before. The opening words of this section "no Court shall take cognizance," clearly limit the meaning of the word "Court" to British Indian Courts to which also the British

Indian Legislature could direct the prohibition which follows in the section. Therefore it is difficult to attach a wider meaning to the word "Court" in the remaining clauses of this section. Moreover S. 1 *supra*, limits the ambit of the Code to British India and no reason is shown for widening the meaning of "Courts in British India" to Courts in Native States, 49 B. 860 where 35 B. 139 is referred to. The term "Court" as used here has a wider meaning than a Court of Justice as defined in S. 20, I.P.O., and includes a tribunal entitled to deal with a particular matter and authorised to receive evidence thereon, 46 C. 585; 17 C. 872. Court means the particular tribunal and not the particular Judge who tried the case, but includes his successor also, 5 C.L.J. 178; 31 C. 551; 11 C.W.N. 119; 33 C. 193; 7 A.L.J. 991. The expression "Court" in this section is of a wider scope than the expression "Civil, Revenue or Criminal Court" occurring in S. 476, *infra*. This is made particularly clear by the amendment in sub-section (2) of this section. It reads in cls. (b) and (c) of sub-section (1) the term includes a Civil, Revenue or Criminal Court. Obviously therefore the word Court is of a wider meaning, 23 A.L.J. 956 at 960. An Insolvency Commissioner is a Court, 39 B. 842 (F.B.), see also a *Mamlaidar* holding an inquiry under the Land Revenue Code, 39 B. 310. A District Judge determining the validity of an election under the District Municipalities Act is a Court, 37 B. 355. So also a *Tahsildar* holding an inquiry under Madras Act III of 1869 as to transfer of names in a land register, 24 M. 121. A Village Munsiff is a Court, 11 M. 375. An Official Assignee is not a Court, 37 M. 107. So also an arbitrator to whom a reference was made by a Court, 17 M.L.J. 520, *followed* in 15 Cr. L. J. 358—23 Ind. Cas. 726. A Commissioner for the examination of witnesses under S. 503, *infra* is not a Court, as Court here means a Court whose duty it is to consider the evidence and to decide whether it is true or false, 11 C.W.N. 119. No complaint of Court will be necessary for prosecution under S. 211, I.P.O., when the false complaint was made to the police, 7 M. 292; 3 C.W.N. 33; 4 B. 479, but if a Magistrate dealt with the matter under S. 203 or S. 253 it will be in relation to any proceeding in any Court, 10 M. 232; 43 C. 1152; 44 C. 650, *followed* in 4 Pat. 323. Where a person made a complaint at a *Thana* but did not follow it up by a complaint in Court, it was held that this clause did not apply, as by making the report no offence was committed in or in relation to any proceeding in Court, 30 A. 52; 28 C. 786; 44 C. 650.

EXCEPT ON THE COMPLAINT IN WRITING OF SUCH COURT.—S. 4 (1) (h) defining complaint says "orally" or "in writing." A Court once abolished and re-established two years later with its territorial jurisdiction somewhat curtailed was held by the Madras High Court to be not "such a Court" within the meaning of this clause, 16 Cr. L.J. 737—31 Ind. Cas. 633. See 35 A. 8; 26 A. 514 as to what amounts to complaint. The Magistrate to whom the complaint is made is not competent to inquire into it, 8 Pat. 450.

SOME OTHER COURT TO WHICH IT IS SUBORDINATE.—See sub-section (3) as to the subordination of Courts.

SUB-SECTION (1) (c).—The word "Court" in this sub-section does not include a Court in a Native State such as Baroda. It is difficult to suppose that the Legislature intended that complaints or sanctions should be made or issued by Courts not within the territorial jurisdiction of the Legislature but outside its control, 49 B. 860 where 35 B. 139 is referred to. The expression "Court" in this section is wider than the expression "Civil, Revenue or Criminal Court" in S. 476, *infra*, 48 A. 80. The words "has been committed" are replaced by the words "alleged to have been committed." In 14 A.L.J. 74 at 77 it was held that "committed" meant "alleged to have been committed" as no Court can decide whether an offence has been committed or not until it has taken cognizance. To meet this criticism the alteration has been made. See 5 Pat. L.J. 133. The only offence to which this sub-section bars from the cognizance of Magistrates without a complaint by the Court is when such offence is alleged to have been committed by a party to any proceeding before that Court and it is not right to divorce these words or take only a part of the section in endeavouring to discover what the offence referred to in this section, 2 Rang. 374; 26 Cr. L.J. 500—85 Ind. Cas. 214. This clause refers only to cases where a forged document has been produced or given in evidence

by a party to a proceeding in Court. In this clause the word "offence" is designedly used in a somewhat abstract manner. It is the offence itself and not the particular offender's offence which the section aims at, and that is in accordance with S. 40, I.P.C., where "offence" is defined as a thing made punishable by that Code. In other words, the clause deals with the case where a substantive offence is committed by a party to a proceedings, 12 Bom. L.R. 383 at 328. The object of mentioning S. 463 in this clause is to include all cases of forgery whatever the nature of the fraudulent intention may be, and hence an offence under S. 468 is covered by the term "S. 463," 22 M.L.J. 141 at 148 following 12 B. 86 and 14 C.W.N. 479; 26 Cr. L.J. 537=85 Ind. Cas. 377; 27 Cr. L.J. 969=96 Ind. Cas. 521; An offence under S. 466, I.P.C., comes within this clause, Ratanlal, 83. As long as the prosecution is confined to offences connected with a document prior to its production in Court this clause has no application, 34 A. 684. Where it is possible that a document was forged by a person but there was no evidence to suggest that he did so for the purpose of using it as evidence in Court or that he used the same in Court, a complaint under S. 476, *infra* against him by the Court is not warranted by law, 28 C.W.N. 880=25 Cr. L.J. 1095=81 Ind. Cas. 919. This sub-section is wide enough to include any document produced or given in evidence by a party who is alleged to have committed the offence or any one else and the intention of the Legislature in the framing of the section, as it stands now, was to give authority only to the Court in which a proceeding was pending, to file a complaint in respect of the documents which were produced or given in evidence before it. If there had been any intention to limit the provisions of the section to a document produced or given in evidence by a party to the proceeding then it would have been a simpler matter to insert words to make that intention clear. These words are not there and we can only construe the section as it stands, 49 B. 608 at 614, see also 39 M. 877.

BY A PARTY TO THE PROCEEDING.—A claimant who files a claim in an insolvency petition in the High Court is a party to the proceedings. If his claim is disputed he has to appear to support it and then a *lis* is constituted between himself on the one hand and the Official Assignee as representing the estate of the debtor on the other. If his claim is rejected and he is not satisfied with it, he appeals to the Court like just any other party in other proceedings, 43 M. 1 at 3; 14 A.L.J. 74; 23 A.L.J. 986. A witness is not a party to a proceeding within the meaning of this clause, 3 M. 400. Under this clause the offence must be alleged to have been committed by a party. If therefore the offence has been alleged to be committed by a person not a party, this clause is inapplicable, 42 M. 530 at 541. In case of witnesses, there is no necessity to resort to this clause, 3 M. 400; 18 C.W.N. 865; 26 M.L.J. 220; 25 M. 671; 30 M. 226; 32 A. 73; 6 A.L.J. 983; 4 Bom. L.R. 268.

PRODUCED OR GIVEN IN EVIDENCE.—The word "produced" was introduced in the Code of 1898; *production* of a document in Court is not the same thing as "*giving it in evidence*." Wide interpretation was given to the word "produce" occurring in this sub-section in, 49 B. 608. The words "*produced or given in evidence*" refer to the production of the original in Court and not to the mere production of a copy because when a copy is produced the Court will not really be in a position to express any opinion about the genuineness of the original. But the use of copies knowing the original to be forged amounts to making use of a forged document within S. 471, I.P.C., 26 Cr. L.J. 29=85 Ind. Cas. 993. A document produced in Court means one which is produced for the purpose of being tendered in evidence or for some other purpose, 9 Bom. L.R. 735=6 Cr. L.J. 78. The decision in, 13 M. 223 and 7 C.W.N. 112 before the 1898 Code, where the wording was merely "*a document given in evidence*" are no longer law. Mere production in Court is sufficient now. A document handed over to the Court by a person tendering it, though rejected for insufficiency of stamp or want of registration, has been produced and given in evidence within the meaning of this clause, 22 C. 1004; Ratanlal 242. A document called for by a party to a proceeding brought into Court and referred to by his pleader in argument and by the Court in its judgment though it expressly refrained from any opinion as to its authenticity, it was held that the document was produced in the proceeding within the meaning of this clause, 44 C. 1002, where 23 C. 887; 22 C. 1003, 14 C.W.N. 805, 9 Bom. L.R. 735=6 Cr. L. J. 73,

are referred to, 27 Cr. L.J. 251-92 Ind. Cas. 427. See 7 C.W.N. 795; 19 C.W.N. 125; 39 C. 383; 17 C.W.N. 94. Where a document was produced in answer to an application for execution purporting to evidence the compromise of the decree under execution, but the Court executing the decree did not take the document on file, holding it was barred and returning it to the applicant's pleader, held, that the document was produced in the proceeding before the Court within the meaning of this section, 49 B. 799 where Ratanlal 242; 44 C. 1002; 9 Bom. L.R. 735 and 49 B. 608 are referred to.

SUB-SECTION (2).—For the word "means" the word "includes" has been substituted. The definition is much wider now. If it is not of a wider meaning it is wholly unnecessary to say "but does not include a Registrar or Sub-Registrar etc.," 23 A.L.J. 845 at 850. For meaning of the term "Court", see notes under sub-section (1) (b), *supra*. See 39 B. 310, where what constitutes a "Court" is discussed at some length. A Registrar and Sub Registrar under the Registration Act, 1908, are not Courts within this definition, 11 M. 300.

SUB-SECTION (3).—This sub-section indicates the Court to which the Court making the complaint should be deemed to be Subordinate. A Court should be deemed subordinate to the Court to which appeals *ordinarily* lie from its appealable decrees or sentences. This sub-section is controlled by S. 526 *infra* which empowers the High Court to transfer proceedings from one Court to another, 26 Cr. L.J. 798-86 Ind. Cas. 428.

ORDINARILY LIE.—The same language is used in Ss. 405 and 436 (1). The word "ordinarily" refers to the tribunal to which the majority of appeals are presented, 28 M.L.J. 486; 27 M. 124; 26 M. 656; 39 C. 774. A Magistrate empowered under S. 407 (2), *infra* to hear appeals by the District Magistrate is not the Court to which appeals ordinarily lie, 30 C. 394; 26 M. 656 (F.B.); 27 M. 124. Where a complaint was made by a Judge of the Presidency Small Cause Court, it was held an appeal lay to the appellate side of the High Court and not to a Full Bench of the Small Cause Court, 48 M. 395, following 34 B. 316. A Village Magistrate is not a public servant subordinate to a Sub-Magistrate within this sub-section and the latter is not competent to file a complaint of Court in respect of an alleged offence under S. 182, I.P.C. of giving false information to a Village Magistrate, 47 M. 229. A Magistrate passing an order under S. 144, *supra* does so only as a public servant and not as a Court. Therefore the Special test laid down in this sub-section for determining the subordination of Courts is inapplicable. The view taken in 35 M.L.J. 454; that an order under S. 144 is an order of a Court treated as a judicial order, is not correct and is opposed to the Full Bench ruling in 6 M. 203. S. 144 *supra* merely empowers certain Magistrates to pass temporary orders in urgent cases. It is not even necessary to record formal evidence and the party against whom it is directed need not be given a chance of being heard and the remedy of the party injuriously affected is to have the order set aside under S. 144, *supra*. Such an order can in no sense be treated as a judicial order, 47 M. 56. This decision is of doubtful authority now as sub-section (3) of S. 435, *infra* on which it was mainly based has been repealed now and orders under S. 144 and Chapter XII of the Code are subject to the ordinary revisional jurisdiction of the High Court. A Magistrate of the first class is not subordinate to the District Magistrate under this section but is subordinate to the Sessions Court to which alone appeals from sentences ordinarily lie, 26 M 656 (F.B.); 27 M. 124. A Subordinate Judge is subordinate to the District Court. An appeal ordinarily lies to the District Court, 41 M.L.J. 320-47 L.W. 311, but when the value of the subject-matter of the suit exceeds Rs. 5,000, the appeal in such cases lies to the High Court, 7 M. 314; 2 B. 481; 11 B. 438; 17 A. 51; Ratanlal 237.

IN THE CASE OF CIVIL COURT FROM WHOSE DECREE NO APPEAL ORDINARILY LIES.—An appeal from Bench of Honorary Magistrates ordinarily lies to the District Magistrate, 26 Cr. L.J. 423-85 Ind. Cas. 39. "Where no appeal lies" was the wording before and in 34 A. 197 at 202, it was held that the Legislature had not made any provision as to the subordination of a Court of Small Causes as the words "where no appeal lies" refer to cases in which no appeal lies; and not to Courts against whose decisions no appeal ever lies. To meet this objection the language has been altered to make it clearly applicable to Court of Small Causes. The word "civil" has now been specially added to meet the decision in 31 A.

313 at 314, where it was held that the clause is not limited to Court of Small Causes, but extended to all Courts where the orders are not appealable and the finality of the decision of the Court with reference to the nature of the case and not with reference to the constitution of the Court is the element which determined subordination. In 34 A. 197 at 202, *Chamier, J.*, said: "I can discover no jurisdiction for reading the word 'the principal Court of original jurisdiction' as if they were 'principal Court of original civil jurisdiction,' and the Legislature never intended the principal Court of original civil jurisdiction to revise orders of Criminal and Revenue Courts with which it has no concern as a Civil Court". So the clause contemplates only Courts of Small Causes and they are subordinate to the principal Court of original civil jurisdiction and the concluding words of this clause "*such Civil Courts is situate*" also makes this clear.

PRINCIPAL COURT OF ORDINARY ORIGINAL JURISDICTION.—The District Court in the mofussal will be the principal Court having ordinary original jurisdiction so far as Provincial Court of Small Causes is concerned, and the High Court will be the principal Court so far as the Presidency Court of Small Causes is concerned. There is no Court to which appeals ordinarily lie from decrees of Presidency Small Cause Courts and so an appeal from an order under S. 476, *infra* lies the principal Court having ordinary original jurisdiction, *i.e.*, the High Court which exercises ordinary original civil jurisdiction. It has been held that for the purpose of this sub-section the original side of the High Court is not different from the rest of the High Court so the appeal lay to the appellate side of the High Court, 48 M. 395 following 36 M. 138 and 45 M. 928. It is submitted that the addition of the word "ordinary" newly made supports the view that it is to the original side of the High Court such appeals lie.

PROVISO (a).—In cases where appeal lies to more than one Court, the Court of inferior jurisdiction shall be the Court to which such Court shall be subordinate. For example, an appeal lies to the District Court from a Subordinate Judge's Court when the value of the subject-matter is less than Rs. 5,000, and to the High Court when the value of the subject-matter is over Rs. 5,000. In such a case the District Court is the Court of inferior jurisdiction to the Court to which the Court shall be deemed to be subordinate, 7 M. 314; 2 B. 481; 11 B. 438; 17 A. 51. See also 22 C. 487; 30 C. 916; 34 M.L.J. 320=17 L.W. 311. In 36 A. 611 it was held that the order of a Commissioner hearing an election petition under the Municipal Act directing the prosecution of one of the parties for having committed forgery in connection with a voting paper is not amenable to the Revisional jurisdiction of the High Court. Nowhere is the relation of an election Court to the High Court defined and there is no statutory provision in the Municipal Act reserving the ordinary Civil Revisional jurisdiction of the High Court which is exercised under S. 116, C.P.C.

PROVISO (b).—This provision was enacted in the Code of 1898 in consequence of the difficulties which had arisen. See 10 A. 582 (F.B.); 19 A. 121 (F.B.); 1891 A.W.N. 82.

ACCORDING TO THE NATURE OF THE CASE.—The words "nature of the case" used in this clause mean "nature of the case pending." The word "case" does not mean "suit" and it would be proper to refer back to the original suit or to consider what its nature was. The proceedings which were pending constituted the "case" and it was the nature of these proceedings which had to be looked to. The offence was alleged to have been committed not in connection with the suit but in connection with the execution case, 34 A. 197 at 198.

SUB SECTION (4).—This sub-section was introduced in the Code of 1898. The decision in 20 M. 8 to the effect that this section did not apply to abatement of the offence mentioned herein is no longer law. See S. 230, *infra* in this connection, where we find the words *previous sanction* is still retained. See also 3 C. 905, where it was held that when once sanction has been obtained to prosecute for the substantive offence no fresh sanction is necessary to prosecute for abatement of that offence.

SUB-SECTION (5).—This sub-section is new and provides for the withdrawal of the complaint made by a public servant on the direction of his superior. Thus where the Registrar of the Presidency Court of Small Causes files a complaint under sub-section (1) (a) as

public servant for an offence under S, 181, I.P.C., the Chief Judge of that Court to whom the Registrar is subordinate may order withdrawal of the complaint, 23 B. 130. A District Superintendent of Police is subordinate to the District Magistrate under S. 4 of the Police Act, 45 A. 135. The procedure for the withdrawal is to send a copy of the order to the Court before which the complaint is pending and the Court shall not take further proceedings on the complaint.

COSTS.—A proceeding under this section ought not to be treated as a proceeding between private parties. It is done in the interests of administration of justice and so no one can claim costs from the party against whom a complaint of Court is made or where a complaint of Court is refused to be made. A complaint of Court does not establish the guilt of the person proceeded against and it may ultimately transpire that the person is innocent. No costs are to be awarded in proceedings under this section, 13 Cr. L.J. 6-13 Ind. Cas. 99; 16 Cr. L.J. 281-28 Ind. Cas. 329. In 43 M. 1 at 4 the costs of the respondent the Official Assignee was allowed in a sanction appeal to come out of the estate.

196. No Court shall take cognizance of any offence punishable under Chapter VI or IX A of the Indian Penal Code (except section 127), or punishable under section 108A, or section 153A, or section 294A, or section 505 of the same Code, unless upon complaint made by order of, or under authority from the Governor-General in Council the Local Government, or some officer empowered by the Governor General in Council in this behalf.

OBJECT OF THE SECTION.—"The object of the section is to prevent unauthorised persons from intruding in matters of State by instituting State prosecutions and to ensure that prosecutions shall only be instituted under the authority of Government." 22 B. 112. The true implication of the section is that the judgment of the Local Government should be specifically directed to the particular sections of Chapter VI of the Indian Penal Code in respect of which proceedings are to be taken and that the order or authority should be proceeded by, and be the result of a deliberate determination that proceedings should be taken, 18 C.L.J. 452 (Sp. B); 37 C. 487. The question whether where a person is accused of committing acts which constitute a grave offence requiring sanction under this section and also a minor offence which requires no such sanction the omission to obtain the sanction precludes the Court from trying the accused for the minor offence was left undecided in 7 Lah. 218 as in that particular case the High Court was of opinion that on the allegations in the complaint no offence requiring sanction was committed and therefore there was no law which offered any obstacle to the trial of the accused for the minor offence. The provisions of the Code allowing the Court to frame a charge of the offence it finds to be proved, to alter the charge or to convict an accused person of an offence although he was not charged therewith must be read subject to the provisions of this section, i.e., those powers can be exercised in respect of offences falling within this section when a prosecution for the offence of which it is proposed to charge or to convict the accused has been duly authorised under this section and cannot be exercised when the prosecution has not been so authorised, 4 Rang. 131. There is nothing in the section to warrant the construction that the actual complaint must be authorised by the Local Government. The only question which the Court has to consider with reference to S, 196 is:—"Is the complaint which I am asked to entertain, a complaint made by the order or under the authority of Government?" 32 M. 3 at 9. The substitution of the word "the prosecution has been sanctioned" in sub-section (2) makes this quite clear now. The Government when acting under this section is certainly not acting in a judicial capacity or exercising a judicial function but acts purely in its executive capacity, 27 M. 51 at 57; 17 L.W. 223; 4 Rang. 131 at 139, differing from 37 C. 647. and no particular form in which the sanction is to be accorded, is necessary.

UNDER CHAPTER VI OR IXA I.P.C. EXCEPT S. 127, ETC.—Chapter VI relates to offences against the State such as waging war against the King or any Asiatic power in alliance with the King, as collecting arms, assaulting Governor-General, sedition, concealing design to wage war, etc. Ss. 121 to 130 I.P.C. S. 127 relates to receiving property with knowledge when the same has been taken in war against an Asiatic power in alliance or at peace with the King, etc., and is excepted. S. 109A deals with the abetment in British India of offences outside it. S. 159A deals with promoting racial enmity and S. 294A relates to false rumours, etc., circulated with intent to cause mutiny. The law regarding malpractices at elections is contained in Act XXXIX of 1920 whereby the I.P.C. was amended by the addition of Ss. 171A to 171-I in Chapter IXA, I.P.C. By the new amendment Chapter IXA is included in this section and hence no proceedings regarding these new offences could be launched without a complaint by order of or under authority from the Governor General in Council or the Local Government or some officer empowered by the Governor General in Council in this behalf and when no such complaint has been made under this section, the Magistrate had no jurisdiction to proceed with the case on the complaint of a private party and his action was wholly *ultra vires*, 26 Cr. L.J. 1234=88 Ind. Cas. 850.

UNLESS UPON COMPLAINT MADE BY ORDER OF OR UNDER AUTHORITY FROM.—Under this section the complaint must be made by order of, or under authority from, the Local Government and the Government order sanctioning the prosecution is to be proved as laid down in S. 78 of the Indian Evidence Act, 35 C.L.J. 180; 50 C. 135 and 44 M. L.J. 587. The order or authority need not be in any particular form. It is desirable but not legally imperative that it should be in writing, 7 M.H.C.R. 58. It should be in express terms but it is not imperative, 22 B. 112 at 124. When the order of Government did not name the accused, but the name was supplied by the police-officer who applied for warrant, it was held that the authority was sufficient, 35 C. 141; but where the complaint omitted to name an accused person it was held that the accused not so named stood discharged from the trial, 38 C. 559. Where the person to be prosecuted is named and the sections under which they were alleged to have committed offences as also the period of activity were specified, the mere circumstance that they were not described as members of the revolutionary society, the existence of which was sought to be established at the trial did not affect the validity of authority, 16 C.W.N. 1105=15 C.L.J. 517. The order or authority should be preceded by and be the result of a deliberate determination that proceedings should be taken in respect of a particular section or particular sections of the chapter and no other and the Local Government cannot delegate to any other body or person the controlling power, 37 C. 457 at 488; 18 C.L.J. 452. See 42 M. 885. Sanction given *after the filing* of the complaint does not fulfil the requirements of this section. The sanction in order to satisfy this section must have been an act of the Local Government and not of a single member of such Government, 42 M. 885; 42 M. 180 is practically overruled by 42 M. 885; 40 Bom. L.R. 1053. All that is required under this section is a complaint of facts within S. 190 (1) (a), *supra* and an order for making that complaint under this section. So long as the matter complained of is made sufficiently clear in the order no specification of the particular section of the I.P.C. is required by this section, 11 Cr. L.J. 583=8 Ind. Cas. 203. See also 32 M. 3.

THE LOCAL GOVERNMENT.—Where the sanction under this section was granted by the *de facto* Local Government and the cognizance of the case was taken up by the *de facto* Sessions Judge, it was not open to a party to question collaterally the legality of the conviction upon the allegation that the Local Government was irregularly constituted and the Sessions Judge irregularly appointed, 16 C.W.N. 1105=15 C.L.J. 517. Where the law clearly says that it is a condition precedent to the prosecution that a sanction should be obtained from the Local Government, it is not open to any subordinate authority to override the provision of law by saying that the offence falls under another section of the Indian Penal Code, that no sanction was necessary for prosecution under that section and that the offender may be prosecuted without any sanction, 22 A.L.J. 1106=26 Cr. L.J. 382=84 Ind. Cas. 714. There is no special mode laid down in the Code whereby the order of sanction of Government is to be conveyed to the officer who puts the law in motion under S. 121 or 121-A, I.P.C. It need not contain the charge for the offence. All that the Court has to see is whether the

complaint is made by order or under authority of Government, 25 Cr. L.J. 401—77 Ind. Cas. 481. A letter issued from the office of the Chief Secretary to Government conveying sanction under this section to a prosecution under S. 294A, I.P.C., which is not signed by the Chief Secretary but by some other officer on his behalf is no legal proof that the Local Government has ordered or authorised the prosecution. The capacity of the Chief Secretary being that of a delegate of the head of the Local Government, the order could not be certified on his behalf but must be proved under S. 78, Indian Evidence Act, 23 Cr. L.J. 111—71 Ind. Cas. 233. The law does not lay down any particular form in which the sanction to prosecute should be accorded. It is sufficient if it names the person or persons to be prosecuted, and specifies the section under which they are alleged to have committed the offence, as also the time and place of the alleged offence. Failure to specify the utterances of the accused will not affect its validity, 28 Cr. L.J. 279—76 Ind. Cas. 871. Consent in writing of the authority specified in this section is not necessary to a prosecution for criminal conspiracy to commit a non-cognizable offence where S. 195, (4) *supra* is applicable, 50 C. 461.

196A. No Court shall take cognizance of the offence of criminal conspiracy punishable under section 120B of the Indian Penal Code,

Prosecution for certain classes of conspiracy.

(1) in a case where the object of the conspiracy is to commit either an illegal act other than an offence, or a legal act by illegal means, or an offence to which the provision of section 196 apply, unless upon complaint made by order or under authority from the Governor General in Council, the Local Government or some officer empowered by the Governor General in Council in this behalf, or

(2) in a case where the object of the conspiracy is to commit any non-cognizable offence, or a cognizable offence not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, unless the Local Government, or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the Local Government, has, by order in writing, consented to the initiation of the proceedings :

Provided that while the criminal conspiracy is one to which the provisions of sub-section (4) of section 195 apply no such consent shall be necessary.

This section was added by Act VIII of 1913, in consequence of the addition of Chapter VA in the Indian Penal Code. For general rule in criminal conspiracy and what a complaint should set forth see the elaborate judgment of *Mookerjee, J.*, in 18 C.W.N. 1108—18 C.L.J. 517 (F.B.).

CRIMINAL CONSPIRACY.—The offence of criminal conspiracy was unknown to Indian Law except what was contained in S. 121A, I.P.C. Criminal Conspiracy is now made a substantive offence in British India. Conspiracy unlike other offences does not require an intention to do an overt criminal act but only an agreement between persons to do some act and it does not matter whether the act is done or not. This section applies only to prosecutions under S. 120B, I.P.C. and not for abetment by conspiracy punishable under S. 109, I.P.C. 26 Cr. L.J. 1329—89 Ind. Cas. 305.

196B. *In the case of any offence in respect of which the provisions 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, in which case such police-officer shall have the powers referred to in section 155, sub-section (3).*

Preliminary inquiry in certain cases.

This section contemplates a preliminary inquiry by a police-officer not below the rank of an Inspector under the orders of a District Magistrate or Chief Presidency Magistrate as the offences involved are of a very serious character, designated in English Law as "high treason", etc.

197. (1) *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.*

Prosecution of Judges and public servants.

(2) Such Government may determine the person by whom, the manner in which, the offence or offences for which the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held.

Power of Government as to prosecution.

AMENDMENT.—Sub-section (1) is newly drafted. For the words "as such Judge or public servant of any offence" the words "of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties" have been substituted. "When any Judge or public servant is accused as such Judge or public servant of any offence no Court shall take cognizance of such offence except with previous sanction. It is proposed to amplify the words with the object of rendering the section clear reverting rather to the wording of the Code of 1872."—*Statement Objects and Reasons.*

OBJECT OF THE SECTION.—The object of the section is to safeguard against vexatious proceedings being started against responsible public servants. The section therefore insists that before starting proceedings, the sanction of the superior authorities specified in the section is necessary. Superior authorities are also empowered when sanctioning prosecution of public servants to specify the person by whom and the manner in which the offence or offences for which prosecution is ordered is to be conducted. There is no mention in this section of any delegated authority. Obviously the intention was to simplify the law regarding sanction in the new Code and the circle of public servants for whose prosecution sanction was necessary under the previous Code has been narrowed. Under the former Code sanction of some authority (other than the Local Government) to whom the power was delegated by the Local Government to grant sanction, was necessary for prosecution of certain public servants. Any sanction for prosecution in their cases is no longer necessary. Therefore no sanction is necessary for the prosecution of an Exise Inspector, 27 Cr. L.J. 345=92 Ind. Cas. 657 not

following (1916) 1 M.W.N. 383-47 Cr. L.J. 168-33 Ind. Cas. 638; 24 Cr. L.J. 311-72 Ind. Cas. 523.

JUDGE, MAGISTRATE OR PUBLIC SERVANT.—The words "Magistrate" has been newly added. For definitions of the term "Judge" and "public servant" see Ss. 19 and 21, I.P.O. All Judges or public servants, but all public servants are not Judges. Any person whether receiving pay or not (*e.g.*, a volunteer in a public office) who chooses to take upon himself duties and responsibilities belonging to the position of a public servant and performs those duties and accepts those responsibilities and is recognized as filling the position of a public servant, must be regarded as such, 8 A. 201. A Municipal Corporation is not a public servant within the section, 3 C. 788, but a Municipal Chairman or Commissioner is, Weir II, 243. A Vice President of a Municipality when charged for receiving a Commission from a firm for ordering goods for the Municipality under S. 409, I.P.O, was held to come within this section, 4 Rang. 128. A Chairman *delegate* is not protected by this section, Weir II, 228. No sanction is necessary to prosecute a municipal secretary, 23 Cr. L.J. 750-69 Ind. Cas. 638. A village-headman in Madras exercising jurisdiction under Regulation XI of 1816 is a Judge, 23 M. 540. A village-headman who fabricates a false record in a criminal case cannot be properly said to be acting as a Judge so as to require sanction for his prosecution, 32 M. 255 but it was held in (1920) M.W.N. 7-21 Cr. L.J. 233-55 Ind. Cas. 108 *distinguishing*, 32 M. 255 that where a village-headman in a case pending before him created a false record, *vis.* a judgment and a calendar he acted as a Judge and sanction was necessary before he could be prosecuted for the offences under Ss. 167, 218 and 469, I.P.O. The new amendment makes this very clear. Similarly no sanction is necessary to prosecute a village-headman of extortion, 6 M.L.T. 123-11 Cr. L.J. 182-4 Ind. Cas. 1036. See also 28 C. 882, as to the exact scope of the provisions of this section. Action taken under this section is more of the nature of an executive than a judicial action, 17 L.W. 226.

NOT REMOVABLE FROM OFFICE WITHOUT SANCTION OF GOVERNMENT.—The Chairman of a Union Committee cannot be said to be not removable from office save by the Local Government because it appears that he can be removed under certain circumstances by a Commissioner and consequently no sanction of the Local Government is necessary for his prosecution, 26 Cr. L.J. 1178-88 Ind. Cas. 602. To prosecute a Sub-Overseer of P.W.D. who can be appointed or removed by the Superintending Engineer without reference to Local Government, no sanction is necessary, 12 M.L.T. 351-13 Cr. L.J. 770-17 Ind. Cas. 402. A village headman is not a public servant removable from office without the sanction of the Local Government. He may be prosecuted for bribery without sanction. Attestation of a vakalat by a village-headman is not a judicial function and he does not act as a Judge then. 9 Cr. L. Rev. 395-36 Ind. Cas. 869.

The power of sanctioning the prosecution of a village-headman in Madras is vested by G. O. No. 1886 J., dated 9th October, 1874, in the District Magistrate, 17 L.W. 228-24 Cr. L.J. 116-71 Ind. Cas. 244 and similarly the power is delegated to the Board of Revenue to sanction prosecution of Sub-Magistrates, Taksildars and Deputy Taksildars (G. O. 1281 J., dated 29th June, 1891). The Inspector-General of Police and the District Magistrates are empowered (G. O. 1036 J., dated 9th June, 1874, and G. O. 1886 J., dated 25th July, 1874) to sanction the prosecution of Police Inspectors.

OF ANY OFFENCE.—These words are wide enough to include "*abatement*" also. See 32 M. 33; Offence need not be specified in the order of Government with the same precision as is necessary in a charge, 13 C.W.N. 1062-10 Cr. L.J. 483-4 Ind. Cas. 13; See also 12 Cr. L.J. 217-10 Ind. Cas. 156.

ACTING OR PURPORTING TO ACT IN THE DISCHARGE OF PUBLIC DUTIES.—Use of public position to insult or annoy others cannot be held to be in the discharge of public duties and no sanction is necessary, 4 L.W. 536; Weir II, 221. Sanction under this section need not be based on legal evidence and the Government acts purely in its *executive capacity*, 17 L.W. 228-24 Cr. L.J. 116-71 Ind. Cas. 244, no set form of sanction is required under this section, 21 Cr. L.J. 883-87 Ind. Cas. 103. No notice to accused is

necessary and it is a matter entirely in the discretion of Government whether such opportunity should be given before sanctioning prosecution, 27 M. 54; the Code does not prescribe any particular form for the sanction; hence the omission to mention the place or time of the alleged offence does not affect its validity, 27 M. 54; inquiry before granting sanction is departmental and not judicial, 23 M. 223. Power of superior Court or officer to sanction prosecution of a subordinate remains in tact unless expressly limited by Government, 7 M. H.C.R. 88. It is to be noted that the saving clause of S. 537, *infra* does not apply to this section and want of sanction under this section invalidates the whole trial and S. 537 cannot apply, 31 M. 80. As to power of Government to specify the Court before which the Judge or public servant shall be tried subject to the exercise of the general power of the High Court to transfer criminal case, see S. 526 (7), *infra*.

198. No Court shall take cognizance of an offence falling under Chapter XIX or Chapter XXI of the Indian Penal Code or under sections 493 to 496 (both inclusive) of the same Code, except upon a complaint made by some person aggrieved by such offence :

Prosecution for breach of contract, defamation and offences against marriage.

Provided that, where the person so aggrieved is a woman who according to the customs and manners of the country, ought not to be, compelled to appear in public, or 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, some other person may, with the leave of the Court, make a complaint on his or her behalf.

AMENDMENT.—The proviso is new and supplies a real omission. In the case of a woman who is a *Gosha* or an incapacitated person or a minor, some other person on her or his behalf with the leave of the Court is entitled to prefer a complaint.

SCOPE OF THE SECTION.—The distinction between Ss. 198 and 199 is pointed out by *Mookerjee, J.*, in 3 C.L.J. 38 at 42. S. 199 allows a complaint of an offence under Ss. 497 and 498 to be preferred only by the husband of the woman or in his absence by some person who had care of her on his behalf. S. 198, allows the complaint of an offence specified therein to be preferred by a person aggrieved thereby. Chapter XIX, I.P.C., deals with *criminal breach of contract of service*, while Chapter XX deals with *offences relating to marriage*. Prosecutions under Ss. 493 to 496 of Chapter XX are restricted by this section, while those under Ss. 497 and 498 are governed by the provisions of S. 199 *infra*. Chapter XXI deals with *defamation*. Prosecutions for these offences are forbidden except upon a complaint by the person aggrieved as what was done concerns solely the individual aggrieved and not the public. It is to be noted that the prosecution for offences of kidnapping, abduction, forced labour, rape, etc., are not similarly restricted as these offences *prima facie* involve some force or violence and are therefore regarded as offences against the public at large.

NO COURT SHALL TAKE COGNIZANCE, ETC.—There is no definition in the Code as to what is meant by this expression which occurs also in Ss. 193, 194, 195, 196, 196A, 197 and 199. See note at p. 257-58. It is noticeable that the provisions of this section do not apply to a charge of abetment of marital offences, of the kind therein referred to. S. 195 *supra* provides in express terms for abetment of offences mentioned therein and to attempt to commit them. No such provision is however contained in this section and it cannot therefore be said that a charge of abetment of a marital offence, specifically referred to therein excluded from the cognizance of Courts without a complaint made by some aggrieved person. The section is limited in its operation to the offences mentioned herein and S. 109, I.P.C. is in a sense, a separate provision for offences punishable with the same amount of punishment as is provided for offences said to have been abetted. To constitute a charge of abetment the

commission of the substantive offence is not committed, but the person committing the substantive offence and the person abetting it may not be the same and it is possible to imagine cases in which the person committing the substantive offence may remain untraced and the abettor be traced and brought to book. In any case the language of this section does not justify the contention that even where a charge is one of abetment a complaint by the person aggrieved is necessary. 24 A.L.J. 155 at 158.

EXCEPT UPON A COMPLAINT MADE BY SOME PERSON AGGRIEVED.—As a general rule any person whatever can institute a complaint of an offence other than certain offences specified in this and the next section, 48 M. 88; 13 B. 600; 18 A. 468. This section modifies the general rule by providing that the offence of defamation shall not be taken cognizance of by any court except upon a complaint made by a person aggrieved by the defamation. It is quite sufficient that the complainant shall state the true facts in his own language and it is for the Magistrate to apply the law to those facts. Where therefore the complaint referred specifically to S. 211 and 199, I.P.C., and asked the court to take action under those or any other section which the facts disclosed might justify, and the Magistrate framed a charge of defamation under S. 500, I.P.C. and convicted the petitioner thereunder, held, the complaint satisfied the provisions of this section and conviction was therefore legal. 27 Cr. L.J. 789—85 Ind. Cas. 308. The object of the section is to prevent Magistrates on their own motion inquiring into cases connected with marriage unless he is moved by the husband or some other person authorized, 1 C.L.R. 523. The term "aggrieved" is nowhere defined in the Code nor is there any indication of the kind of grievance which may qualify a man to complain; any fanciful or sentimental grievance would not suffice; it must be such grievance as the law can appreciate; it must be what has been termed a legal grievance and not a *stat pro ratiore voluntas reason*. "It is obviously impossible to lay down any inflexible rule for determining in every case whether the complainant is a person aggrieved by the offence alleged; the answer to the question must depend upon the nature of the offence and upon the special circumstances of each case"—*Per Mookerjee, J.*, in 3 C.L.J. 38 at 40-41. Where the wife of a lunatic was prosecuted for bigamy on a complaint preferred by the lunatic's brother, it was held that the complainant merely as the brother of the lunatic was not a person aggrieved by such offence and the complaint could not be proceeded with, 10 B. 340; but when the father the head of his family, his son being a lunatic, preferred a complaint of bigamy against his daughter-in-law and others, the daughter-in-law having been living under his protection, it was held that the father-in-law is an aggrieved person as the alleged offence if true would seriously affect his reputation and status, 3 C.L.J. 38. In a charge of bigamy on the part of the wife, the husband is a person aggrieved within the meaning of this section, 28 C. 336; 25 A. 209 and 132, and not the father, 32 A. 78; 13 Cr. L.J. 204—14 Ind. Cas. 204. In a charge of defamation by imputing unchastity to one's wife, the husband is an aggrieved person within the section, 14 M. 379; Weir II, 231; 15 M.L.J. 224; 28 Cr. L.J. 521—85 Ind. Cas. 361; 25 B. 151 (F.B.); ordinarily a brother or a son is not aggrieved by the imputation of unchastity to his sister or mother, Ratanlal 327, but when she is a widow residing in the house and under the charge of her brother or son having regard to the circumstances and conditions under which people live in India, the brother or son was held to be an aggrieved person within this section, 32 C. 425; the decision in 25 B. 151 which seemed to lay down the view that only a husband can lay a charge of defamation when a wife is defamed was interpreted and reconciled with the Calcutta view by *Mookerjee, J.*, in 3 C.L.J. 38 at 42. The President of a Municipal Corporation is not an aggrieved person entitled to lodge a complaint of defamation when certain allegations were made in a newspaper against his subordinate officers although he was responsible for the efficient administration of the affairs of the Corporation, 26 M. 43.

PROVISO.—The new proviso has been added to this section for the purpose of enabling a guardian or other person lawfully entrusted with the care and custody of the person or property of a minor or lunatic to file a complaint when such minor or lunatic is aggrieved. The prosecution abates on the death of the complainant, 31 C. 993; 46 M. 88. An agent prosecuting under the powers granted by this section for the alleged abduction of another's wife when the husband is in jail is not legally competent to compound the offence under

S. 345, *infra* on behalf of the husband whose interests will not be affected by the composition and an order of acquittal based on such composition is bad, 24 Cr. L.J. 120=71 Ind. Cas. 248. See also 24 Cr. L.J. 780=74 Ind. Cas. 744.

199. No Court shall take cognizance of an offence under section 497 or section 498 of the Indian Penal Code, except upon a complaint made by the husband of the woman or, in his absence, *made with the leave of the Court* by some person who had care of such woman on his behalf at the time when such offence was committed:

Prosecution for adultery or enticing a married woman.

Provided that, where such husband is under the age of eighteen years, or is an idiot or lunatic, or is from sickness or infirmity unable to make a complaint, some other person may, with the leave of the Court, make a complaint on his behalf.

AMENDMENT.—The words “made with the leave of the Court” in the section and the proviso are newly added; when the husband is absent or is under 18 years or an idiot or lunatic, etc., some other person may complain with the leave of the Court.

OBJECT OF THE SECTION.—The offences of adultery and enticing away a married woman are obviously of a private character and hence the limit on the person by whom initiation of proceedings is allowed, for it would be eminently undesirable that any one should have it in his power to drag into a Court of Justice offences of this sort, and thus guard against the mischief which would otherwise be done, 25 B. 151 at 155. Without a formal complaint from the husband or the care-taker during his absence, a Court is forbidden to take cognizance of these offences and the Legislature has left it entirely to the husband or the care-taker to decide whether he shall bring the matter which affects his honour before a public Court, and trial by the Court may necessarily aggravate the injury he had already suffered by giving publicity to what has occurred. S. 497, I.P.C., deals with adultery and S. 498, I.P.C. with enticing away married woman. These offences are compoundable by the husband alone. An agent prosecuting under this section is not competent to compound under S. 345 *infra*, 24 Cr. L.J. 120=71 Ind. Cas. 248; 24 Cr. L.J. 780=74 Ind. Cas. 444.

NO COURT SHALL TAKE COGNIZANCE EXCEPT UPON A COMPLAINT.—The death of a husband after lodging a complaint does not necessarily put an end to the prosecution for adultery, since the section requires only that the prosecution is to be initiated by a formal complaint by him, 4 M.H.C.R. Appx. 55. See also 8 Cr. L.J. 190, where it was held that once the Court gets jurisdiction to inquire into the offence by virtue of a complaint made by the husband, his subsequent death will not divest the Court of its jurisdiction and there cannot be abatement of a criminal prosecution. But when the statement by the husband is not a complaint within this section it is not open to another after the husband's death to revive the proceedings which had been dropped. 8 Cr. L. Rev. 313=16 Cr. L.J. 466=29 Ind. Cas. 58.

The word ‘complaint’ in this section must be taken as including not only a written complaint but also the examination of the complainant at any rate prior to the issue of process. Ratanlal 584; 45 M.L.J. 843=(1923) M.W.N. 876 which did not follow the view taken in 13 L.W. 698=(1921) M.W.N. 514 to the effect that a sworn statement taken under S. 200 cannot be read as part of the complaint to ascertain the specific charges preferred by the complainant. See also (1923) M.W.N. 470. Statement made by the husband in the course of his deposition could not be taken as a complaint as defined S. in 4 (1) (h), *supra*, within the meaning of this section. 14 Bom. L.R. 141=13 Cr. L.J. 287=14 Ind. Cas. 671. The complaint referred to in this section means a complaint of an offence under S. 498 or S. 499, I.P.C., and not any complaint. Complaint is defined in S. 4 (1) (h) *supra* and information laid before the police cannot be regarded as a complaint within this section, 30 C. 910; 23 M. 628; 6 A. 96; 11 M. 448; 14 C. 707; 43 M.L.J. 864=16 L.W. 494. The fact that in a

charge of rape by the wife the husband appears as a prosecution witness cannot be regarded as the institution of a complaint by him within this section, 5 A. 233 ; 27 M. 61 ; 29 C. 415 ; 2 Cr. L. Rev. 377 ; 14 Cr. L.J. 283 = 19 Ind. Cas. 716. A conviction had for an offence under S. 498 without a complaint by the aggrieved person is illegal and cannot be sustained, *Wair-II*, 235 ; 31 B. 218 ; where a husband charges his wife with theft of jewels and also alleges that the person to whose house she went with the jewels had enticed her away, and presents a complaint not with the object of getting the Magistrate to take action under S. 498, I.P.C., but simply to coerce the wife to return the jewel, it was held that there was no complaint under this section which could be proceeded with after the death of the husband, 5 Cr. L. Rev. 313 = 16 Cr. L.J. 466 = 29 Ind. Cas. 98.

BY THE HUSBAND OF THE WOMAN.—The intention of the Legislature is to prevent a Magistrate taking cognizance of offences namely those connected with marriage, on his own motion or on the complaint of strangers but only on the complaint of the husband or some other person authorised to make the complaint on his behalf. Where a married woman is defamed by imputation of unchastity, her husband is the person aggrieved under this section entitled to prefer a complaint of defamation. 37 M.L.J. 746 = 20 L.W. 921 ; 5 Lah. 101, *following* 14 M. 379 and 25 B. 151 (F.B.).

OR IN HIS ABSENCE BY SOME PERSON WHO HAD CARE OF THE WOMEN.—Primarily the husband is to lodge a complaint for adultery or for enticing, and an exception is made only in the case of a person having the care of the woman during the husband's absence, to complain. Before the amendment when the husband is present and is incapable of complaining, say a minor, a lunatic or an idiot or a paralytic, he cannot be said to be "absent" and another person cannot lodge a complaint, as the terms of this section expressly prohibited such a procedure, but the addition of the new proviso to the section provides for the making of a complaint where the husband of the woman is an incapacitated person through a guardian or other person lawfully entrusted with the care and custody of the person or property of such person. The words "some person who had care of such woman" certainly do not imply that there should be any express delegation of trust by the husband to another before the latter could be competent to file a complaint. The words mean a person who had care of the woman on the husband's behalf during the latter's absence. It may sometimes be absolutely necessary that when the husband is away a complaint should be promptly filed, whether his absence be for a few days or more. There is a probability that unless prompt action is taken, the accused may entirely vanish from the scene with the woman whom he had enticed and it may not be possible to trace their whereabouts. It is also necessary under the amended section for a valid complaint, that the leave of the Court must be expressly given to the complainant and where the proceedings of the Magistrate showed that he accorded such leave, the provisions of the section would be held to be substantially complied with even though such leave was not expressly recorded, 27 Cr. L.J. 414 = 93 Ind. Cas. 78. The husband must be absent from the place at the time the offence is committed, 9 Cr. L.J. 450. The words 'in his absence' refer to the original entrustment and not to the time when the complaint was made, 17 Cr. L.J. 363 = 88 Ind. Cas. 667.

PROVISO.—The proviso newly added allows other persons acting with the leave of the Court on behalf of the husband when he is a minor, an idiot or lunatic or one unable to make a complaint owing to sickness or infirmity, to prefer a complaint. The decision in 23 Cr. L.J. 613 = 68 Ind. Cas. 313, is no longer law,

199A. *When in any case falling under section 198 or section 199,*

Objection by law-
ful guardian to com-
plaint by person
other than person
aggrieved.

the person on whose behalf the complaint is sought to be made is under the age of eighteen years or is a lunatic, and the person applying for leave has not been appointed or declared by competent authority to be the guardian of the person of the said minor or lunatic, and the Court is satisfied that there is a guardian so appointed

or declared, notice shall be given to such guardian, and the Court shall, before granting the application, give him a reasonable opportunity of objecting to the granting thereof.

This section is new and is enacted to safeguard the rights of guardians legally appointed. When a complaint is filed not by a husband but by some person on account of the latter's minority or incapacity not being his guardian appointed by a competent authority, the Court is bound to give notice of the application, if it is satisfied that there is a guardian already appointed by a competent authority and give such guardian a reasonable opportunity of objecting to the granting of leave to complain, by the Court.

CHAPTER XVI.

OF COMPLAINTS TO MAGISTRATES.

SCOPE OF THE CHAPTER.—The object of the procedure prescribed by this chapter which is entitled "Of Complaints to Magistrates" is the separation of unfounded from substantial cases at the outset, and to prevent innocent persons from being brought into Court and subjected to annoyance on frivolous charges, 37 M. 181 at 183.

200. A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the Magistrate:

Examination of complainant.

Provided as follows:—

(a) when the complaint is made in writing, nothing herein contained shall be deemed to require a Magistrate to examine the complainant before transferring the case under section 192;

(aa) when the complaint is made in writing, nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complaint has been made by a Court or by public servant acting or purporting to act in the discharge of his official duties;

(b) where the Magistrate is a Presidency Magistrate, such examination may be on oath or not as the Magistrate in each case thinks fit, and where the complaint is made in writing * need not be reduced to writing; but the Magistrate may, if he thinks fit, before the matter of the complaint is brought before him, require it to be reduced to writing;

(c) when the case has been transferred under section 192, and the Magistrate so transferring it has already examined the complainant, the Magistrate to whom it is so transferred shall not be bound to re-examine the complainant.

AMENDMENT.—The opening words "subject to the provisions of S. 476," have now been omitted and proviso (aa) is added allowing a Magistrate to take cognizance on a written complaint by a presiding officer of a Court and by a public servant acting, or purporting to act in

* Inserted by Act II of 1926, S. 3.

the execution of his official duties without examining the complainant on oath, thus avoiding possible inconvenience to public officials. The italicised words in proviso (b) were added by Act II of 1926, S. 8.

OBJECT OF THE SECTION.—The object aimed at by the examination under this section is to ascertain whether there is a *prima facie* case and to prevent unnecessary issue of process in cases where the examination of the complainant would show that the complaint was really false, frivolous, or vexatious and further proceedings will tend merely to harass accused persons and waste public time. When a complaint is in writing and is sufficiently clear it is sufficient compliance with this section if the Magistrate reads over the complaint and asks him to subscribe to it on oath and it is only when it is obscure or vague that the Magistrate is bound to examine the complainant at length for clearly ascertaining the allegations on which it is based, 26 Cr. L.J. 1101—88 Ind. Cas. 189. The evident object of getting the substance of the examination of the complainant signed, is to make use of it in case of need as against the complainant's subsequent deposition as a witness for starting against him a prosecution for perjury for making two contradictory statements. The reading over of a deposition of a witness is an essential condition to sustain a prosecution for perjury. But this section merely requires the substance of the complainant's oral examination on oath recorded by the Magistrate, to be signed by him. To hold that the Magistrate should read over the statement recorded by him is importing into the section something which would certainly be very desirable especially if the statement is to be ultimately used for contradicting him. The principle underlying S. 360 (1) *infra* should be made applicable on grounds of public policy to sworn statements if the accuracy of the record is to be vouchsafed. The provision is not in the section and is in the province of the Legislature, 26 Cr. L.J. 1401—88 Ind. Cas. 713.

TAKING COGNIZANCE OF THE OFFENCE.—The expression "taking cognizance" is not defined in the Code. It means action taken with a view to prosecute an offender for an offence and denotes a stage preliminary to the commencement of an inquiry or trial. A Court may be empowered to take cognizance of an offence and yet not be empowered to "inquire" or "try." S. 201, *infra* makes provision for such cases. S. 190, *supra* mentions the ordinary ways in which a Magistrate takes cognizance of an offence; where there was only an oral complaint to a Magistrate who did not record the same under this section, nor was there a police-report, nor did the Magistrate profess to act under S. 190 (1) (c), *supra*, it was held that the Magistrate had not duly taken cognizance of the offence under S. 190, *supra* and he had no power to arrest and remand the accused to custody, Welr II, 241.

SHALL AT ONCE EXAMINE THE COMPLAINANT ON OATH.—The provisions of the Code as to procedure should be strictly complied with. Complaints are very frequently drawn up by ignorant persons or by careless petition writers and the examination of the complainant may and should be of much assistance in eliciting the facts on which the complainant desires the Court to take cognizance and how much of the facts complainant himself has knowledge of, 18 A. 221. Non-observance of the provisions of the Code leads to much confusion and waste of public time, not to speak of putting the parties to unnecessary expense, 13 A.L.J. 840 at 842. It is imperative that the complainant be examined *at once*, 13 B. 590 (F.B.); 18 A. 221; 3 B.L.R. 53; 4 M.H.C.R. 162; 10 A.L.J. 79—13 Cr. L.J. 705—16 Ind. Cas. 513; 10 M.L.T. 120—(1911) 2 M.W.N. 74—12 Cr. L.J. 463—11 Ind. Cas. 999; and the fact that the allegations were fully set out in the written complaint will not absolve the Magistrate from examining the complainant on oath forthwith, 3 C. W. N. 17. But omission to examine a complainant is only an irregularity cured by S. 537 *infra*, 4 Lah. 389; 1 Rang. 517; 23 Cr. L.J. 691—69 Ind. Cas. 371; 20 C. 923; 12 Cr. L.J. 839—12 Ind. Cas. 515; 38 M. 606. The person prejudiced by such an irregularity is the complainant and when the case ends in a conviction he has no grievance and the accused cannot in general complain of the irregularity, as the omission to take a sworn statement from the complainant cannot prejudice him. If the complainant is not examined, it must be a matter of evidence to be decided by the Court hearing the case whether the evidence without that of the complainant is sufficient for a conviction, 19 L.W. 481; 16 L.W. 220. The object of the provision as to examination of the complainant *at once* on oath is

really to prevent issue of process to accused in cases of frivolous or vexatious complaints. Such examination cannot be regarded as part of the complaint to ascertain what specific charges are preferred by the complainant, 13 L.W. 693=(1922) M.W.N. 353. The words "at once" in this section clearly indicate that a complaint must ordinarily be presented in person; otherwise a Magistrate should be very loath to take cognizance and should not accept the complaint not signed by the alleged complainant and not preferred by a person duly authorized to institute the specific complaint. No process should be issued against accused unless the Magistrate has first examined the complainant and when a *pardanashin* makes a complaint, the Magistrate may take cognizance if satisfied that it was really her complaint by whatever means it reaches him, and he may issue a commission under S. 503, *intra*, for the examination required by this section, but a Magistrate has no power to issue process to an accused person when a complaint was presented to him by the alleged agent of a *pardanashin* on her behalf without the complaint being signed by her and without a power-of-attorney filed along with the complaint, 42 C. 19. A complaint which is otherwise proper is not illegal, merely because the person making it has no personal knowledge of the offence committed, 21 Cr. L.J. 846; but in such a case the Magistrate must satisfy himself fully that a case has been made out for issue of process, 10 C.W.N. 1090. A Presidency Magistrate need not examine the complainant on oath at once; complaints to the Presidency Magistrates are generally made by means of an affidavit or solemn affirmation before the Magistrate himself and so no further examination on oath is necessary. See 35 M. 606. If a complaint is dismissed without examining the complainant under this section, the Magistrate cannot call upon the complainant to show cause why he should not be proceeded against S. 211 I.P.C., 27 Cr. L.J. 740=95 Ind. Cas. 68.

SUBSTANCE OF EXAMINATION SHALL BE REDUCED TO WRITING.—The Legislature does require that a Magistrate taking cognizance of a complaint shall examine the complainant upon oath and the substance of that examination is by law required to be reduced to writing and that writing must be and was intended to be distinct from the complaint, and merely asking the complainant to swear to the complaint and sign it, is not sufficient compliance with law, 18 A. 221. The examination will certainly be of much assistance in eliciting the actual facts on which the complainant desires the Magistrate to take cognizance and how much of the facts alleged, the complainant knows personally. 18 A. 221.

SHALL BE SIGNED BY COMPLAINANT.—When the complainant did not sign the examination which was reduced to writing by the Magistrate under this section, it was held that it cannot subsequently be used as evidence of the statement made by the complainant in a prosecution against him for perjury under S. 193, I.P.C., 6 C.W.N. 840.

PROVISO (a) was intended to meet decisions like, 9 B.L.R. 146 (F.B.); 8 B.L.R. 19 which held that referring the case to a subordinate Magistrate for disposal before reducing the examination of complainant to writing was illegal.

PROVISO (aa).—This proviso has been newly added allowing a Magistrate to take cognizance of written complaint by the presiding officer of a Court and by a public servant acting or purporting to act in the discharge of his official duties under Ss. 195 and 476 and 476A, *intra*, without examining such presiding officer or public servant on oath. This is enacted for the purpose of avoiding inconvenience to public officials, of appearing before Magistrates when exercising their statutory functions. When a police officer makes a report in writing even in a non-cognizable offence, the Court can take cognizance without examining the police-officer *on oath* as a complainant, 42 M. 525 (F.B.)

MAGISTRATE MAY REQUIRE COMPLAINT TO BE REDUCED TO WRITING.—A complaint under S. 4 (1) (h), *supra* may be oral, but a Presidency Magistrate may require the complaint to be reduced to writing and generally in Presidency towns complaints are made by affidavits, sworn before the Magistrate. The examination referred to in this section by a Presidency Magistrate is not therefore obligatory, but the Magistrate is not excused from the necessity of placing on record the necessary evidence of complainant's authority to file a complaint, 32 C. 469 at 472. From the wording of this section and the next it is clear that a complaint need not be in writing but can be oral.

201. (1) If the complaint has been made in writing to a Magistrate who is not competent to take cognizance of the case, he shall return the complaint for presentation to the proper Court with an endorsement to that effect.

Procedure by Magistrate not competent to take cognizance of the case.

(2) If the complaint has not been made in writing, such Magistrate shall direct the complainant to the proper Court.

MAGISTRATE NOT COMPETENT TO TAKE COGNIZANCE.—If a Magistrate is not competent to take cognizance of a case he shall return the complaint for presentation to the proper court with an endorsement to that effect and he is not entitled to examine the complainant on oath under S. 200, *supra*, 10 C.W.N. 1086. A Magistrate may not be competent because (1) of his not being empowered under S. 190, *supra*, or (2) of his not having local jurisdiction or (3) of want of sanction under Ss. 197 to 199, *supra*, or (4) of any special or local law, or (5) of his being not empowered to try under Sch. II, col. 8 or to commit for trial under S. 206, *infra*, or (6) of the accused claiming the special privileges of Chapter XXXIII of the Code.

SHALL RETURN THE COMPLAINT.—If a Magistrate on a perusal of the written complaint finds he has no jurisdiction to entertain the complaint, his duty is to return that complaint to be presented to the proper Court. He need not or rather should not examine the complainant in such a case, 10 C.W.N. 1085.

SUB-SECTION (2).—This sub-section which was introduced in the 1898 Code permits an oral complaint being made. See 1 Rang, 549 at 552.

202. (1) *Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance, or which has been transferred to him under section 192, may if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or, if he is a Magistrate other than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police-officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint:*

Postponement for issue of process.

*Provided that *save where the complaint has been made by a court* no such direction shall be made unless the complainant has been examined on oath under the provisions of section 200.*

(b) [Omitted by Act II of 1926, S. 6.]

(2) *If any inquiry or investigation under this section is made by a person not being a Magistrate or a police-officer, such person shall exercise all the powers conferred by this Code on an officer in charge of a police-station, except that he shall not have power to arrest without warrant.*

(2A) *Any Magistrate inquiring into a case under this section may, if he thinks fit, take evidence of witnesses on oath.*

(3) This section applies also to the police in the towns of Calcutta and Bombay.

AMENDMENT.—Sub-section (1) has been re-drafted with a proviso. Sub-section (2) also has been re-drafted; Sub-section (2-A) is new. Proviso to sub-section (1) has been amended by Act II of 1926 by omitting pro. (b) and adding the same to the first portion of the proviso. The following are the principal changes made by the amendment:—

(1) Third class Magistrates have been given power to make preliminary inquiries personally; (2) authority to make a preliminary inquiry has been given in any case in which the Magistrate thinks fit for reasons to be recorded in writing. The only ground contemplated by the present section is if the Magistrate is not satisfied as to the truth of the complaint. This is thought to be undesirable. (3) The words "inquiry or investigation" have been substituted for the expression "previous local investigation" which at present the Magistrate is empowered to order and power is given to take evidence upon oath in the case of such preliminary inquiry. (4) Presidency Magistrates are enabled to act under this section without special authorisation.—*Statement of Objects and Reasons.*

SCOPE OF THE SECTION.—The object of the section is to prevent the harassing of innocent persons by an indiscriminate issue of process in cases where there is no sufficient ground for proceeding against them. Unless and until a Magistrate is satisfied that there is in his judgment sufficient ground for proceeding he should not compel the appearance of the accused before him. The inquiry is to be held to enable him to see whether there is sufficient ground, 51 M.L.J. 605 (F.B.) at 607=24 L.W. 613 (F.B.) at 617. Process is not to issue where there exists doubt as to the truth of the complaint. 21 Cr. L.J. 519. The procedure of calling upon an accused person to render an explanation to enable the Magistrate to decide if he should issue process, has been condemned on several occasions. It is not fair to the accused that he should be called upon to state his defence before the prosecution have laid all their cards on the table. Though there is no obligation on him either to appear or to render an explanation in the preliminary inquiry, a refusal or failure on his part to attend in answer to a rule nisi issued by a Magistrate is likely to prejudice the mind of the Magistrate and a compliance therewith, to expose him to serious risks, 27 Cr. L.J. 711 at 713=94 Ind. Cas. 903; See 30 C.W.N. 312, where 40 C. 434 is followed. The practice of calling upon the accused why a summons or warrant should not issue against him is, however much advantageous it may be in certain cases, though not illegal, is clearly opposed to the general principles of the Code, and should not be allowed to prevail and must be put an end to. An accused person should not be called upon to disclose his defence unless the Court is satisfied that a *prima facie* case has been made out which he should be called upon to rebut, 51 M.L.J. 605 (F.B.)=24 L.W. 613 (F.B.) following 47 A. 722 and 51 M.L.J. 602=24 L.W. 613 (foot note). The Full Bench ruling has condemned in the strongest terms the practice prevailing in the Presidency Towns of the indiscriminate practice of issuing a notice to show cause why a summons should not issue. The decisions in 6 Bom. L.R. 91 and 28 A. 421, were not accepted as laying down the correct law. Notice to show cause why process should not issue is a mere intimation that the Magistrate intends to take action upon the complaint, but does not amount either to a summons or to an invitation to a party charged to appear or to take any other steps in the matter. Moreover it is not included in the fifth schedule of the Code as one of the forms to be issued by the Court, nor does it appear to be prescribed or contemplated by the Code, 37 M. 181 at 182 approved in 51 M.L.J. 605 (F.B.); in 24 L.W. 613. In Calcutta the learned Chief Justice in 27 C.W.N. 198 remarked thus on this practice. "The Magistrate did not act in accordance with the law contained in S. 202 and the Sessions Judge was right in saying that the procedure was improper and irregular. I hope this judgment and the judgment in 21 C.W.N. 127 will be brought to the notice of the Magistrate and they will observe in this respect the plain provisions of the Code." Under the Code a wide discretion is given to a Magistrate with respect to the grant or refusal of process and in the interests of the community generally, it is essential that Magistrates should be vested with an ample discretion in respect of the issue of the process. Except as

otherwise provided by statute anybody is entitled to prefer a complaint in a Criminal Court, and in India where the Grand Jury system does not exist as an additional shield to innocent persons against whom unfounded complaints are laid, it is specially necessary that caution and discretion should be used in issuing summons. An accused ought not to be dragged off to answer a charge merely because a complaint has been lodged. "An extensive power is confided in the Justices in their capacity as Justices to be exercised judiciously. Discretion means, something to be done according to the rules of reason and Justice, not according to private opinion, according to law, and not humour. It is not to be arbitrary and fanciful but legal and regular. It must be exercised within the limits to which an honest man competent in the discharge of his office ought to confine himself." A Magistrate should therefore proceed according to the provisions of the Code and if he is of opinion that a *prima facie* case is made out, he ought to issue process and cannot refuse to do so merely because he thinks it unlikely that proceedings will result in a conviction. If he does so at that stage it would be guess work and speculation, which he is not permitted to do. It is settled practice that if the Magistrate having followed the procedure laid down in the Code exceeded a judicial discretion as to whether he should issue process or not the superior tribunal will be slow to disturb his order. 27 Cr. L.J. 788—95 Ind. Cas. 388; 30 C.W.N. 546. When a man files a complaint and supports it by his oath rendering himself liable to a prosecution if it is false, he is entitled to be believed unless there is some apparent reason for disbelieving him, and to have the person complained against to be brought before the Court and tried. 17 C.W.N. 290; 11 A.L.J. 754. It is undesirable that the inquiry should be prolonged by the cross-examination of the complainant's witnesses and hearing arguments and there is no reason either in common sense or in law why the accused should not be present at the inquiry, 26 Cr. L.J. 1349—89 Ind. Cas. 706. But the accused has no right to be present while the Magistrate is holding the inquiry under this section. It may often be a matter of convenience both to allow the accused to be present and to allow any legal adviser to watch the proceedings, but the grant of such a concession by the Magistrate is a mere act of grace and the accused has no innate right to it. Proceedings under this section are not proceedings *inter partes* but they are instituted and conducted by the Magistrate to enable him to satisfy himself whether there is or not sufficient ground for issuing process and it is not until process is issued, the matter becomes a case. 27 Cr. L.J. 495—93 Ind. Cas. 894. The procedure laid down in this section should be strictly complied with and unless this is done, the order will be illegal, 11 A.L.J. 921—15 Cr. L.J. 21—22 Ind. Cas. 165. This section has application only to a complaint of an offence on which the Magistrate does not deem it fit to issue process, Weir II 239. Under this section a Magistrate has the option of only one out of two alternatives, *viz.*, either to inquire into the case himself or direct a previous local investigation. But he cannot have recourse to both the alternatives. If a Magistrate having partially inquired into a case, then directs a local investigation he commits an irregularity and if he suffers his mind to be influenced prejudicially to the accused by the results of such local investigation, his proceedings will be vitiated, 44 A 550. First, there must be a *complaint* within the meaning of S. 4 (1)(h) *supra* which is distinct from information under S. 190 (1) *supra*, and secondly, the Magistrate authorized to take cognizance thinks fit for reasons to be recorded in writing after examining the complainant to postpone the issue of process for compelling attendance of the accused while he himself inquires into the matter or an investigation is made by another, 37 M. 181 at 185 followed in 51 M.L.J. 605—24 L.W. 613 (F.B.); 10 A. L.J. 79—13 Cr. L.J. 704—16 Ind. Cas. 512. Any Magistrate authorized to take cognizance may postpone issue of process. The section as it stood before the amendment permitted only the Chief Presidency Magistrate, Presidency Magistrates authorized by Government in this behalf, and any Magistrate of first or second class, to act under this section. It was rather strange that third-class Magistrate who may be empowered under S. 190 *supra* and Sec. IV *infra* to take cognizance of complaints could not be empowered to act under this section, but now the amendment removes this unnecessary restriction on third-class Magistrates and Presidency Magistrates. The practice of hearing arguments on behalf of the accused in a preliminary inquiry held under this section is not authorized by law and ought to be condemned, 25 Cr. L.J. 305—84 Ind. Cas. 439, where 40 C. 443 is followed; see 51 M.L.J. 605 (F.B.)—24 L.W. 613 (F.B.) 14 C. 141; 40 C. 414; 47 A. 722.

FOR REASONS TO BE RECORDED IN WRITING.—The Magistrate is bound to record his reasons, 20 M 387 ; 9 A. 85 ; 1900 A.W.N. 187 and 189 ; 10 M.L.T. 120—(1911) 2 M.W.N. 74—12 Cr. L.J. 463—11 Ind. Cas. 999 ; 1902 A.W.N. 195 ; 26 Cr. L.J. 1394—89 Ind. Cas. 706 ; 13 Cr. L.J. 749—17 Ind. Cas. 61.

MAY IF HE THINKS FIT POSTPONE.—A Magistrate who holds the investigation under this section has no power to dismiss the complaint under S. 203, 18 C.W.N. 95. Before the amendment, the wording was "*not satisfied with the truth of the complaint*" and this was the only ground contemplated by the section ; now wider power is given. If a Magistrate issues process to a set of accused in a case where on the same complaint another set of accused who had been already tried and acquitted, it was held that he acted improperly in issuing process without paying due regard to what had transpired in the earlier proceedings, 30 C.W.N. 546.

THE ISSUE OF PROCESS.—Prosecution of the accused commences with the issue of process after the complaint has been entertained by the Magistrate, 37 M. 161 at 183 ; 38 C. 880. Once process has been issued, subsequent reference for inquiry under this section is illegal, 9 M. 282 ; 1896 A.W.N. 140 ; 21 W.R. (Cr.) 44. Before process is issued the accused is not a party to the proceedings under this section and he is not entitled to claim under S. 340 *infra* the right to be represented by a pleader. If he happens to be present and represented by a pleader that was not by compulsion of law but of his own free will, 38 C. 880 at 887.

EITHER INQUIRE INTO THE CASE HIMSELF.—The inquiry under this section by the Magistrate himself does not necessarily mean an inquiry by examining witnesses or by holding an investigation into the case. It is open to him to investigate into the matter in order to ascertain the truth or falsity of the complaint in any way he thinks proper. There is nothing in law to prevent the Magistrate from looking into the police investigation papers for the purpose of ascertaining the truth or otherwise of the complaint. The inquiry under this section is not limited to any particular form of inquiry and if upon looking into the police papers he is satisfied that it was not a fit case in which process ought to be issued against the person accused, there is nothing in law preventing the Magistrate from doing so, 1923 Pat, 796—26 Cr. L.J. 129—83 Ind. Cas. 869.

OTHER THAN A MAGISTRATE OF THE THIRD CLASS.—A third-class Magistrate must inquire into the case himself, since he is the lowest grade of Magistrates, as there is no Magistrate subordinate to him. He is also not entitled to direct a police-officer or some other person as he thinks fit, to ascertain the truth or falsehood of the complaint.

DIRECT AN INVESTIGATION BY SUBORDINATE MAGISTRATE OR POLICE OFFICER.—The words "investigation" is not defined in the Code. It must be taken to have been used in its ordinary sense. The investigation must be into the truth or falsity of the allegation made in the petition of complaint, 19 Cr. L.J. 126. The word "Local" has been omitted now thereby widening the scope of the investigation. Great caution should be shown in sending ; for the investigation by the police, charges against members of that force. Where a District Magistrate sent for inquiry a complaint against an Inspector of Police without giving reasons and without expressing his opinion as to the truth of the complaint, the High Court in Revision sent back the case remarking it would generally be better in such a case if the inquiry be prosecuted by a Magistrate, 20 M. 387. See also 1884 A.W.N. 47 ; 1902 A.W.N. 195 ; 9 C.W.N. 199. Where an inquiry has been ordered by a person other than the Magistrate who orders the inquiry he is precluded from holding a second inquiry himself in the absence of the accused, 11 A.L.J. 754—14 Cr. L.J. 493—20 Ind. Cas. 749. A reference under this section to the police after the evidence of the complainant has been taken and process issued to the accused is illegal, 9 M. 282. Where the police on investigation had examined witnesses in the course of the investigation, there is nothing in law to prevent the Magistrate from looking into the police papers sent up to him after investigation for the purpose of ascertaining the truth or falsehood of the

complaint and a Magistrate will not be acting improperly if upon looking into the investigation papers by the police he was satisfied that the case is a fit one to issue process or for dismissal, (1924) Pat. 226=26 Cr. L.J. 129=83 Ind. Cas. 839. An opportunity should be given to the complainant to prove his case, 16 C.Y.N. 143=13 Cr.L.J. 125=13 Ind. Cas. 781.

SUCH OTHER PERSON AS HE THINKS FIT.—An inquiry may be made by any person chosen by the Magistrate and sub-section (2) empowers such person to exercise all the powers of an officer in charge of a police station except the power to arrest without a warrant. An inquiry may be made by a clerk under the Magistrate, 36 C. 72.

PROVISO (a).—Unless a complainant has been duly examined under S. 200 *supra* an inquiry under this section cannot be ordered, 12 Cr.L.J. 539=13 Ind. Cas. 515, where 27 C. 921 is followed. A Presidency Magistrate has now to examine the complainant himself and to have his statement on oath or not before he can direct an inquiry under this section. The new sub-section (4) empowers evidence to be taken on oath in the inquiry held under this section by Magistrates; investigation is not defined in the Code, it must be taken in its ordinary meaning, 19 Cr. L.J. 125. See S. 200 *supra* which lays down that ordinarily on presentation of a complaint the Magistrate shall *at once* examine the complainant upon oath; exception is made in the case of action taken by Courts under S. 476 *infra* and a new proviso (a) is added to S. 200 *supra* which allows a discretion to Magistrates to dispense with the examination of the presiding officer of a Court or public servant who complains acting in the execution of official duties.

PROVISO (b).—By the new amendment, S. 9 of Act II of 1926, Presidency Magistrates need not reduce the examination into writing when the complaint is already in writing. When the complaint is made by a Court under S. 195, this section cannot apply; but when a complaint is made by a public servant, this section may apply.

SUB-SECTION (2-A).—This sub-section is new and empowers a Magistrate inquiring into the case to take evidence of witnesses on oath and so the decisions which held that the inquiry is not a judicial one are no longer law, 39 M. 750; 21 M.L.J. 795; 22 B. 936; 32 A. 30, and is in accordance with 36 C. 72. A prosecution can be ordered on this basis of the evidence recorded under this section, 24 Cr. L.J. 862=74 Ind. Cas. 1034.

203. The Magistrate before whom a complaint is made or to whom it has been transferred, may dismiss the complaint, *if after considering the statement on oath (if any) of the complainant and the result of the* investigation or inquiry (if any) †under section 202, there is in his judgment no sufficient ground for proceeding.* In such case he shall briefly record his reasons for so doing.

AMENDMENT.—For the words "after examining the complaint and considering the result of the investigation (if any) made under S. 202" the words "after considering the statement on oath (if any) of the complainant and the result of any investigation or inquiry under the preceding section" have been substituted. For the words "any investigation" the words "the investigation" has been substituted and after the words "or inquiry" the words "if any" were inserted by Act II of 1926 S. 5.

SCOPE OF THE SECTION.—This section provides for the dismissal of a complaint on any one of three grounds—(1) If the Magistrate upon the statement made by the complainant reduced to writing under S. 200 finds that no offence has been made out; (2) if the Magistrate distrusts the statement by the complainant; (3) if the Magistrate distrusts the complainant's statement but his distrust is not sufficiently strong to warrant him to act upon it.

* 'any' altered into 'the' by Act II of 1926, S. 5.

† inserted by Act II of 1926 S. 5.

except upon a further inquiry as provided for in S. 202 *supra*, 13 C. 131; 13 B. 600; 27 C. 921. See also 9 Bom. L.R. 732-6 Cr. L.J. 85; 13 B. 590; 27 Cr. L.J. 991-87 Ind. Cas. 327. The Magistrate in all other cases is bound as soon as the complainant is examined to issue process to have the accused person brought before him. This section applies only to cases where there has been no issue of process to the accused and once process is issued there has been a commencement of the proceedings and the complaint cannot be dismissed under this section. The proviso to S. 436 *infra* cannot apply to a dismissal under this section. It only applies to the case where an accused person has been discharged. Where no process is issued to the accused at all and he does not appear in Court and the complaint against him is dismissed summarily, the accused person cannot be said to have been discharged. It is only after he has appeared in Court and the evidence against him is found to be insufficient so as to make it unnecessary to call upon him to enter upon his defence that he can be discharged. Before the amendment courts were unanimous that in the case of the dismissal of complaint under this section notice was not necessary. 35 A. 78; 30 A. 128. The amendment has left these rulings untouched and therefore no notice is necessary when a complaint is dismissed under this section or under S. 204 before further inquiry is ordered, 47 A. 722; 51 M.L.J. 605-24 L.W. 613 (F.B.). This section refers only to cases taken cognizance of by a Magistrate. The Magistrate who holds the inquiry under S. 202 *supra* is not competent to dismiss the complaint under this section. 15 C.W.N. 95. See also 43 C. 173; 15 A.L.J. 632. An application under S. 107 *supra* does not fall within the definition of complaint in S. 4. (1) (h) *supra* and therefore this section cannot apply to such a case, 25 Cr. L.J. 89-76 Ind. Cas. 25.

DISMISS THE COMPLAINT AFTER EXAMINING THE COMPLAINANT.—It is imperative on the Magistrate to examine the complainant on oath and thus give him an opportunity of showing cause against *prima facie* grounds for distrusting his complaint. The provisions of this and S. 200 *supra* are imperative and any dismissal of the complaint without examining the complainant is without jurisdiction, 13 B. 590 (F.B.); 9 C.W.N. 199; 30 C. 923; 33 C. 1; 21 Cr. L.J. 333. An order dismissing a complaint under this section is clearly unsustainable when the complainant has not been examined at all and there is no valid disposal of the complaint, 43 B. 380. A Presidency Magistrate may dismiss a complaint without such examination, as verification on oath of the complaint is a sufficient compliance. 35 M. 606; but see the amended S. 200 (b). When a Magistrate disbelieves the complainant's story he is not bound to summon his witnesses and examine them before acting under this section, 14 C. 707; 27 C. 921; 6 C.W.N. 295 at 297; 10 C.W.N. 1085, but when once he had issued summonses to complainant's witnesses he is bound to examine them when tendered by the complainant before dismissing his complaint. 20 M. 388. The conclusion must be arrived at by the Magistrate by the exercise of a discretion based on judicial considerations, 25 M.L.J. 510. A dismissal under this section does not amount to an acquittal for the purposes of S. 403 *infra*. See explanation to S. 403 *infra*. If a complaint pending before a Magistrate is sent to the District Magistrate with a view to its transfer to some other Court the District Magistrate is seized of the case and has jurisdiction to dismiss the complaint under this section if after examining the record he is of opinion that the complaint was wholly unfounded. 28 Cr.L.J. 533-81 Ind. Cas. 43. A criminal case does not abate on the death of the complainant and therefore a Magistrate cannot dismiss it on that ground, 16 Cr. L.J. 713-30 Ind. Cas. 1001.

CONSIDERING THE RESULT OF THE INVESTIGATION OR INQUIRY IF ANY UNDER SECTION 202.—The use of the word "any" clearly implies that an investigation or inquiry under S. 202 may or may not be made and it cannot be said, the change in the language of the section by the amendment makes it obligatory on the Court to make an investigation or inquiry. The change is merely verbal and is not a change in substance. This section is not in any way dependent upon the provisions of S. 202 *supra* and an investigation or inquiry under the latter section is not a condition precedent to the dismissal of a complaint under this section, 26 Cr.L.J. 921-86 Ind. Cas. 985. A dismissal of a complaint solely on the ground that the Magistrate agrees with the police report is illegal unless

such report is made a part of the order, 21 M.L.J. 492-7 M.L.T. 175-11 Cr.L.J. 381-5 Ind. Cas 928. The inquiry or investigation is for the purpose of ascertaining the truth or falsehood of the complaint. Any report submitted under S. 202 shall form part of the record and is to be considered by the Magistrate before dismissing the complaint, 14 C. 141; 33 C. 1; 13 B. 590.

THERE IS NO SUFFICIENT GROUND FOR PROCEEDING.—The expression "sufficient ground" points conclusively to the fact which the complainant brings to the knowledge of the Magistrate and to his establishing a *prima facie* trustworthy case against the accused. A Magistrate in dismissing a complaint should not be influenced by considerations altogether apart from the facts which are adduced by the complainant in support of the charge and should not proceed exclusively on what he presumed from the surrounding circumstances to be the motive by which the complainant was actuated in moving the matter. In so doing he failed to exercise the discretionary power of summary dismissal under this section. The motives by which complainants are actuated must necessarily be of the most varied description; any attempt to determine them would open but a wide and speculative field of inquiry. The object of the Code is to provide a machinery for the punishment of offences against the substantive criminal law. Had it been intended that the Magistrate should only proceed to inquire into an alleged offence when the complainant's motives were such as he could approve of, very different language would have been used. 13 B. 590 (F.B.) at 598. In dismissing a complaint under this section a Magistrate has to exercise a discretion based on judicial considerations. That the probable result of proceeding is undesirable or the conduct and motives of complainant are discreditable is irrelevant, 38 M. 512. Where the question relates to the civil rights of parties the complaint may be dismissed, 17 Cr. L.J. 406. A Magistrate cannot dismiss a complaint on the ground that the complainant has suffered no personal injury and is only a mere tool of another, 13 B. 600. A Magistrate has no jurisdiction to dismiss a complaint under S. 302, I.P.C. on the ground that the case was one in which no jury would convict the person complained against, 23 C.W.N. 392.

A Magistrate may dismiss a complaint if after perusing the record he is of opinion that no case of a criminal character is made out against the accused, 6 B.L.R. (Ap, Cr). 18. Process cannot be refused on the ground that a civil suit may afford a more convenient and appropriate remedy, 9 M.L.T. 332; 17 Cr. L.J. 406; 10 W.R. (Cr), 40; 8 W.R. (Cr). 65. Where the Criminal Court entertains a complaint which is purely of a Civil nature it undoubtedly countenances the scandalous abuse of its own process, it enormously and unnecessarily increases its own work, it encroaches upon the province of the Civil Court, it deprives the Government of a great deal of its legitimate revenue and last but not least, it deprives itself of its primary function as the vindicator of outraged justice and becomes merely a tool in the hands of the unscrupulous, 2 M.L.T. 9 at 10 (Jour.); 5 Cr. L.J. 84 (Jour.).

SHALL RECORD BRIEFLY HIS REASONS.—The provisions of the Code as to procedure ought to be strictly complied with; non-observance of the provisions of the Code leads to much confusion and waste of public time not to speak of involving the parties in unnecessary expense, 13 A.L.J. 840 at 842. The Magistrate is to record his reasons in writing, 21 C.W.N. 127; 27 C. 921; 15 A.L.J. 842; 40 C. 41; 26 Cr. L.J. 1502-90 Ind. Cas. 188; 16 C.W.N. 886-13 Cr. L.J. 484-15 Ind. Cas. 484; 13 Cr. L.J. 482-15 Ind. Cas. 482. Unless the Magistrate records his reasons for dismissing the complaint under this section it will be impossible for the High Court as a Court of revision to consider under S. 497 *infra* whether the discretion vested in the Magistrate under this section had been properly exercised, 14 C. 141 at 146, but a failure to record reasons is at most an irregularity and will not be interfered with in revision unless a failure of justice has in fact occasioned thereby, 25 M. 546; Weir II, 244, but where a Magistrate dismissed a complaint on account of the delay in filing the complaint and also on the ground that the charge was made from improper motives, *held*, there were no sufficient grounds for dismissal in the absence of a finding that the complaint was false or unsustainable, 38 M. 512. The Full Bench decision

in 29 M. 126 after an elaborate review of all the authorities has held that a Magistrate who had dismissed a complaint under this section is competent without any order of further inquiry by a superior Court to rehear the complaint. See also 31 Ind. Cas. 830; 36 A. 53 and 129; 22 A. 106; 27 Cr. L.J. 383=92 Ind. Cas. 895; 28 C. 652 (F.B.); 29 C. 726 (F.B.); 35 A. 78; 21 Cr. L.J. 660 but see 23 C. 983; 24 C. 236 and 528; 4 C.W.N. 46 and 26; 24 M. 337; 28 M. 255; 22 B. 949=36 A. 129; 26 Cr. L.J. 991=87 Ind. Cas. 527=16 Cr. L. J. 174=27 Ind. Cas. 588; 15 Cr. L.J. 638=23 Ind. Cas. 838; 22 A. 106; 21 A.L.J. 215, which took a different view; Unless there are special reasons a Magistrate will not be acting properly if he entertains a second complaint. There is nothing illegal or *ultra vires* of a Magistrate reviving a complaint which he himself had dismissed under this section even though the District Magistrate had declined to order further inquiry at the request of the complainant, 33 C. 415.

FURTHER INQUIRY.—When a complaint is dismissed under this section no notice to accused is necessary before ordering a further inquiry, 47 A. 722; 27 Cr. L.J. 302=92 Ind. Cas. 590; 40 A. 138; 51 M.L.J. 608 at 608 (F.B.)=24 L. W. 613 where 47 A 722 is followed; 35 M. 78; but when a complaint is dismissed under this section after giving the accused an opportunity of being heard an order for further inquiry should not be made, without giving notice to the accused, 27 C.W.N. 552=25 Cr. L.J. 140=76 Ind. Cas. 236. This is of doubtful authority as there is no provision of law under which a notice can be given to accused before process is issued against him. When further inquiry is ordered into a complaint which had been dismissed under this section, the Magistrate had no option but to summon the accused and cannot again dismiss the complaint under this section, 11 C. W.N. 316.

REVISION.—This High Court will refuse to interfere in revision if after making proper inquiry and after satisfying himself the Magistrate finds the dispute is purely of a civil nature and dismisses the complaint, 11 W.R. (Cr.) 54; 9 W.R. (Cr.) 21. But when the discretion is exercised by the Magistrate improperly by dismissing the complaint holding the case was completely for the Civil Court without assigning satisfactory reasons, the High Court will interfere in such a case, 20 W.R. (Cr.) 80.

CHAPTER XVII.

OF THE COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES.

204. (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 one in which, according to the fourth column of the second schedule, a summons should issue in the first instance, he shall issue his summons for the attendance of the accused. If the case appears to be one in which, according to that column a warrant should issue in the first instance, 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.

(2) Nothing in this section shall be deemed to affect the provisions of section 90.

(3) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid, and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

IN THE OPINION OF THE MAGISTRATE.—The opinion of the Magistrate referred to in this section is his own independent opinion; where an inquiry by the police is held and the result reported to the Magistrate the opinion of the Police Inspector expressed in the report will not warrant the complaint being dealt with otherwise than it would have been if there had been no such report, 4 M.H.C.R. 18. The Magistrate is given a wide discretion to issue process and the section speaks of his opinion. It is not open to a party to contend that the Magistrate exercised jurisdiction vested in him under this section wrongfully, or issued a process on insufficient complaint. If the Magistrate had jurisdiction to issue process the trial would be perfectly regular even if the Magistrate exercised that jurisdiction on insufficient grounds, 16 C.W.N. 1103. A Magistrate has jurisdiction to rescind an order as to the issue of summons under this section and direct a subordinate Magistrate to hold an inquiry and report under S. 202 *supra*. An order under this section is not a judgment to which the provisions of S. 369 *infra* will be applicable and the Code does not forbid the Magistrate reconsidering his order on sufficient grounds, 39 C.L.J. 329—27 C.W.N. 651—25 Cr.L.J. 464—77 Ind. Cas. 816.

THERE IS SUFFICIENT GROUND FOR PROCEEDING.—Where the police after investigation made a report to the Magistrate to the effect that the complaint was true and the Magistrate thereupon directed the case to be entered as such, he cannot subsequently decline to enter into a judicial inquiry merely because in his opinion there was no chance of a conviction and no useful purpose would be served by an inquiry, *held*, that the complainant was entitled to be examined under S. 200 *supra* and to have process issued against the accused and for the attendance of his witnesses, 29 C. 410. In a case in which a prosecution is started by a person in the position of a Government Pleader who has no personal knowledge of the facts, who makes statements on information furnished to him, and who does not disclose the source of his information, it is reasonable that the Court before issuing process should satisfy itself upon proper materials that a case has been made out for issuing process to the accused, 10 C.W.N. 1090. The fact that the complainant did not specifically and in terms accuse any one of an offence under the Penal Code does not affect the question; if the fact as stated in the complaint constituted an offence under the Penal Code, then the Magistrate has jurisdiction to proceed with the case, 26 C. 786. Process should ordinarily issue against all the persons accused and the practice of Magistrates issuing process to some of the accused only when no discrimination is made by the complainant is unwarranted, 5 C.W.N. 560.

MAY ISSUE A WARRANT, OR, IF HE THINKS FIT, A SUMMONS.—As to issue of summons the word 'shall' is used in this section. A summons becomes unnecessary when the accused appears of his own accord to answer the charge and insists the charge against him be proceeded with or dismissed, 26 B. 552. It is not imperative on a Magistrate to issue a warrant in every case shown in the column that a warrant shall issue in the first instance. A wide discretion is given to the Magistrate to substitute a summons for a warrant and he may even for sufficient cause shown, a warrant recall already issued and issue a summons instead, 8 Cr. L. J. 187. 14 Cr. L. J. 604. The Magistrate may also dispense with the attendance of the accused under S. 205 *infra* whenever he issues a summons though the case is a warrant case, 21 C. 588. A mere notice to the person complained against that a preliminary inquiry will be held in the matter of the complaint does not amount to a summons. Such a notice is neither contemplated by the Code nor is it one of the forms in Sch. V of the Code, 37 M. 181 followed in 51 M.L.J. 605—24 L.W. 613 (F.B.).

IF HE HAS NOT JURISDICTION.—These words were introduced for the first time in the Code of 1898. Though the Court is not bound by the complaint and sworn statement recorded in framing the charge or determining jurisdiction but may look into the evidence, it cannot go outside the record and when evidence has yet to be taken it must decide the question of jurisdiction *prima facie* pending further materials being regularly placed before it on the basis of the complaint and sworn statement, 1908 A.W.N. 115.

SUB-SECTION (3).—This was introduced in the Code of 1898, Court-Fees Act VII of 1870 and the rules made thereunder make provision for the payment of Court-fees and process-fees in criminal cases. No process shall be issued until the prescribed fee is paid and if not paid within a reasonable time the Magistrate may dismiss the complaint. A complainant by

omitting to take out a summons cannot keep a case hanging over a man for an indefinite time. The summons is merely a means of procuring attendance, and if the accused appears of his own accord without a summons, he is entitled to require that the complaint shall either be proceeded with, or dismissed. The Magistrate must take care that proceedings are conducted with reasonable expedition as will prevent the parties from being improperly harassed by undue delay. 26 B. 552 at 557. When a complaint is dismissed for failure to comply with this sub-section, a further inquiry may be ordered under S. 436 *infra* by the Sessions Judge or District Magistrate. In non-cognisable warrant cases neither complainant nor the accused can be compelled to pay process fees for the summoning of witnesses although the complainant must under this section ordinarily pay process fee for summoning the accused. 27 Cr. L.J. 415-93 Ind. Cas. 78. S. 20 of the Court Fees Act has reference only to fees for processes issued in the case of "offences" and since an order for payment of maintenance under S. 488 *infra* is not a conviction for an offence, the application cannot be dismissed under this sub-section for failure to comply with an order for payment of process-fees, 18 M. 233.

Magistrate may dispense with personal attendance of accused.

205. (1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in manner hereinbefore provided.

SCOPE OF THE SECTION—The provisions of this section should be freely utilised when so much prejudice exists against the appearance of females in public and especially when the law is set in motion to gratify private spite. The mere impression of a Magistrate that certain female accused are not *pardanashin* is not sufficient reason for refusing to allow them the benefit of this section. 11 Cr. L.J. 197-3 Ind. Cas. 1152. A Court should abstain from compelling a *pardanashin* woman's appearance in Court unless and until the case against her has reached the stage at which her personal attendance is clearly and legally required in the interests of justice and it is the duty of the Court to see that the machinery of the law is not utilised as a means of satisfying petty spite. 9 Cr. L.J. 188-1 Ind. Cas. 101. The section applies only to cases where the Magistrate has issued a summons in the first instance. It does not apply to a case where the accused has been arrested without or after the issue of a warrant [1923] Pat. 239 at 240. There is no provision in the Code to proceed against an accused person *ex parte*. It is only with special permission of the Magistrate that the personal attendance can be dispensed with in cases where the Magistrate issues a summons in the first instance. The power of substituting a summons for a warrant is not to *pardanashin* ladies only. It should be exercised in the case of all female accused. 14 Cr. L.J. 603-21 Ind. Cas. 376. S. 366 (3) *infra* provides for the pronouncing of judgment in cases like these in the presence of the pleader where in the case of conviction the sentence is one of fine only. See the new section S. 540A which permits trials being held in the absence of the accused in certain cases.

ISSUES A SUMMONS.—A Magistrate may issue a summons even in a case where a warrant is to be issued. See S. 204 *supra*. If a warrant is issued then he is not entitled to dispense with personal attendance of the accused and permit him to appear by pleader except on the ground of illness. See 2 Pat. 793.

IF HE SEES REASON TO DO SO.—The Magistrate is to exercise his discretion in the matter of dispensing with the personal attendance of the accused. The Magistrate should place upon record his reasons for refusing an application for permission to appear in Court by a pleader, more particularly when the application is made by a *pardanashin* lady accused of an

offence, 6 A. 59; 21 C. 538; 45 M. 359; 19 Ind. Cas. 514; 17 C.W.N. 1248—15 Cr. L.J. 281—23 Ind. Cas. 489. But *pardanashin* ladies are not as of right exempted from personal attendance in Court, when they happen to be complainants, 5 A. 92, and the High Court has the power to set aside an order requiring personal attendance, 6 C.W.N. 11x.

PERMIT HIM TO APPEAR BY PLEADER.—See S. 340 *infra* as to the right of accused persons to be defended by pleader. This section allows the accused to appear by pleader and such appearance involves the performance of all acts which devolve upon the accused in the course of the trial such as answering the examination by the Court under S. 342 *infra*, or pleading or refusing to plead to a charge under S. 155 *infra*. The discretion under this section is one that should be liberally exercised, 15 Cr. L.J. 272—19 Ind. Cas. 844.

MAY DISPENSE WITH PERSONAL ATTENDANCE.—In a case where a Magistrate dispenses with the personal attendance of an accused and permits him to appear by a pleader under this section, the Magistrate should note on the record that such permission has been granted and not leave it to mere implication, 30 B. 280, and there should also be on record a clear indication that the person who represents the accused was duly appointed by him. See S. 353 *infra* in this connection. The Magistrate cannot dispense with the personal attendance of the complainant but only of accused persons, 5 A. 92. An accused person to whom a summons was issued failed to appear personally but appeared through his *mukhtar* who requested the Court to dispense with the personal attendance of his client. The Magistrate instituted contempt proceedings against the accused under S. 174, I.P.C., held by the High Court that in case the Magistrate considered personal attendance necessary, he should have fixed a day and informed the *mukhtar* that if his client did not appear, a warrant would be issued, 27 C. 988, but if no special permission to appear by pleader is given, the presence of the pleader cannot be taken as presence of the accused and the case cannot be proceeded with; 25 W.R. (Cr), 25 and reasons for refusing leave to appear by pleader, should be given, 6 A. 59; and a Magistrate acts unreasonably in enforcing personal attendance of an invalid accused, 6 C.W.N. 11x. In cases where personal attendance is dispensed with, the Magistrate may take a recognizance bond from the accused to appear either personally or by agent when called upon, 5 B.H.C.R. (Cr. Ca.) 64.

SUB-SECTION (2).—S 365 (2) *infra* permits the absence of the accused up to the stage of delivering judgment and even after that stage when the judgment is one of acquittal or one imposing a sentence of fine. This sub-section gives power to the Magistrate at any stage to insist on the personal attendance of the accused and if necessary to enforce the attendance of the accused.

CHAPTER XVIII.

OF INQUIRY INTO CASES TRIABLE BY THE COURT OF SESSION OR HIGH COURT.

206. (1) Any Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class, or any Magistrate (*not being a Magistrate of the third class*) empowered in this behalf by the Local Government, may commit any person for trial to the Court of Session or High Court for any offence triable by such Court.

(2) But, save as herein otherwise provided, no person triable by the Court of Session shall be committed for trial to the High Court.

AMENDMENT.—The words “not being a Magistrate of the third class” have been newly added depriving third-class Magistrates of the power to commit.

MAY COMMIT.—By the new amendment third-class Magistrates are incompetent to commit. In Madras, previously all third-class Magistrates were empowered to commit. A Magistrate is not bound to commit in every case. A Magistrate who has been invested with power to commit under this section has authority to carry into effect any of the provisions of Chapter XVIII of the Code which relates to cases triable exclusively by the Court of Session and to cases which in the opinion of the Magistrate ought to be tried by such Court and therefore the Magistrate could legally pass an order of discharge, 6 A. 477 at 479. If the case is one which a Magistrate is both competent to try and adequately punish he has no discretion to commit the accused to the Court of Session, 15 Cr. L.J. 663=28 Ind. Cas. 922. Although a Magistrate has large powers of discharging the accused he should only exercise it when he is clearly of opinion that the evidence for the prosecution is unworthy of credit. If it is a matter of weighing probabilities, he should be well advised in leaving the case to the Court of Session which alone is empowered to try it, and should not discharge the accused because in his opinion he ought to have the benefit of doubt, 25 A. 564 at 570; 13 A.L.J. 111; see also notes under S. 209, *infra* at pp. 303-05. In committing cases not exclusively triable by the Court of Session the Magistrates shall exercise a proper discretion and give adequate reasons for their action. When a Magistrate of the first class committed a case of theft to the Court of Session on the ground that the case was connected with another case which he felt bound to commit, the High Court of Bombay set aside the order of commitment as no valid reason was given for departing from the ordinary procedure prescribed by the Code, 15 Bom. L.R. 998=2 Cr. L. Rev. 387. See 1905 A.W.N. 28, where the order of a Magistrate committing a case of criminal trespass under S. 447, I.P.O., was set aside as unsustainable in law. See S. 215 *infra* for power to set aside illegal commitments by the High Court. See also 21 A.L.J. 420 where it was held that a petty case ought not to be committed to the Court of Session.

MAGISTRATE EMPOWERED IN THIS BEHALF.—Where a commitment is made without jurisdiction, it is void, 11 C.L.R. 55, but when the Magistrate acts with jurisdiction the commitment, *e.g.*, to a wrong Sessions Court, could be set aside only on a point of law by the High Court under S. 215, *infra*. 35 M. 387. See S. 532 *infra* which makes provision for validating irregular commitments made by Magistrates not duly invested with power to commit.

OR TO THE HIGH COURT.—Presidency Magistrates commit direct to the High Court which exercises its original criminal jurisdiction in cases committed to it; when a maffasal Magistrate committed to the High Court, such commitment is not void, because the local Sessions Court has jurisdiction, 32 M. 791. An inquisition drawn up by a Coroner, under Act IV of 1872 has the effect of a valid commitment to the High Court in Calcutta and Bombay, when the High Court has accepted the commitment, 31 C. 1, but the jurisdiction of a Presidency Magistrate is not ousted by the inquisition drawn up by the Coroner, 16 B. 159. The Coroners Act does not apply to Madras.

FOR ANY OFFENCE TRIABLE BY SUCH COURT.—“Triable” and not “exclusively triable.” A Sessions Court can try any offence under the Penal Code, see S. 28, *supra*, and there is nothing in law prohibiting a Magistrate committing a summons-case to the Court of Session. But there are sections like 245 and 254, *infra* which limit the Magistrate’s power of commitment. See also 42 M. 83, where commitment to a Court of Session of a case which could adequately be punished by the Magistrate was held good, but see the observations in 15 Bom. L.R. 998, as to the committal of cases which Magistrates can try and decide to the already overworked Courts of Session. A case properly triable by a Magistrate cannot be committed to the Court of Session merely because the witnesses for the defence are not in attendance, nor for the reason that the Magistrate is going on leave, and it would be inconvenient for his successor to hold a *de novo* inquiry.

207. The following procedure shall be adopted in inquiries before Magistrates where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the Magistrate, ought to be tried by such Court.

Procedure in inquiries preparatory to commitment.

The Code seems to have been carefully framed with a view to provide that no one shall be committed for trial without his having previously had a fair opportunity of meeting the charge upon which he is to be committed, 10 B.L.R. 285 at 289. The object of the law in providing that the inquiry shall be held by the Magistrate before the accused has to undergo a trial in the Court of Session seems to be to prevent the commitment of cases in which there is no reasonable ground for conviction, 5 A. 161 at 162. The words "ought to be tried" occurring in this and S.347, *infra*, must be read with S.254, *infra*, and a case which ought to be tried by a Court of Session is one which a Magistrate is not competent to try or is one in which in his opinion an adequate punishment cannot be inflicted by him, 24 C. 429 ; 4 Bom. L.R. 85. They do not restrict the ground on which a Magistrate should arrive at his opinion as to the want of jurisdiction in himself or to his inability to sentence the accused adequately. If, for instance, the Magistrate considers that a complicated question of law arises, or that some connected matter is already before the Sessions Court, or that a trial with a jury or with assessors who may be chosen from experts would be more satisfactory, there is nothing preventing him from committing the case to the Court of Session, 42 M. 83 following 1 M. 289 (F.B.) and 3 C. 498. A commitment so made cannot be quashed by the High Court on the mere ground that the punishment which the Magistrate could have awarded would have been sufficient, 11 A.L.J. 439—14 Cr.L.J. 304—19 Ind. Cas. 960. If from the very beginning the Magistrate is convinced that the case in his opinion ought to be tried by the Court of Session he should forthwith follow the procedure laid down in this chapter, but if in the course of the proceedings, he is so convinced, he should stay proceedings and then adopt the procedure laid down in this chapter. The provisions of S. 347, *infra*, do not override the express provisions of this chapter, 13 Cr. L.J. 877 at 882—17 Ind. Cas. 813.

208. (1) The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant (if any), and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or in behalf of the accused, or as may be called for by the Magistrate.

Taking of evidence produced.

(2) The accused shall be at liberty to cross-examine the witnesses for the prosecution, and in such case the prosecutor may re-examine them.

(3) If the complainant or officer conducting the prosecution, or the accused, applies to the Magistrate to issue process to compel the attendance of any witness or the production of any document or thing, the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so.

Process for production of further evidence.

(4) Nothing in this section shall be deemed to require a Presidency Magistrate to record his reasons.

OBJECT OF THE SECTION :—The object of this section is to have the whole of the procurable evidence placed at the trial before the Court of Session and not merely a part of it. For this end a Magistrate is required to make a full and careful inquiry and record all the available evidence before he commits the case to the Court of Session. Sub-section (1) contemplates the production of the evidence by the prosecution or by the accused without the aid of the Magistrate while sub-section (3) contemplates the intervention of the Magistrate to secure the attendance of the witnesses and in regard to this evidence, the

Magistrate has a discretion for reasons to be recorded by him to refuse to issue process if he deems it unnecessary to do so. When therefore S. 209, *infra*, requires the evidence referred to in these sub-sections to be recorded before a charge is drawn up, it does not require the Magistrate to record the evidence of witnesses whom in the exercise of the discretion given by sub-section (3) he has deemed it unnecessary to summon. This procedure appears to be convenient and reasonable whereas the procedure of allowing the accused to wait till the last moment and then require the Magistrate to summon witnesses will lead to undue delay in committing cases. The proceeding before the Magistrate is only an inquiry preliminary to the trial and, while the law in order to avoid unnecessary commitments, is careful to require the Magistrate to examine any witness produced before him by the accused and provides for the Magistrate also summoning and examining defence witnesses before drawing up a charge even gives the Magistrate a discretion under S. 212, *infra*, to examine defence witness after charge, then cancel the charge and discharge the accused under S. 213 *infra*. It does not compel the Magistrate to summon and examine defence witnesses after charge or even before charge, if for reasons recorded he deems it unnecessary to do so. 36 M. 321. See also in this connection 24 L.W. 304.

WHEN THE ACCUSED APPEARS OR IS BROUGHT BEFORE HIM.—The accused appears in obedience to a summons issued to him on the day fixed for the inquiry. He is brought before the Magistrate under arrest in pursuance of warrant issued against him. The accused, when his personal attendance is excused can appear by his pleader. See S. 205, *supra*. But under this section the accused must appear in person. A commitment cannot be made in the absence of the accused. Where a Magistrate recorded the evidence in the absence of the accused and committed the accused for trial to the Court of Session, it was held that his procedure was illegal. Weir II, 259.

THE COMPLAINANT IF ANY.—Under S. 190 (1) (c) *supra* a Magistrate may take cognizance on his own personal knowledge or suspicion without a formal complaint being made to the police, or to the Magistrate, or there may be a complaint of court in writing, or one by a public servant under Ss. 195 476, and 476A *infra*. In such cases there will be no complainant before the Court and to meet such a case the words "if any" are used in this section.

IN THE MANNER HEREINAFTER PROVIDED.—See Ss. 356, 357, 359, 360, and 362, *infra*.

TAKE ALL THE EVIDENCE PRODUCED BY PROSECUTION OR BY ACCUSED, ETC. It is the duty of the prosecution to bring before the Court as witnesses all persons who are alleged or are known to have knowledge of the facts constituting the offence charged, and the court is bound to examine them. 10 C. 1070. But the prosecution is not bound to call persons whom they reasonably believe will not speak the truth, 8 C. 121. In every inquiry into a Sessions case the Magistrate is bound before he draws up a charge to take all such evidence as may be produced, (1) in support of the prosecution, (2) on behalf of the accused, (3) as may be called by the Magistrate. If he does not take the evidence, he errs, unless he can justify his procedure, on some such ground as that the evidence of such and such a witness produced is obviously irrelevant, or that because he considers the fact in issue between the parties proved in one or the other way by the evidence already produced, 10 A.L.J. 143 at 136. The section only requires that the Magistrate should hear all the evidence produced before him. The section does not require the summoning of further witnesses on an application made for that purpose on the date on which the commitment was made, 42 C. 608 where 20 A. 264, was followed, and 26 A. 177 not followed. A Magistrate is not empowered to frame a charge or to commit until he has taken all such evidence as may be produced on behalf of the accused, 20 A. 264; 26 A. 177. A commitment made without examining any of the defence witnesses is bad, 1906 A.W.N. 308—4 Cr. L.J. 482. This section requires that the commitment should not be made till the Magistrate has heard the complainant and taken all such evidence as may be produced in support of the prosecution or on behalf of the accused. Where the original complaint was one under S. 342 I.P.C. and after hearing the evidence for the prosecution, the Magistrate framed a charge under S. 395, I.P.C. and without asking the accused whether they had any evidence, and rejecting the application of the accused to have some

witnesses summoned, committed the accused, it was held that the commitment was illegal and should be set aside. 46 A. 137.

OR AS MAY BE CALLED FOR BY MAGISTRATE.—Under S. 212, *infra*, a Magistrate may in his discretion summon and examine any witness named in the list given by the accused under S. 211, *infra*.

SUB-SECTION (2); RIGHT OF CROSS-EXAMINATION.—This sub-section was introduced in the Code of 1898 probably on account of the suggestion made in 21 C. 642, to the effect that the provision as to cross-examination contained in the Code of 1872 was omitted in the Code of 1882 perhaps through inadvertence. The accused is at liberty to cross-examine the witnesses. From the wording of this section it is clear that the intention of the Code was that as each witness was examined he should be then and there cross-examined, re-examined and allowed to go to his home. The Code has consideration for witnesses and their convenience, but this consideration is not always shared by Magistrates, 10 A.L.J. 144 at 147. This section does not confer on the accused the right of reserving the cross-examination until the prosecution is over, though in practice the right is reserved and an order refusing to grant leave is not open to revision, 14 M. L. T. 532—15 Cr. L.J. 29—22 Ind. Cas. 173. In 36 C. 48 it was held that the provisions of S. 347, *infra* laying down that the Magistrate shall stop further proceedings when he had made up his mind to commit, is not controlled by the provisions of this section, and once he has made up his mind the Magistrate is not bound to allow the accused an opportunity to cross-examine the prosecution witnesses, and call witnesses for his defence. In that case the accused did not cross-examine the prosecution witnesses immediately after examination-in-chief, but applied to the Magistrate at the close of the prosecution to cross-examine them, and to examine defence witnesses and the Magistrate's refusal was held justified under S. 347, *infra*. But the Madras High Court in 36 M. 321 doubted the view taken in the above case as to the applicability of S. 347, which refers to stoppage of proceedings at a trial. But where a Magistrate after drawing up a charge with a view to commit allowed the accused to cross-examine the prosecution witnesses and as a result cancelled the charge it was held that the course taken by the Magistrate was proper, 39 C. 885; 5 C.W.N. 110; 1913 M.Y.N. 728—14 M.L.T. 200—14 Cr. L.J. 529—21 Ind. Cas. 129. Under this section the accused has no right to ask the Magistrate for an order to reserve cross-examination of the prosecution witnesses until after all the prosecution witnesses are examined in chief. It is impossible to construe the section as conferring such a right. The Magistrate has no discretion in the matter. "No doubt the practice obtains of reserving cross-examination. Probably the true view is that if purporting to exercise a discretion, the Magistrate had made an order giving leave to reserve cross-examination of the witnesses, it would have amounted to nothing more than an irregularity which would not have had the effect of vitiating the proceedings," 14 M. L. T. 532—15 Cr. L. J. 29—22 Ind. Cas. 173.

OFFICER CONDUCTING PROSECUTION.—Under S. 495, *infra* a Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police-officer whose rank is to be fixed by the Local Government. But no person other than the law officers of the Crown such as the Advocate General, Standing Counsel, Public Prosecutor, Government Solicitor, etc., or other officers, generally or specially empowered by Government shall be entitled to do so without such permission.

ISSUE OF PROCESS FOR PRODUCTION OF EVIDENCE.—A Magistrate is bound if the complainant or officer conducting the prosecution of the accused applies to him to issue process to compel the attendance of witnesses, and as a matter of consequence to take evidence produced. Here, there is one exception provided by law; the Magistrate can record reasons showing that it is unnecessary to compel attendance of witnesses in question, and can in such a case decline to issue process, 10 A. L. J. 144 at 145-147. The procedure that has to be followed by the committing Magistrate with regard to the evidence produced before him by the accused is quite different from that prescribed in regard to evidence not produced before him but what the accused desires him to obtain by issue of process. An accused cannot delay asking for process against witnesses until the last moment, and a Magistrate is

under no duty to issue summons merely because the accused asks for it, if in his opinion there are no sufficient grounds to grant the application, 38 M. 321 ; 42 C. 608 where 28 A. 177 is not followed. Where a Magistrate after recording the evidence for the prosecution, had summoned the witnesses for the defence, and had consented to make a local inspection also, but committed the accused without examining the defence witnesses and without making a local inspection merely on a direction of the Sessions Court, it was held that the commitment was bad in law, 1906 A. W. N. 306—4 Cr. L. J. 452.

UNLESS FOR REASONS TO BE RECORDED HE DEEMS IT UNNECESSARY.—The Magistrate is to record his reasons for refusing process for the production of further evidence. The accused has a right to adduce his evidence and the Magistrate cannot refuse process and take down his evidence without recording sufficient reasons. Ratanlal 100.

SUB-SECTION (4).—Curiously in this sub-section it is enacted that Presidency Magistrates need not record reasons for refusing process. The reason for this distinction is not at all clear. Presidency Magistrates enjoy several such privileges, e.g. (1) *Ses* S. 213, *infra*, which enacts that they need not record reasons for commitment for trial. (2) Also under S. 364 (4) they are not bound to record evidence or frame a charge in non-appealable cases. (3) Under S. 370, *infra* when convicting an accused and passing a non-appealable sentence they need not write a judgment and need not record reasons for conviction. (4) Under S. 441, *infra*, they may send up along with the records called for by the High Court in the exercise of its Revisional Jurisdiction a judgment setting forth reasons for the conviction.

209. (1) When the evidence referred to in section 208, sub-sections (1) and (3) has been taken, and he has (if necessary) examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

SCOPE OF THE SECTION.—The object of the law in providing that the inquiry shall be held by a Magistrate before the accused had to undergo a trial in the Court of Session is to prevent the commitment of cases in which there is no reasonable ground for conviction. The provision of law is calculated, on the one hand to save the subjects from prolonged anxiety of undergoing trials for offences not brought home to them; and, on the other hand to save the time of the Court of Session being wasted in cases in which the charge is not obviously supported by such evidence as would justify a conviction, 5 A. 161. This section empowers a Magistrate holding an inquiry preparatory to commitment to discharge the accused if he finds that there are no sufficient grounds for committing. Compare S. 253 (2) with regard to the discharge in warrant-cases.

WHEN EVIDENCE.....HAS BEEN TAKEN.—The evidence referred to here is the evidence produced in support of the prosecution and on behalf of the accused or as may be called by the Magistrate. A commitment made without a preliminary inquiry under this chapter is illegal. 17 Bom. L. R. 910—16 Cr. L. J. 747—31 Ind. Cas. 337. A commitment

must depend on the evidence actually before the court and not on evidence that may be given in the future. 16 Cr. L.J. 5-25 Ind. Cas 309.

WHEN THE MAGISTRATE HAS, IF NECESSARY, EXAMINED THE ACCUSED.—

The words "if necessary" have been introduced in the Code of 1898. It is not absolutely necessary that the Magistrate should examine the accused in every case. The Magistrate is not bound to examine the accused if he makes up his mind to discharge the accused, but he is bound to examine him if he means to commit. It is the duty of the Magistrate before committing the accused persons for trial to have them examined for the purpose of enabling them to explain any circumstances appearing in the evidence against them. The effect of S. 209 of the Code is that it is not left to the discretion of the Magistrate who intends to commit, to examine the accused person. He is bound to examine them and if he makes an order of commitment without examining them the order is irregular, 23 M. 636 at 637.

FOR ENABLING HIM TO EXPLAIN ANY CIRCUMSTANCES AGAINST HIM—

See S. 342 which deals with power to examine the accused at any stage of any inquiry or trial. The purpose is there also to enable the accused to explain any circumstance appearing in evidence against him. The real object of the law in allowing the accused to be examined, is to enable the Judge to ascertain from time to time from a prisoner, particularly if he is undefended, what explanation he may desire to offer regarding any fact stated by the witnesses or after the close of the case how he can meet what the Judge may consider to be damaging evidence against him, 6 C. 98 at 102. The discretionary power given by this section should be used to ascertain from the prisoner how he may explain facts appearing in evidence against him so that these facts should not stand against him unexplained, but not to drive him to make self-accriminating statement, 1 M.H.C.R. 199; 10 M. 295 at p. 315; 5 A. 253; 30 A. 540; 1 C.L.R. 436; 6 C.L.R. 431; 6 C. 279. Statements obtained from the accused by such examination should not be used to remedy gaps in the prosecution case, 27 M. 238; 39 M. 770; 26 C. 39; 28 C. 689, and the accused should not be examined when there was nothing for him to explain, 5 M.L.T. 216; 10 W.R. (Cr.) 25; 39 M. 770. A Magistrate has no power to direct an accused person to file a written statement in proceedings under this Chapter, but it is not competent to the Court to refuse to allow the accused to make a statement, Weir II, 265.

IF HE FINDS THERE ARE NO SUFFICIENT GROUNDS FOR COMMITTING.—

A *prima facie* case should be made out to justify a commitment in the Court of Session, 15 M. 39. A Magistrate should not treat a grave offence beyond his jurisdiction as a less grave one to bring it within his jurisdiction and he should not ordinarily go into the defence in a case triable exclusively by the Court of Session when a *prima facie* case for committal has been made out. To do so would be to take upon himself the function of a superior Court, (1910) M.W.N. 862-9 M.L.T. 71-12 Cr. L.J. 20-8 Ind. Cas. 1103. The words "*sufficient ground for committing*" which occurred previously in the section have been explained to mean in 27 B. 84 not ground for convicting, but where the evidence is sufficient to put the accused on his trial, and such a case arises when credible witnesses made statements, which, if believed, would sustain conviction. The weighing of their testimonies with regard to improbabilities and apparent discrepancies is more properly a function of the Court having jurisdiction to try the case. It is not necessary that the Magistrate should satisfy himself fully of the guilt of the accused before making a commitment. It is his duty to commit when the evidence for the prosecution is sufficient to make out a *prima facie* case against the accused, and he exercises a wrong discretion if he takes upon himself to discharge an accused in the face of evidence which might justify a conviction, (1913) M.W.N. 726 at p. 733-14 M.L.T. 200-14 Cr. L.J. 829-21 Ind. Cas. 129. The section provides that if a Magistrate finds that there are no sufficient grounds for committing the accused person for trial he may discharge him. It is not merely therefore that the Magistrate in the case put is empowered to discharge the accused; he is bound to do so. What then is the case put? It is the case where the Magistrate finds that there are no sufficient grounds for committing the accused person for trial. He may so find either because there is no evidence whatever, or because the evidence tendered for the prosecution appears to him to be totally unworthy of credit,

But in this latter case, equally with the former case, it would be his duty under the section to discharge the accused since the grounds relied on for a commitment would, in his opinion, be insufficient. That is the construction which the words of the section suggest to us and which we understood was accepted in 9 Bom. L.R. 225. It is perhaps unnecessary to add that where the Magistrate entertains any real doubt as to the weight or quality of the evidence the task of resolving that doubt and assessing the evidence should be left to the Court of Session, 35 B. 168 ; 4 Lab. 69. Except in cases where the charge is found to be groundless, in other words where the evidence on record is of such a nature, that no tribunal, judge or jury would ever convict the accused on that evidence, the inquiring Magistrate is bound to commit to the Court of Session for trial. What the inquiring Magistrate has to determine is not whether a case has been made out, but only whether there is a case to be sent up for trial to the Sessions Court. Where the Magistrate discharged the accused because he considered that no case has been made out against the accused it was held that the order of discharge was based on a mistaken notion of the function of the inquiring Magistrate and therefore should not be allowed to stand. The intention of the Legislature is to make a distinction between grounds for conviction and grounds for committing for trial which mean satisfactory evidence to go to trial which must be regarded as the ground for committing for trial, 48 M. 874 at 881. It is the duty of the Magistrate merely to record the evidence and leave it to the jury at the Sessions to decide as to the credibility of the evidence. The Magistrate acts wrongly in expressing his opinion with regard to the credibility of the witnesses who are before him. But according to the decisions of the various High Courts it is open to the Magistrate to form his opinion with regard to the credibility of the witnesses called before him but it is not his duty to closely criticise their evidence. If a *prima facie* case is made out he should clearly leave it to the jury at the Sessions to form their own view as to the credibility of the evidence. But, if, after hearing the evidence he is satisfied that it is not trustworthy and that a conviction will not result, then he is entitled to record a finding that the witnesses who speak to the charge cannot be believed and that a conviction will not result with an order of discharge in such a case, the District Magistrate will not be justified in interfering and when he does interfere the High Court in Revision will set aside the order of further inquiry and uphold the order of discharge, 51 C. 849 ; 27 Cr. L.J. 509=93 Ind. Cas. 973. Although a Magistrate has large power of discharging the accused he should only exercise it when he is clearly of opinion that the evidence for the prosecution is untrustworthy. If it is a matter of weighing probabilities he would be well advised in leaving the case to the Court which alone is empowered to try it and should not discharge the accused because in his opinion the accused ought to be given the benefit of doubt, 26 A. 564 ; 13 A.L.J. 111. When a committing Magistrate pronounces upon evidence, merely because it does not commend itself to his mind he is really trying the case and not merely considering whether there are sufficient grounds for committing an accused for trial, 1904 A.W.N. 8. The existence of a possible ground of defence is not a sufficient reason for a Magistrate to refuse to commit a person for trial against whom a *prima facie* case is made out. It is ordinarily for the Court that has to try the case, not for the Magistrate who makes the preliminary inquiry, to determine having regard to all the facts and probabilities whether the guilt is brought home to the accused, (1913) M.W.N. 728 at 732=11 M.L.T. 200=21 Ind. Cas. 129. In the case of offences exclusively triable by a Court of Session the committing Magistrate cannot be considered to have the power to proceed to the trial of the accused in the inquiry and the chief business of the Magistrate is to see whether the prosecution has adduced such evidence as is not on the face of it absolutely incredible on every ingredient of the offence that is charged, (1918) M.W.N. 233=18 Cr. L.J. 307=28 Ind. Cas. 643. A Magistrate holding a preliminary inquiry under Chapter XVIII of the Code into an offence exclusively triable by a Court of Session is entitled to discharge the accused if the evidence tendered by the prosecution appears to him to be totally unworthy of credit but if there is evidence as to some material facts deposed to by credible witnesses on which facts a Court of Session or a jury may not unreasonably find the accused guilty, that is a case in which the accused should be put on his trial before the Sessions Court leaving it to the Judge and jury as the case may be, to find the accused's guilt proved or not proved on these facts,

3 Cr. L. Rev. 375. See 43 M.L.J. 49—16 L.W. 450, where it was held that when the evidence is untrustworthy in the Magistrate's opinion he is not bound to commit; to hold otherwise is to make preliminary inquiry a mere matter of form. Where a Magistrate has heard the evidence for the prosecution with entire disbelief, when he considers himself in a position to show that the prosecution witnesses are totally unworthy of credit and a *fortiori* where, after examining certain witnesses named on behalf of the accused he comes to the conclusion that the evidence given by them is reliable and disproves that given by the prosecution witnesses, he is well within his discretion in discharging the accused and not committing him to the Sessions, 37 A. 355 followed in 44 A. 37; 21 A. 266; 5 A. 161; 7 C.W.N. 77; 12 C.W.N. 117; 26 Cr. L.J. 117—83 Ind. Cas. 677; 11 Cr. L.J. 18—4 Ind. Cas. 612; 12 A.L.J. 150—14 Cr. L.J. 491—20 Ind. Cas. 747. Having regard to the wording of the section a Magistrate can hardly be said to be *satisfied that sufficient grounds for committing* are supplied by the evidence of witnesses if he himself is unable to believe those witnesses. Before he can be so satisfied it is manifest that all grounds for discrediting them must be taken as excluding all cases in which the alleged grounds for commitment appear insufficient, whatever the reason for this insufficiency may be, and is not limited as to the essentials of the alleged offence, 9 Bom. L.R. 225. For consideration which should weigh with a Court in committing the case to the Sessions, see 42 E. 172. The test which should be applied to decide whether a committal ought or ought not to be made on the facts is—assuming that whole of the evidence telling against the accused is true, is there a case which a Judge at a trial could leave to a jury? If the evidence is such that a Judge would have been bound to rule that there was no evidence on which a jury could convict, then a committal ought not to have been made. If there was any evidence which called for an answer, however great the preponderance in favour of the prisoner might be, then the committal was proper, 9 C.W.N. 829 at 839 *not approved of* in 37 A. 355 at 357. It is now settled law that if a Magistrate is satisfied that the charge is without foundation and that there are no sufficient grounds for committing the accused for trial, he is entitled, and indeed it is his duty to discharge him, 46 A. 537 at 538, where 26 A. 564; 12 A.L.J. 150; 37 A. 355; 44 A. 37 are followed; 27 Cr. L.J. 274—92 Ind. Cas. 450. It is well established that if a Magistrate hearing a charge triable by a Court of Session comes to the conclusion that the evidence before him is totally unworthy of credit and there is no reasonable possibility of the case resulting in a conviction he is entitled and it is his duty to discharge the accused under this section. The same result follows if he comes to a similar conclusion after hearing witnesses for the defence under S. 213 (3), after framing a charge. Of course the discretion is to be exercised carefully and whenever there is possibility that different Courts might take different views of the evidence, the Magistrate even though he may himself not think the evidence sufficient for conviction, should leave it to the Sessions Court to decide, 24 A.L.J. 133 at 134—27 Cr. L.J. 2—91 Ind. Cas. 34; see also 51 C. 849; 25 Cr. L.J. 1089—81 Ind. Cas. 913; 4 Lah. 69. A Magistrate is not compelled to commit to the Sessions any case in which he considers the conviction to be impossible. But he must however exercise a proper discretion in discharging an accused charged with an offence triable by a Court of Session. It is not enough for him merely to doubt some portions of the prosecution evidence. He must be satisfied that the prosecution will fail and rightly fail in the Sessions Court, 25 Cr. L.J. 1189—82 Ind. Cas. 53; 26 Cr. L.J. 117—83 Ind. Cas. 677.

RECORD HIS REASONS.—Reasons are to be recorded for making the order of committal, but a Presidency Magistrate need not record reasons, S. 213 (1). Reasons are to be recorded to enable the Court of Revision to exercise its powers effectively under Ss. 435 to 439, *infra*.

UNLESS IT APPEARS SUCH PERSON SHOULD BE TRIED BEFORE HIMSELF, ETC.—This proviso applies to a case which according to Sch. II, Col. (8) may be triable by the Court of Session as well as the Magistrate. See 10 C. 85.

SHALL PROCEED ACCORDINGLY.—That is, try the case under the provisions of Chapters XX to XXII, *infra*.

SUB-SECTION (2).—This sub-section relieves the Magistrate from the necessity of going on with an inquiry when he is reasonably convinced it will serve no useful purpose and empowers him to discharge the accused before complying with the procedure laid down in S. 208 (1) or (3) and the examination of the accused if he considers the charge to be groundless. Before he does so he must record his reasons. See S. 263 (2) *infra*, as to discharge in warrant cases. This sub-section empowers a Magistrate holding a preliminary inquiry to see whether the case is to be committed. It does not preclude him from trying the case if he thinks that only an offence within the jurisdiction of a Magistrate has been committed, and when he does so he acts within his jurisdiction, 10 C. 85 at 86.

REVISION.—The remedy in cases of erroneous and improper discharge is provided by Ss. 436 and 437, *infra*. S. 437 refers to cases of discharge of offence *exclusively triable by Court of Session*. In such cases the Sessions Judge or District Magistrate may direct a commitment to the Court of Session instead of ordering a further inquiry contemplated by S. 436, *infra*. But in considering whether an accused person has been improperly discharged within the terms of S. 437, a Sessions Judge or District Magistrate is bound to consider all the grounds upon which the discharge has been passed including the evidence which has not been disbelieved or held to be sufficient to establish a *prima facie* case, 7 C.W.N. 77; 27 M. 53; 14 M. 335; 12 C.W.N. 117. The High Court will go into questions of fact in such cases, 30 M. 225; 8 Cr. L. Rev. 375—15 Cr. L.J. 373—23 Ind. Cas. 741. S. 436, *infra* contemplates a further inquiry into the case where an improper or illegal discharge is made.

210. (1) When, upon such evidence being taken and such examination (if any) being made, the Magistrate is satisfied that there are sufficient grounds for committing the accused for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged.

When charge is to be framed.

Charge to be explained, and copy furnished, to accused.

(2) As soon as *such* charge has been framed, it shall be read and explained to the accused, and a copy thereof shall, if he so requires, be given to him free of cost.

OBJECT OF THE SECTION.—The provision of law is calculated on the one hand to save the time of the Court of Session being wasted over cases in which the charge is obviously not supported by evidence which would justify a conviction as also to save the subjects from prolonged anxiety of undergoing trials for offences not brought home to them, 5 A. 161.

UPON SUCH EVIDENCE BEING TAKEN.—“Such evidence” refers to evidence taken under S. 208, *supra*. But a Magistrate need not record evidence of witnesses whom he deemed unnecessary to summon under S. 208 (3), *supra*. 36 M. 321. It is imperative on a Magistrate to record evidence in a preliminary inquiry which results in a committal. A Magistrate inquiring into a case under this Chapter is not empowered to frame a charge or make out an order for commitment until he has such evidence as the accused may produce before him, 20 A. 263; 26 A. 177. It is doubtful whether S. 247, *infra* applies to preliminary inquiries, 39 M. 321. This section empowers a Magistrate to commit at any stage of the proceedings.

THE MAGISTRATE IS SATISFIED THERE ARE SUFFICIENT GROUNDS FOR COMMITTING.—The words “*is satisfied*” were substituted in the Code of 1898 for the word “*finds*.” The test which should be applied to decide whether a committal ought or ought not to be made on the facts is this:—Assuming that the whole of the evidence telling against the accused is true is there a case which a Judge at a trial could leave to a jury? If the evidence is such that a Judge would have been bound to rule that there was no evidence on which a jury could convict, then a committal ought not to be made. If there was any evidence which called for an answer, however great the preponderance in favour of the prisoners

might be, then the committal is proper, 9 C.W.N. 829 at 839. Ordinarily sufficient grounds exist where witnesses make positive, consistent and apparently credible and sufficient allegations against the accused and there is nothing to rebut or weaken the force of those allegations. But difficulty will be felt where, as often happens, there are counter allegations and opposing circumstances. The requirement that the grounds for committing the case should be sufficient, must be taken as excluding all cases in which the alleged grounds for commitment appear insufficient whatever the reasons for the insufficiency may be, and is not limited to a requirement for merely formal allegations, whether credible or not as to the essentials of the alleged offence, 9 Bom. L.R. 225—5 Cr. L.J. 213; see also 46 A. 537. A Magistrate in considering the sufficiency of grounds may take into account whether on the evidence before him it is probable that a conviction will be arrived at, 7 C.W.N. 77; see 37 A. 355; 28 A. 534; 21 A. 265; 35 B. 163; 27 B. 84—17 Bom. L.R. 810; 12 Bom L.R. 923; (1915) M.W.N. 233; Weir II, 260; 44 A. 87; 13 A L.J. 111; 9 C.W.N. 829; 25 Cr. L.J. 238—76 Ind. Cas. 702. The duty of a committing officer is to ascertain by the evidence for the prosecution whether a *prima facie* case is made out against the accused. Magistrates are apt to suppose that it is incumbent on them to satisfy themselves fully of the guilt of the accused before making a commitment. This idea is erroneous, 3 N.W.P.H.C.R. 27; 16 M. 89; Weir II, 542. In a charge exclusively triable by a Court of Session if there is some evidence in support of the charge, it is not obligatory for the Magistrate to commit in all cases. He should exercise his discretion and see the facts in true proportion and decide whether or not he should try the case himself, 37 C.L.J. 34.

HE SHALL FRAME A CHARGE.—The duty of framing a charge rests primarily with the Magistrate and with the prosecutor and the charge is to be framed in accordance with the offence disclosed by the evidence recorded by the Magistrate, and a Magistrate is not restricted to the sections or offences named by the complainant in his original complaint, 12 W.R. (Cr.) 40; 25 C. 785. The drawing up of the charge must always follow the determination of the Magistrate to commit the case, but the mere framing of a charge against the accused is distinct from and does not amount to an order of commitment which has to be made under S. 213, *infra*; 12 Bom. L.R. 821—11 Cr. L.J. 486—7 Ind. Cas. 450; 15 Cr. L.J. 16—22 Ind. Cas. 160. After framing a charge the Magistrate can allow the accused to cross-examine the prosecution witnesses and as a result of such cross examination cancel the charge; 39 C. 855, where 5 C.W.N. 110 is referred to.

SUB-SECTION (2).—This makes it imperative on the Magistrate to read and explain to the accused the charge he has framed. Mere reading of the charge is not sufficient. It must also be explained to the accused so that he may have sufficient notice of what is imputed to him. Where in a case of murder the meaning of "murder" was not explained to the accused as required by this section and the accused pleaded killing the deceased, it was held that it was not an admission of murder which could be acted upon, 9 M. 81. A copy of the charge shall, if the accused requires the same, be given to him free of cost.

211. (1) The accused shall be required at once to give in, orally or in writing, a list of the persons (if any) whom he wishes to be summoned to give evidence on his trial.

List of witnesses for defence on trial.

(2) The Magistrate may, in his discretion, allow the accused to give in any further list of witnesses at a subsequent time and, where the accused is committed for trial before the High Court, nothing in this section shall be deemed to preclude the accused from giving, at any time before his trial, to the Clerk of the Crown a further list of the persons whom he wishes to be summoned to give evidence on such trial.

Further list.

THE ACCUSED SHALL BE REQUIRED AT ONCE TO GIVE IN A LIST.—A duty is cast upon the Magistrate to call upon the accused *at once* to give a list of persons whom he wishes to be summoned to give evidence on his behalf. The question 'Have you evidence?' is ambiguous and is not a sufficient compliance with the section. The Magistrate is bound to call upon the accused to give a list of witnesses he desires to call, 7 Bom. L.R. 723, but a Magistrate cannot force the accused to disclose either the names of his intended witnesses or what those witnesses would prove. An accused person may reserve his defence and also refuse to give a list of his witnesses but in that case he will have to bring his witnesses and cannot have the assistance of the Court to compel their attendance, 14 A. 242; 19 A. 502. The accused is entitled as of right to have any witness named in the list filed by him to be summoned and examined, 23 W.R. (Cr.) 55; 15 W.R. (Cr.) 7; 3 W. R. (Cr.) 36. But there is nothing in the section which prevents a Magistrate from allowing an accused person to reserve his defence for the Court of Session, 14 B L R. (Appx.) 1. An accused is not entitled as of right to have his witnesses not named by him before the Magistrate, summoned at the Sessions trial. But there is no reason to refuse an application by an accused person for summons simply because a large number of witnesses is mentioned in his list, 11 C. 752 at 755.

SUB-SECTION (2) provides for giving a further list of witnesses at any subsequent time. See Ss. 216, 231 and 291, *infra*.

212. The Magistrate may, in his discretion, summon and examine any witness named in any list given in to him under section 211.

Power of Magistrate to examine such witnesses.

THE OBJECT OF THE SECTION.—The object of the section is to prevent concoction of evidence by the accused after his commitment. This section gives a discretion to the Magistrate to summon and examine any defence witness named in the list furnished by the accused under the last section, but the discretion should be used very sparingly as such a course may seriously prejudice the accused person in his defence. But such examination may result in the benefit of the accused in some cases, for, if after examining any such witness the Magistrate is satisfied there is no sufficient ground for his committal, the Magistrate may act under S. 213 (2), cancel the charge and discharge the accused. This section did not exist in the Act of 1861. It appeared for the first time in the Code of 1872 on account of two conflicting decisions of the Calcutta High Court reported in 4 B.L.R. Appx. 1 and 14 W.R. (Cr.) 16. With these cases before them the Legislature inserted a new S. 200 in Act X of 1862 and retained it as S. 212 in Act X of 1882. That section gave the Magistrate the widest possible discretion to summon and examine any witness in any list given to him under S. 211. With that discretion the High Court cannot interfere, nor do we see how any line could be drawn, limiting it one way or another. The Code does not require a Magistrate to record his reasons for acting or refusing to act under the section and the High Court cannot lay down a direction that before exercising his powers he should record reasons. He is given a discretion which he may be trusted to use properly and it will be for a person impugning his order to satisfy the High Court that a judicial discretion has not been used before that order under this section could be interfered with. We need not go into or state any reason why it is necessary that this section should appear in the Statute Book. It is there; and as it is there, it is the duty of every Magistrate who considers that the use of it is necessary and expedient in the interests of justice to make use of it to the fullest extent necessary in the interests of justice. If he does not do so, he neglects an obvious duty, 18 A. 380 at 381—382.

MAY SUMMON AND EXAMINE.—It is not imperative on the Magistrate to summon and examine any defence witnesses after reaching the stage of framing a charge under S. 210, *supra*. The fact that the Magistrate had already issued summonses to the defence witnesses named in the list put in by the accused and had examined some of them before he made up his mind to commit, does not prevent his stopping proceedings under S. 247, *infra* as his power under this section is unqualified, 17 M.L.T. 53=15 Cr. L.J. 703=26 Ind. Cas. 152 but it was held in 1906 A.W.N. 306 that a commitment made by a Magistrate was bad where

a Magistrate after recording the prosecution evidence had summoned certain defence witnesses and had consented to make a local inspection at the request of the accused, but committed the accused without examining the defence witnesses summoned, and without making the local inspection. A Committing Magistrate is not justified either in law or in common fairness in enforcing the accused to disclose the names of his intended witnesses or what those witnesses would be called on to prove, or when they attend, to threaten them with penalties unless they are giving wilfully false evidence or persistently refuse to give facts within their knowledge, 14 A. 212.

213. (1) When the accused, on being required to give in a list under section 211, has declined to do so, or when he has given in such list and the witnesses (if any) included therein whom the Magistrate desires to examine have been summoned and examined under section 212, the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session, (as the case may be) and (unless the Magistrate is a Presidency Magistrate) shall also record briefly the reasons for such commitment.

(2) If the Magistrate, after hearing the witnesses for the defence is satisfied that there are not sufficient grounds for committing the accused he may cancel the charge and discharge the accused.

MAY MAKE AN ORDER COMMITTING ACCUSED FOR TRIAL BY COURT OF SESSION.—According to this section a Magistrate may make an order committing the accused for trial by the Court of Session. It is not the duty of a Magistrate in all cases exclusively triable by a Court of Session to commit the accused. He is to exercise his own discretion in each case, 37 C.L.J. 34; 4 Loh. 63; 34 A. 57; 42 M.L.J. 49—16 L.W. 460; 15 L.W. 552; 5 C.W.N. 110. The expression "*the Court of Session*" here can only mean the Court of Session having jurisdiction to try the case under S. 177, *supra*. S. 63 of Act X of 1872 provided that Magistrates shall ordinarily commit to the Court of Session for the Sessions division in which the district to which they are appointed is situated. But the Code of 1898 contained no similar provision. The Bombay High Court in 8 B. 312 held that the commitment should be to the Court empowered to try the case under S. 177, *supra* and held the commitment in a similar case bad, but instead of quashing the illegal commitment directed the transfer of the case to the Court having jurisdiction. By such a course, the express ruling of the Privy Council in, 9 A. 191 to the effect that a transfer from a Court having no jurisdiction would not render the proceedings legal was lost sight of.

SHALL RECORD BRIEFLY REASONS FOR COMMITMENT.—The law requires that reasons for the commitment shall be recorded, and failure to give reasons is more than an irregularity, but an illegality vitiating the commitment, 38 B. 114; 11 Bom. L.R. 18—9 Cr. L. J. 163—5 M. L. T. 225; 24 C. 329; 6 A.L.J. 939. In a case where the trial may either be by the Magistrate himself or by the Court of Session, the reasons for the commitment which the Magistrate is bound to record under this section must include also special reasons for sending the accused before the Court of Session and when he does not do so there is a failure to comply with the law. This no doubt would amount to no more than an irregularity if the case were one which ought to be committed to the Sessions, but when the case is not one which ought to have been committed then to commit without giving reasons is more than an irregularity and it is an illegality, 38 B. 114.

UNLESS HE IS A PRESIDENCY MAGISTRATE.—A Presidency Magistrate enjoys the privilege of committing without stating reasons. For similar instances see note at page 302. But it is submitted that certainly if a Magistrate has to record some reasons for committing an

accused to take his trial at the High Court Sessions at least in cases which could be tried by a Presidency Magistrate.

SUB-SECTION (2).—This sub-section was introduced in the Code of 1898. It empowers the Magistrate only to cancel the charge but if he once makes a commitment he is *functus officio* and it can be quashed only by the High Court under S. 215, *infra*. The Magistrate after he has pronounced the order of commitment is not competent to try the accused for an offence triable by him by cancelling the charges of offences beyond his jurisdiction, 2 C. L. J. xxxiii.

AFTER HEARING WITNESSES FOR DEFENCE.—Sub-section (2) provides that if a Magistrate after having drawn up a charge hears witnesses for the defence and is then satisfied that there are no sufficient grounds for committing the accused he may cancel the charge and discharge the accused. Commitment made without examining the witness named by the accused is illegal, 26 A. 177; 20 A. 264. No doubt the sub-section refers to "witnesses for the defence" but these words are wide enough to cover evidence extracted by cross-examination from witnesses for the prosecution. The course taken by the Magistrate is clearly within the spirit of the provision and it is not unduly straining the words used to put the construction indicated upon them, 39 C. 835, where 5 C. W. N. 110 at 112 is approved. A Magistrate may under the sub-section discharge the accused even in a case triable exclusively by a Court of Session, if defence evidence renders the prosecution evidence unreliable or incredible, 44 A. 57.

NO SUFFICIENT GROUNDS FOR COMMITTING THE ACCUSED.—The expression is quite different from such expressions as "the case not proved," or "the accused are innocent." In 40 A. 615 and 26 A. 584, the functions of a committing Magistrate have been too narrowly restricted. But the principle underlying seems to be sound. When, after hearing the evidence for the defence, the Magistrate comes to the conclusion that their evidence rebuts that produced for the prosecution or renders it so incredible or unreliable that a conviction will not follow, he may pass an order of discharge as was done in 44 A. 57. The statement of law in 46 A. 537 is that the Magistrate, when satisfied that a charge is without foundation and there are no sufficient grounds for committing for trial, the Magistrate is entitled and indeed it is his duty to discharge the accused. This however does not mean that the Magistrate is to arrogate to himself the functions of the Sessions Court and try the case as if he were that Court himself. The policy of the Legislature seems to be that serious offences should be tried by Sessions Judges who are ordinarily more experienced and are proper Courts to pronounce on the guilt or innocence of the accused in cases triable exclusively by the Court of Session. Where evidence is wholly untrustworthy and the Magistrate is satisfied, that it cannot lead to a conviction, he would be justified in discharging the accused even though he had already framed a charge. The Magistrate has to see whether there are sufficient grounds for committing the accused or not. He should not however weigh the probabilities of the case and then after balancing the evidence on both sides decide whether the guilt of the accused has, or has not been proved. 24 A. L. J. 133 at 126. See also 27 Cr. L. J. 2=91 Ind. Cas. 34.

REVISION.—A commitment under this section can be quashed by the High Court under the provisions of S. 215 *infra* only on a point of law, 36 A. 4. The commitment contemplated by this section should not be confounded with an order which a Sessions Judge or District Magistrate could pass under S. 437, *infra* when exercising powers of revision in a case of discharge in a case exclusively triable by a Court of Session. In that case the High Court in revision is empowered to set aside the commitment on the merits, *i.e.*, the High Court could go into facts, 27 M. 54; 7 C. W. N. 327 and 77; 3 Cr. L. Rev. 375=15 Cr. L. J. 378=23 Ind. Cas. 741; 30 M. 224.

214. Omitted by S. 10 of Act XII of 1923.

215. A Commitment once made under S. 213 by a competent Magistrate, or by a Civil or Revenue Court under section 478, can be quashed by the High Court only, and only on a point of law.

Quashing commitments under S. 213.

AMENDMENT.—Reference to Ss. 214 and 477 has been omitted as both these sections are now repealed.

SCOPE OF THE SECTION.—This section applies only to a commitment actually made under S. 213 or by a Civil or Revenue Court under S. 478 *infra*, the proceedings before which being deemed to have been held by a Magistrate but has no application to an order to commit made by a Sessions Judge or District Magistrate, acting under S. 497, *infra*, 30 M. 224; 7 C.W.N. 77 and 327; 12 C.W.N. 117; 18 C. 608 at 621; 13 M. 334 at 338; 27 M. 54; 28 Cr. L.J. 518—77 Ind. Cas. 982. A commitment once made is not open to legal objection before the Sessions Court and the remedy of the party aggrieved is to move the High Court in revision. 30 C.W.N. 276. In a case falling under S. 497, *infra*, it is open to the High Court to consider whether the Sessions Judge has or has not exercised a proper judicial discretion and for that purpose the High Court may consider the facts as well as the questions of law involved, 30 M. 224; 3 Cr. L. Rev. 375; 12 C.W.N. 117, but a commitment made can be set aside by the High Court only on a point of law, 36 A. 4; 13 Bom. L.R. 201; 11 A.L.J. 489; 8 M.L.T. 205; 43 M. 381; 31 C. 1; 27 M. 54 and cannot be quashed on the ground that there is no evidence to justify a commitment, 27 M.L.J. 593; or on the ground that the evidence is of a doubtful character, 3 Cr. L. Rev. 167. A Magistrate after committing the accused cannot himself quash the commitment and discharge the accused on the ground that the complainant had compounded the case, 4 A. 150; 43 B. 147; 16 M.L.J. 525; Welr II, 262.

A commitment once made stands unless quashed by the High Court and if it is not quashed the trial must take place in pursuance thereof. When a trial held in pursuance of a commitment has ended in a conviction it is not open to the accused to impugn the commitment because the stage at which he could do so has passed. A commitment is quashed with only one object, *vis.*, that the trial of the persons committed may not take place. If the trial has already taken place it serves no purpose to impugn the commitment, 27 Cr. L.J. 134—91 Ind. Cas. 808. A commitment once made by a competent Magistrate to the Court of Session cannot be quashed by allowing the prosecutor, to file a compromise. Such a case must go to trial when once committed, however incomplete the original investigation may have been, 2 W.R. (Cr.) 57. Under the Code a Court of Session has no power to withdraw a case from the jury. The power of quashing commitment, in other words, withdrawing the case from the jury is specially given to the High Court which has to consider whether there is a ground of law, 5 C.W.N. 411 at 413. But if the Sessions Court finds the commitment illegal the procedure to be followed is to make a reference to the High Court under S. 493, *infra*.

The words "on a point of law" occurring in this section have been the subject of a liberal as well as a narrow and literal construction by various High Courts. In the case of offences either exclusively or not at all triable by the Court of Session under Col. 8 of Sch. II, of the Code no difficulty arises. But in the case of offences triable either by the Court of Session or by a first class Magistrate whether an improper exercise of judicial discretion in committing is not a point of law, is a question on which there is difference of opinion. The Madras High Court in 42 M. 88 is in favour of a narrow and literal construction of the words as also the Bombay High Court in 13 Bom. L.R. 201—12 Cr. L.J. 288—10 Ind. Cas. 802. If this interpretation is adopted it is difficult to say how any point of law can possibly arise in the case of offences triable either by a Court of Session or Magistrate. In 4 Bom. L. R. 85; 38 B. 114; 42 B. 172; 21 C. 429 the broader interpretation was adopted, 27 Cr. L.J. 479—93 Ind. Cas. 703.

OR BY A CIVIL OR REVENUE COURT UNDER S. 478.—The words were introduced in the Code of 1898.

CAN BE QUASHED BY THE HIGH COURT ONLY ON A POINT OF LAW.—The use of the word "only" is significant and imposes an important restriction on the powers of the High Court. The High Court alone is competent to quash a commitment once made.

In 4 A. 160, it was held that even in a compoundable case, *vis.*, adultery, a Magistrate who had

committed the accused to the Court of Session had no power to discharge the accused subsequently when the offence was compounded and the fact made known to the Magistrate. See also 16 M.L.J. 525; Weir II, 262. A doubt was raised in 36 C. 48 at 50 whether the High Court in exercising its ordinary appellate jurisdiction could quash a commitment made to it by a Presidency Magistrate for trial under its ordinary original criminal jurisdiction and it was suggested that the practice in somewhat similar cases had been to apply to the Judge exercising ordinary original criminal jurisdiction of the Court, but the Court did not decide the point but dealt with the case on the merits as the application was urgent. Commitment can be quashed at any stage of the case. 6 C. 582. But where the prisoner is put on his trial and has pleaded to the charge the commitment is not to be quashed, 12 C.L.R. 120.

A commitment can be quashed only on a point of law 36 A. 5; 13 Bom. L.R. 201; followed in 26 Cr. L.J. 1035=87 Ind. Cas. 965; 37 M.L.J. 652; 11 A.L.J. 439; 13 Cr. L. J. 304=19 Ind. Cas. 960. A question of jurisdiction is a point of law, 15 Cr. L.J. 270=23 Ind. Cas. 478; Weir II, 255, it cannot be quashed on the ground that there is no evidence to justify a commitment, 27 M.L.J. 593 and 13 Bom. L.R. 201=12 Cr. L.J. 286=10 Ind. Cas. 802. It can be quashed on the ground that the facts did not necessarily establish an offence charged, 2 C.L.J. 46, but see 6 A. 98; 9 C.W.N. 829; 14 C. 740, which took a different view, or on the ground that the evidence is of a doubtful character, 3 Cr. L. Rev. 187. Insufficiency of evidence has never been treated as a ground for quashing a commitment, 1 W.R. (Cr.) 8, but the absence of evidence to warrant a commitment is a point of law and may furnish a good ground for quashing the commitment, 5 C.W.N. 411, but as pointed out in 27 M.L.J. 593=15 Cr. L.J. 665=25 Ind. Cas. 993 and 13 Bom. L.R. 201=12 Cr. L.J. 286=10 Ind. Cas. 802, the result of quashing commitment on the ground of absence of evidence may not be to the benefit of the accused as he may be charged again with offence, but if the committal were allowed to stand the Court of Session will have to acquit him on the ground that there is no evidence against him. A commitment made of some of the accused while others have not yet been arrested is no ground for quashing the commitment, 7 M.L.T. 187=11 Cr. L.J. 338=5 Ind. Cas. 933. The test which should be applied to decide whether a committal might or might not be made on the facts is this; assuming that the whole of the evidence against the accused is true, is there a case fit to go to the jury? If the answer is 'No,' then a committal is improper and ought not to be made, 9 C.W.N. 829. There is a conflict of opinions among the different High Courts as to its powers to quash a commitment on the ground that there is no evidence (apart from the question of credibility) to support a conviction. But there is a clear consensus of opinion in the High Courts that they have no power to quash a commitment merely because of doubts as to the credibility of the evidence for the prosecution if there is, in fact some evidence which would justify the Sessions Judge in leaving the decision of guilt or innocence to the jury. The High Court in such cases has no concern with the question of credibility of the evidence when there is in fact some evidence on record, 1 Rang. 526; 25 Cr. L.J. 261=76 Ind. Cas. 821. A commitment made without exercising a judicial discretion but merely acting on the suggestion of the District Magistrate was quashed by the High Court, 15 M. 39. A commitment made to the High Court when the Magistrate himself could try the offence but thinks it is a proper case to be dealt with by the Sessions Court is good, 32 M. 83. But if he gives no reason whatever for committing to the Sessions a case which he himself is competent to try as in, 38 B. 114 or if he gives reasons which are bad in law as in 15 Bom. L.R. 998=14 Cr. L.J. 657=21 Ind. Cas. 897; or on the ground that the case created a sensation in a particular community, 28 Bom. L.R. 293=27 Cr. L.J. 479=93 Ind. Cas. 703, or at the request of the parties and in reliance of a Government resolution which he could not take into consideration as reasons, 42 B. 170, the High Court has power to quash the commitment as being bad in law. A commitment made without the complaint of a Court was quashed, 6 A. 98; 25 M. 121. A commitment made on evidence recorded in the absence of the accused was held bad, Weir II 269; 5 C.W.N. 110, but discovery of fresh evidence after commitment is no ground for quashing a commitment already made, 1885 A.W.N. 53, or that the Committing Magistrate had no territorial jurisdiction, 17 M. 402; 3 Cr. L. Rev. 167. A Magistrate is bound to state reasons for commitment, 38 B. 114; 11 Bom. L.R. 18=9 Cr. L.J. 183=1 Ind. Cas. 104.

When an order of committal made by a District Magistrate under S. 437, *infra*, is illegal because the offence is not triable exclusively by the Court of Session, is referred to the High Court for orders the best course for the High Court is to set aside the order of committal and take up the case in revision, set aside the order of discharge by the first Court, direct the Magistrate to frame a charge and then commit the accused to the Court of Session, 3 Cr. L. Rev. 117. A commitment made is liable to be quashed when an alteration in the charge was made by the Magistrate at a very late stage in the inquiry and the accused committed to the sessions without affording him an opportunity to re-examine the prosecution witnesses and to adduce his defence evidence in respect of the altered charge, 22 A.L.J. 239—25 Cr. L.J. 798—31 Ind. Cas. 318.

See S. 532 which validates irregular commitments made. The principle of S. 537, *infra*, applies to orders of commitment which ought not to be quashed unless prejudice is clearly shown, 12 Cr. L.J. 320; no appeal lies against an order of commitment under S. 478 by a Judge sitting on the Original Side of High Court in the course of the trial of a suit. The remedy is under this section to apply to quash the commitment, 33 M. 361.

216. When the accused has given in any list of witnesses under section 211 and has been committed for trial, the Magistrate shall summon such of the witnesses included in the list, as have not appeared before himself, to appear before the Court to which the accused has been committed :

Summons to witnesses for defence when accused is committed.

Provided that, where the accused has been committed to the High Court, the Magistrate may, in his discretion, leave such witnesses to be summoned by the Clerk of the Crown, and such witnesses may be summoned accordingly :

Provided, also, that if the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice, the Magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material, and if he is not so satisfied, may refuse to summon the witness (recording his reasons for such refusal), or may before summoning him require such sum to be deposited as such Magistrate thinks necessary to defray the expense of obtaining the attendance of the witness and all other proper expenses.

Refusal to summon unnecessary witness unless deposit made.

THE MAGISTRATE SHALL SUMMON.—An accused is entitled as a matter of right to have any witness named in the list he delivers, summoned and examined, 23 W.R. (Cr.) 88; 6 B.L.R. Appx. 88. A Magistrate cannot refuse to summon the witnesses on the ground that the evidence appears to him not to be material or reliable, Weir II 263. It is not open to a Magistrate to decide on the credit to be attached to the evidence of a witness before he had an opportunity of hearing him. By so doing he exceeds the discretion given to him by law, 19 M. 375; 6 B.L.R. (Ap.) 65.

AS HAVE NOT APPEARED BEFORE HIMSELF.—The next section provides for the procedure to be followed when the witnesses had appeared before the Magistrate; the witnesses shall execute before the Magistrate bonds binding themselves to be in attendance when called upon at the Court of Session or High Court.

FIRST PROVISIO.—The summoning of witnesses in cases of commitment to the High Court may be left at the discretion of the Magistrate to the Clerk of the Crown.

SECOND PROVISIO.—This proviso is not intended to enable a Magistrate to inquire generally into what the defence of the accused person is to be, and to consider whether, on learning the nature of the defence he is absolutely to abstain from summoning all the witnesses cited by the accused. There is no warrant for the exercise of such sweeping authority, 3 C. 573. This proviso is clearly inapplicable where a witness though once summoned failed to appear on the day fixed on account of some delay in the service of the summons. In such a case the Magistrate was bound to make a further attempt to secure the attendance of the absent witness, 4 A. 53.

FOR THE PURPOSE OF YEXATION OR DELAY OR DEFEATING ENDS OF JUSTICE.—The same words occur in S. 257 (1) *infra* which refers to summoning of witnesses in warrant-cases. It is only on these grounds the Magistrate is entitled to refuse to summon the witnesses tendered by the accused and if he refuses on these grounds then he is further required to ask the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witnesses is material and if he is not satisfied, then he may refuse to summon, 16 C. 714; when a Magistrate asked the accused who was about to be committed why he desired to summon the witnesses named in the list and the accused refused to give reasons, the Magistrate was at liberty to refuse to summon these witnesses, 4 M. H. C. R. 81; 16 W. R. (Cr.) 14.

RECORD HIS REASONS FOR SUCH REFUSAL.—When a Magistrate refuses to summon witnesses for the defence he is bound to record his reason for such refusal. The power should not be lightly exercised. He must show in his order of refusal that he had satisfactory ground that the evidence was not material. 8 A. 668. When an accused gives a list of witnesses he wishes to summon after the case is committed to the Court of Session, it is incumbent upon the Magistrate to exercise his discretion on the point. By returning the list of witnesses filed by the accused and passing no orders upon it he acted illegally. He was bound distinctly to state whether he would summon the witnesses or not and he ought to state his reasons for so doing. He should consider the reasons given by the accused for the delay in giving the list and whether they were sufficient or not, 16 W. R. (Cr.) 14.

BEFORE SUMMONING REQUIRE SUCH SUM TO BE DEPOSITED.—Even in a case the Magistrate refused to summon the witnesses on the ground that the accused when called upon to state his reasons for summoning the persons named in his list, the Magistrate was bound to have fixed the amount which he considered necessary to defray the cost of attendance of the witnesses and intimated to the accused his readiness to issue summons on the amount being deposited, 4 M. H. C. R. 81.

AND ALL OTHER EXPENSES.—These words were introduced in the Code of 1899.

217. (1) Complainants and witnesses for the prosecution and defence, whose attendance before the Court of Session or High Court is necessary, and who appear before the Magistrate, shall execute before him bonds binding themselves to be in attendance when called upon at the Court of Session or High Court to prosecute or to give evidence, as the case may be.

(2) If any complainant or witness refuses to attend before the Court of Session or High Court, or execute the bond above directed, the Magistrate may detain him in custody until he executes such bond, or until his attendance at the Court of Session or High Court is

Bond of complainants and witnesses.

Detention in custody in case of refusal to attend or to execute bond.

required, when the Magistrate shall send him in custody to the Court of Session or High Court, as the case may be.

A complainant is not at liberty to withdraw from the prosecution after commitment. If he does so, he will forfeit his recognizance, 2 W.R. (Cr.) 87.

218. (1) When the accused is committed for trial, the Magistrate shall issue an order to such person as may be appointed by the Local Government in this behalf, notifying the commitment, and stating the offence in the same form as the charge, unless the Magistrate is satisfied that such person is already aware of the commitment and the form of the charge;

Commitment when to be notified.

and shall send the charge, the record of the inquiry and any weapon or other thing which is to be produced in evidence to the Court of Session or (where the commitment is made to the High Court) to the Clerk of the Crown or other officer appointed in this behalf by the High Court.

Charge, etc., to be forwarded to High Court or Court of Session.

(2) When the commitment is made to the High Court and any part of the record is not in English, an English translation of such part shall be forwarded with the record.

English translation to be forwarded to High Court.

SHALL ISSUE ORDER TO SUCH PERSON APPOINTED BY LOCAL GOVERNMENT.—The order is to be issued to the Government Pleader or more appropriately to the Public Prosecutor. See Form No. 27 of Sch. V, form of notice to Government Pleader as to commitment by the Magistrate.

ALREADY AWARE OF THE COMMITMENT.—In cases where the Public Prosecutor himself appears at the preliminary inquiry before the Magistrate, to conduct the prosecution, no notice is necessary as he is aware of the commitment.

WEAPON OR OTHER THING WHICH IS TO BE PRODUCED AT THE SESSIONS.—The other things referred to herein are material objects such as blood-stained clothes, ropes, sticks, human hair, portions of unused food, vomitted matter, blood stained earth scraped, etc.

219. (1) *The committing Magistrate or in the absence of such Magistrate any other Magistrate empowered by or under section 206* may, if he thinks fit, summon and examine supplementary witnesses after the commitment and before the commencement of the trial, and bind them over in manner hereinbefore provided to appear and give evidence.

Power to summon supplementary witnesses.

(2) Such examination shall, if possible, be taken in the presence of the accused and, where the Magistrate is not a Presidency Magistrate, a copy of the evidence of such witnesses shall be given to the accused free of cost.

AMENDMENT.—The words in italics are new. Under this section power is given to examine supplementary witnesses after the commitment to the Sessions and before the

commencement of the Sessions trial, while under S. 540 a Court has wide powers to summon any witness. In order that use should be made of the latter section more particularly for the summoning of witnesses desired by the Court, rather than by parties, it is thought desirable to provide more clearly for the examination during Sessions trial of witnesses whose evidence has not been recorded by the Committing Magistrate and this is sought to be effected by amendment of this section and S. 286, under which it will be possible for the prosecution to tender any witness at the Sessions provided that his statement has been recorded by any Magistrate and a copy of it has been given to the accused not less than twenty-four hours before the witness is produced at the trial.—*Statement of Objects and Reasons.*

OBJECT OF THE SECTION.—The object of the section is to secure all the evidence available and not merely a portion of it at the Sessions trial. A committing Magistrate is bound to make his record complete and if he should discover that owing to some mistake or inadvertance he has omitted to record some material evidence which will be recorded at the Sessions trial, he is empowered by this section before the commencement of the Sessions trial to examine supplementary witnesses and bind them over to appear at the Sessions trial.

IF HE THINKS FIT.—These words were introduced in the Code of 1898.

220. Until and during the trial, the Magistrate shall, subject to the provisions of this Code, regarding the taking of custody of accused pending trial, the Magistrate shall, subject to the provisions of this Code, regarding the taking of bail, commit the accused, by warrant, to custody.

See S. 541 as to place of custody of accused pending trial.

PROVISIONS REGARDING THE TAKING OF BAIL.—See Chapter XXXIX dealing with bail. If the offence is bailable the Magistrate should admit the accused to bail; if the offence is non-bailable the accused should not be released on bail if there are reasonable grounds for believing that the accused is guilty of an offence punishable with death or transportation for life and in other cases of non-bailable offences the Magistrate is to use his discretion in granting bail. By the new amendment the power to grant bail is further extended in the case of any person under 16 years of age or any woman or any sick or infirm person, accused of non-bailable offences. The High Court or Court of Session may however direct that any person may be released on bail in any case under S. 493, *infra*.

COMMIT BY WARRANT TO CUSTODY.—The warrant referred to herein is a written order to a Jailor to receive the accused who is refused bail in a non-bailable offence or who fails to offer bail in bailable offence, into his custody and produce him before the Court for trial when required. This presupposes that the accused is present before the Magistrate.

CHAPTER XIX.

OF THE CHARGE.

The provisions of this chapter relating to charge are intended to provide that the charge shall give the accused full notice of the offence charged against him, but that the only result of any defect in the charge shall be an amendment in terms as to delay, or a new trial if the accused seems to have been misled, S. B. 200 at 213. The charge corresponds to the English indictment and it is very much more than a mere form. An accused person is entitled to know with the greatest precision what acts he is said to have committed and under what sections of the Penal Code these acts fall, 27 Cr. L. J. 62=91 Ind. Cas. 238. The charge is a notice to the prisoner of the matter whereof he is accused and it must convey to him with sufficient clearness and certainty that which the prosecution intends to prove against him and of which he will have to clear himself. It is also an information to the Court which is to try the accused of the matters to which evidence is to be directed, 21 W. R. (Cr.) 72; 19 C. W. N. 972. The importance and necessity of precision in the framing of a charge was pointed out in the following passage in the judgment in 23 M. 61 (P. C.) at 97 by their Lordships of the Privy Council. "The reason for such a provision, is obviously in order that the Jury may not be prejudiced by the multitude of charges

and the inconvenience of having together of such a number of instances of culpability and the consequent embarrassment both to the Judge and accused. It is likely to cause confusion and to interfere with the definite proof of a distinct offence which it is the object of all Criminal Procedure to obtain. The policy of such a provision is manifest and the necessity of a system of written accusation specifying a definite criminal offence is of the essence of Criminal Procedure." When the mischief sought to be averted by the statute has been done as evident from the verdict of the Jury and the acceptance of it by the learned Judge the effect cannot be averted by dissecting the verdict and appropriating the verdict of guilty only to such parts of the written accusation as ought to have been submitted to the Jury. 52 C. 253 at 258-9.

Charge to state offence.

221. (1) Every charge under this Code shall state the offence with which the accused is charged.

Specific name of offence sufficient description.

(2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

How stated where offence has no specific name.

(3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

What implied in charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

Language of charge.

(6) In the presidency-towns the charge shall be written in English; elsewhere it shall be written either in English or in the language of the Court.

Previous conviction when to be set out.

(7) If the accused *having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence,* the fact, date and place of the previous conviction, shall be stated in the charge. If such statement *has been omitted,* the Court may add it at any time before sentence is passed.

Illustrations.

(a) A is charged with the murder of B. This is equivalent to a statement that A's Act fell within the definition of murder given in sections 299 and 300 of the Indian Penal Code; that it did not fall within any of the general exceptions of the same Code; and that it did not fall within any of the five exceptions to section 300, or that, if it did fall within Exception I, one or other of the three provisions to that exception apply to it.

(b) A is charged, under section 326 of the Indian Penal Code, with voluntarily causing grievous hurt to B by means of an instrument for shooting. This is equivalent to a statement that the case was not provided for by section 335 of the Penal Code, and that the general exceptions did not apply to it.

(c) A is accused of murder, cheating, theft, extortion, adultery or criminal intimidation, or using a false property-mark. The charge may state that A committed murder, or cheating, or theft, or extortion, or adultery, or criminal intimidation, or that he used a false property-mark, without reference to the definitions of those crimes contained in the Indian Penal Code; but the sections under which the offence is punishable must, in each instance be referred to in the charge.

(d) A is charged, under section 184 of the Indian Penal Code, with intentionally obstructing a sale of property offered for sale by the lawful authority of a public servant. The charge should be in those words.

AMENDMENT.—The words in italics are newly added in sub-section (7). By the amendment it was intended to remove the doubt which existed before whether evidence of previous conviction may be given when enhanced punishment sought to be awarded was beyond the competence of the Court. Now such evidence can be adduced.

CHARGE.—For definition of charge see S. (1) (c), *supra* which was inserted in the Code of 1898; a charge is a first notice to the prisoner of the matter whereof he is accused and must convey to him with sufficient clearness and certainty that which the prosecution intends to prove against him of which he will have to clear himself, 49 C.W.N. 972 at 983, and it is also an information to the Court which is to try the accused of the matter to which evidence is to be directed, 21 W.R. (Cr.) 72 at 82. An accused person is entitled to know with certainty and accuracy the exact nature of the charge against him, 42 C. 937; 26 Cr. L.J. 843—86 Ind. Cas 703, and unless he has this knowledge he must be seriously prejudiced in his defence, 11 C. 106; 22 C. 276 and 391; 1898 A.W.N. 70; 4 C.W.N. 193. But when the accused fully understood the nature of the offence with which they are charged they had clearly not been prejudiced by the omission of the words "*unlawfully* and *maliciously*" and "*in British India*" occurring in S. 4 (b) of the Explosive Substances Act VI of 1908; such omission can be cured by the verdict. Moreover, where the illegal act charged under S. 120B, I.P.C., is the unlawful and malicious possession of explosive substances within the meaning of S. 4 of that Act, it is essential to specify in the charge the explosive substance which the accused had conspired to have in their possession or control. It is a wholesome rule that the Courts should adhere to the language of the statute as far as practicable when a charge is drawn up, as nothing is to be gained by a paraphrase, while opportunity is afforded to the accused to take exception to the form of the charge, 42 C. 937.

SUB-SECTION (2).—In cases where the description with the particulars required to be specified by S. 222 *infra* is found insufficient then further particulars may be stated as permitted by S. 228 *infra*, see illustration (c) to this section.

SUB-SECTION (3).—The law does not give the offences under Ss. 124A and 124B, any specific names, and therefore under this sub-section so much of the definition of the offence must be stated to give the accused notice of the matter with which he is charged. If the charge is in English and the words uttered are in vernacular, there is nothing in the Indian Law requiring that the actual words should be set out in the vernacular, 32 M. 384. The descriptions of crimes in the Penal Code must of necessity be expressed in abstract terms, but the very object of a trial is to determine whether particular acts or omission on the part of an accused fall or do not fall within the rule thus abstractedly stated. Conformably to this principle all the models of charges in Sch. V to the code contain or imply the setting forth with reasonable particularity of the matters alleged to constitute the offence. 2 B. 142 at 144. See illustration (d) to the section. When the publication of the seditious in a newspaper and the whole article is relied upon, no particular passages need be specified, 28 B. 77 and 221. A charge of house-breaking and theft must specify the particular house broken into and the specific article stolen; merely naming the village is not sufficient, 28 M.L.J. 381. A charge under this section should specify the office held by the

accused so as to make him liable as a public servant, 5 W.R. (Cr. Let.) 6. Where the accused was charged as being a public servant knowingly having disobeyed the direction of law as to the way in which he had to conduct himself as such public servant, what the direction of law was, what the conduct was, which contravened it, should be stated in the charge. A charge under S. 211, I.P.C., should specify the words, knowing that there was no just or lawful ground for such charge, 2 W.R. (Cr. Let.) 2. A charge under S. 461, I.P.C., should set out the intention of the accused, 17 C.W.N. 334. But see 6 M.L.T. 266. When a charge of attempt at cheating did not specify both the person upon whom the attempt was made and also the manner in which he was induced, and the defect was not remedied till the close of the prosecution case, it was held that the accused was prejudiced, 8 C.W.N. 278. Similarly under S. 217, I.P.C. the omission to specify the direction of law which was disobeyed was held fatal to the conviction, 2 B. 142. A charge of perjury should specify the actual words used by the person charged in his deposition and not merely the substance Ratanlal 55; 7 N.W.P.H.C.R. 137; 7 B.L.R. Appx. 66. A charge for rioting should specify the common object of the unlawful assembly, 33 C. 295; 42 C. 937; 39 C. 781; 36 C. 865; 11 C. 103; 22 C. 276; 35 C. 364 and 718 though in simple cases the omission might not have prejudiced the accused, 21 C. 827; 12 C.W.N. 944. In a charge of cheating it should be set out the manner in which the offence was committed, and the question whether the charge was reasonably sufficient to give notice to the accused of the accusation he has to meet depends on the circumstances of each case. 25 Cr. L.J. 849—86 Ind. Cas. 705.

SUB-SECTION (3).—The law and the section of the law under which the offence is punishable should be stated: See form No. 28 of Sch. V, *infra*.

SUB-SECTION (5).—See illustrations (a) and (b) to this section which show that the allegation that a person has committed a particular offence impliedly negatives its falling within any of the provisions or general exceptions which would excuse or justify the act. A charge which is not reasonably sufficient to give the accused notice of the matter with which he is charged is bad in law, 38 C.L.J. 163.

SUB-SECTION (6).—In the Presidency towns, the charge shall be written in English—elsewhere it shall be either in English or the language of the Court.

SUB-SECTION (7).—The amendment here was made with a view to clear all doubt that a charge may be framed even where the enhanced punishment sought to be awarded is beyond the competence of the Court, and is in accordance with the decision in [1919] Patna 453. This sub-section provides for the drawing up of a charge as to previous conviction though the fact of the accused having been previously convicted does not constitute an offence, 11 A. 393. The prosecution is at liberty to prove a previous conviction just like any other relevant fact without the necessity of framing a written charge. This would also be the case where after conviction the Court desires to ascertain the antecedents of the accused with a view to fix the sentence which should be passed without reference to S. 75, I.P.C., 39 B. 326. There must be a separate charge under S. 75, I.P.C., if the charge is to be proved against the accused, 9 M. 284. A mere statement in a charge of previous conviction that the accused is an old offender is wholly insufficient to satisfy the requirements of law. An admission by the accused, that he had been to jail before is not a valid admission of the facts set forth in the charge dispensing with proof of the same, 4 Bom. L.R. 177. A charge under S. 75, I.P.C., may be drawn up at any time before pronouncing judgment and not after such pronouncement, 19 W.R. (Cr.) 41; Weir II, 299. When a previous conviction is proved the accused cannot be dealt with under S. 85, *supra* as if he had been convicted of two offences in the same trial, 11 A. 393.

As to form of the charge see Sch. V, Form XXVIII and Ss. 223, 224, *infra*.

222. (1)—The charge shall contain such particulars as to the time and place of the alleged offence, and the person Particulars as to time, place and person, (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 234 :

Provided that the time included between the first and last of such dates shall not exceed one year.

OBJECT OF THE SECTION.—By this section a slight departure from the law as laid down in Ss. 233 to 235, *infra* is intended. It provides that when an accused person is charged with breach of trust or criminal misappropriation of money, it shall be sufficient to specify the gross sum misappropriated and the dates between which the offence is alleged to have been committed, without specifying in the charge each item misappropriated, or exact dates of misappropriation which in most cases may not be possible, and sometimes misleading. The proviso to the section is important and it shows that it was not the intention of the Legislature to make any further departure and so the period is restricted to one year between the first and last of such dates as in S. 234, *infra*. The charge thus framed will be deemed to a charge of one single offence and not a series of acts constituting a transaction. If a charge relates to items exceeding one year the trial and the conviction will be illegal, 25 M. 61 (P.C.). The procedural law was altered to meet two difficulties. Under the law as it stood before, there was very great difficulty in convicting a person charged where there was a running account and where the prosecution was unable to put there on a specific item out of which the particular item was embezzled or to which it is attributable. The other difficulty was what was experienced in 21 C. 193 where the charge was embezzlement of a large sum of Rs. 9,000 and odd made up of so many hundred items; under S. 234, *infra*, it was not allowed to have more than three offences of the same kind and so the charge could not legally stand. The law on these two points was altered and altered for the better. It was not intended either to throw the onus on the accused by bringing a charge against him of a deficiency in his accounts or to do away with the necessity of proving the elements of the offence as laid down in the Indian Penal Code. An indictment of embezzlement might be supported by proof of a general deficiency of any particular sum received and not accounted for, 26 Cr. L. J. 531—85 Ind. Cas. 731.

SUB-SECTION (1).—A charge was held bad as being vague when it did not specify the article stolen, or the name of the person whose house was broken into; and the place of offence was given only at village T, whereas the trial was for offences committed both at village T and N, 29 M.L.J. 381 at 383; 7 B.L.R. Appx. 66; 25 W.R. (Cr.) 46. It is not right to charge generally under any section of the Penal Code, but the various acts should be specifically set out in the charge giving the accused sufficient particulars of time, place, person and circumstance as would give them notice of the matter with which they are charged, 15 B. 491; 17 Cr. L.J. 411; 25 M.L.T. 379. Where the charge of assault mentions a certain date and place of occurrence and the prosecution tried to prove the same, the Court is not entitled to convict the accused of an assault at a different place or time, 23 Cr. L.J. 471—77 Ind. Cas. 823. Where a person was tried and convicted of an unnatural offence on a charge which did not specify the time when, place where, or any known or unknown person with whom, the offence was committed, the only fact proved being that the accused habitually wore women's clothes and exhibited physical signs of having committed the offence, it was held that the conviction was bad in law, 6 A. 203. A charge of adultery alleging commission of offences between two dates is illegal if it is impossible in the circumstances of the case to assign particular dates on which sexual intercourse took place, 11 C. 488 at 492.

REASONABLY SUFFICIENT TO GIVE NOTICE TO ACCUSED.—The reasonableness of the notice is the criterion by which the validity of the charge must be judged and this must depend upon the facts and circumstances of each particular case. No hard and fast rule can be laid down. The requirements of law are satisfied if the charge gives such a description of the words used in a charge under S. 124A, I.P.C. as is reasonably sufficient to enable the accused to know the matter with which he is charged, *i.e.*, if the charge states the words used with substantial accuracy though not with actual accuracy. Even if the substance is wholly omitted still Ss. 225 and 537 may be considered and applied if the accused has not been misled, 32 M. 365 at 387; 33 B. 77; 32 M. 3. An accused person is entitled to know with certainty and accuracy the nature of the charge brought against him, more especially when it is sought to implicate him for acts not committed by himself, but by others with whom he was in company. 11 C. 106; 39 C. 781; 22 C. 276.

SUB-SECTION (2).—This sub-section was inserted in the Code of 1898 to set at rest the conflicting rulings in 17 A. 183; 18 A. 116; 19 B. 749 and 21 C. 193. This is an exception to the general provisions contained in Ss. 221, 223 and 229 and modified the rule as to charges of criminal breach of trust, etc., but does not restrict in any way the scope and object of S. 234, 12 Bom. L.R. 226. The operation of this sub-section is not confined to cases where exact dates and amounts cannot be specified so as to comply with sub-section (1) of this section, even where these particulars are known, the charge in respect of the gross sum is permissible and the charge would be held to be a charge for a single offence within S. 234. The plain meaning of the language of the sub-section appears to be that where a man in a certain capacity is entrusted from time to time with various sums of money and commits criminal breach of trust in respect thereto, he may be charged with an offence in respect of the gross sum embezzled, and it is not necessary to specify particular items embezzled or the exact dates on which they were so embezzled, 42 A. 822, and that a charge so framed shall be deemed to be a charge for one offence, provided that the period within which such embezzlement has taken place is not more than one year, 33 A. 36 at 38—39. This sub-section dispenses with the particulars which otherwise should be required to be stated, but it does not say that the gross sum is to include every act of misappropriation committed within the dates specified in the charge. 50 C. 622. See also 27 A. 69; 29 M. 558; 31 C. 923. The language of the sub-section does not prohibit the giving of exact dates on which the particular sums were embezzled during the course of one year and even then the charge will really be a single charge within S. 234 *infra*, 33 A. 36 at 39. Giving greater details than is really required will not affect the jurisdiction of the Court or prejudice the accused in any way, 30 B. 49; 40 C. 846. There cannot be the slightest doubt that this section does not cover two sets of offences, any number of which may be tried together. This sub-section refers to cases of criminal breach of trust or dishonest misappropriation of money and it is not necessary to specify the separate sums which have been embezzled provided that the time included between the first and the last date shall not exceed one year. This sub-section does not apply to an offence under S. 477A, I.P.C., falsification of accounts, 28 C. 860; 41 C. 722; 4 Bom. L.R. 433; 35 C. 480; 30 M. 328; 17 Cr. L.J. 369; 17 M.L.J. 141; (1911) 2 M.W.N. 536; 38 A. 42; 30 A. 351; or to the offence of cheating, 1 A.L.J. 599. It is not enough to show that there was an embezzlement at some time before during or after the period specified, 17 C.W.N. 479—14 Cr. L.J. 219—19 Ind. Cas. 315. The wording of the sub-section refers to a single accused; and since two persons cannot be guilty of misappropriation or breach of trust of the same sum of money, the charge must be of the substantive offence as against one and abetment as against the other, or in the alternative by way of making each accused abet the act of the other, 18 C.W.N. 600—13 Cr. L.J. 508—15 Ind. Cas. 850.

223. When the nature of the case is such that the particulars mentioned in sections 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such

When manner of committing offence must be stated.

particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

Illustrations.

(a) A is accused of the theft of a certain article at a certain time and place. The charge need not set out the manner in which the theft was effected.

(b) A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B.

(c) A is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by A which is alleged to be false.

(d) A is accused of obstructing B, a public servant, in the discharge of his public functions at a given time and place. The charge must set out the manner in which A obstructed B in the discharge of his functions.

(e) A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B.

(f) A is accused of disobeying a direction of the law with intent to save B from punishment. The charge must set out the disobedience charged and the law infringed.

SCOPE OF THE SECTION.—This section provides that when the particulars given as required by the preceding section do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the offence was committed. In a case of extortion or obtaining money from several persons by unlawful means, it must be stated with some approach to accuracy the approximate sums alleged to have been obtained from each person and the nature of the extortion against each. It is not sufficient to say that at the close of the evidence the accused knows what is alleged against him, 17 Cr. L.J. 411. In a charge under S. 294 I.P.C. for singing, reciting, or uttering obscene songs etc., the obscene words must be set out in the charge as the words uttered constitute the gist of the offence. In a charge of cheating or attempt to cheat the manner of cheating must be set out in the charge, 8 C.W.N. 278 (F.B.). In a charge of giving false evidence in the course of a long deposition it is the duty of the prosecution to specify the particular statements made by the accused which are intentionally false and when no such particulars are specified, the accused has a legitimate grievance, 38 C.L.J. 163—25 Cr. L.J. 177—76 Ind. Cas. 417; 35 C. 808; 10 C.W.N. 1099. The charge should also specify the Court or officer before whom that the date on which the offence of perjury was committed and also the particular stage of the judicial proceeding and the exact words alleged to be false, 9 W.R. (Cr.) 85; 10 W.R. (Cr.) 47; 7 B.L.R. (Appx) 68—16 W.R. (Cr) 47. A charge should state and name S. 149 I.P.C. if an accused person is to be charged constructively by force of S. 149; I.P.C., 18 L.W. 946—33 M.L.T. 210; (1924) M.W.N. 47; 11 C. 108; 39 C. 781; 22 C. 276. but a conviction had on such a defective charge is not bad unless the accused has been materially prejudiced in his defence, 47 M. 748 (F.B.). In a charge of rioting the common object of the unlawful assembly should be stated in the charge, 22 C. 275; 11 C. 108; 25 C. 630; 33 C. 295; 39 C. 761; 3 C.W.N. 605; 35 C. 718 and 384; 32 M. 3; 15 C.W.N. 422. When a charge has been expressed in very vague terms, the prosecution on appeal should be limited to the particular sense in which the charge was understood at the trial, 2 B. 142.

Words in charge taken in sense of law under which offence is punishable.

324. In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable.

The description of crimes in the Penal Code must of necessity be expressed in abstract terms. But the very object of a trial is to determine whether particular acts or omissions on the part of the accused fall or do not fall within the rule thus abstractedly stated. Conformably to this principle all the model charges in Sch. V of the Code contain or imply the setting

forth with reasonable particularity of the matters alleged to constitute the offence. 2 B. 132 at 133.

225. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

Effect of errors.

Illustrations.

(a) A is charged, under S. 242 of the Indian Penal Code, with "having been in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit," the word "fraudulently" being omitted in the charge. Unless it appears that A was in fact misled by this omission the error shall not be regarded as material.

(b) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge, or is set out incorrectly. A defends himself, calls witnesses, and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(c) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B, and A had no means of knowing to which of them the charge referred, and offered no defence. The Court may infer from such facts that the omission to set out the manner of the cheating was, in the case, a material error.

(d) A is charged with the murder of Khoda Baksh, on the 21st January, 1882. In fact, the murdered person's name was Haidar Baksh, and the date of the murder was the 20th January, 1882. A was never charged with any murder but one, and had heard the inquiry before the Magistrate, which referred exclusively to the case of Haidar Baksh. The Court may infer from these facts that A was not misled, and that the error in the charge was immaterial.

(e) A was charged with murdering Haidar Baksh on the 20th January, 1882, and Khoda Baksh (who tried to arrest him for that murder) on the 21st January, 1882. When charged for the murder of Haidar Baksh, he was tried for the murder of Khoda Baksh, the witnesses present in his defence were witnesses in the case of Haidar Baksh. The Court may infer from this that A was misled, and that the error was material.

SCOPE OF THE SECTION.—This section is designed to prevent miscarriage of justice by reason of failure to comply with technical provision of law unless the accused has been misled. This section refers to error in framing the charge at any stage of the case and provides that such error or omission in a charge will not vitiate proceedings, 10 B.H.C.R. 373; 32 M. 3. It refers only to *errors in framing the charge* and does not specifically deal with a case of *absence of charge*. See also S. 232, *infra*, which deals with absence of charge or an error in the charge, and S. 535, *infra*, refers only to an error or omission in the charge and does not cover the case of absence of charge. If the accused was in fact prejudiced, his consent to such an illegal procedure is perfectly immaterial, for there can be no waiver in a criminal trial, 48 M. 117 at 120; 18 M.L.J. 330; 6 C.W.N. 202; 21 A.L.J. 89. It is a well established principle of criminal law that a prisoner can consent to nothing which is not authorised by law nor can the consent of Counsel for the accused person validate a course of procedure which the law does not authorise, 21 Cr.L.J. 68—75 Ind. Cas. 980; 35 M. 117 at 120; 28 M.L.J. 329—(1913) M.W.N. 229; 20 C. 23; 12 W.R. (Cr.) 59; 16 W.R. (Cr.) 69; 23 W.R. (Cr.) 59; 2 Pat. 792 at 795; where a criminal trial takes place under a procedure not authorised by law, even the consent of the accused and their counsel will not validate the proceeding. When no charge has been framed or a defective one has been framed there is no justification for a *de novo* trial. But the trial is to be proceeded with from the stage at which the illegality occurred. 25 Cr.

L.J. 1152=81 Ind. Cas. 976. When the common object of an unlawful assembly is stated in the complaint and found by the Court, mere omission of it in the charge, will not vitiate the trial, 28 Bom. L.R. 497=27 Cr. L.J. 744=85 Ind. Cas. 72 where 21 C. 872 is followed and 22 C. 276 is distinguished.

AT ANY STAGE OF THE CASE.—If the mistake is found out after the conclusion of the trial but before pronouncing judgment, the Court is entitled to proceed in accordance with the provisions contained in Ss. 226 to 231, *infra*. Ss. 255 and 271, *infra*, require that where an accused is called on to plead to a charge it should be read and explained to him. If this direction of law is complied with there can be no reasonable objection at any subsequent stage of the cause to regard the charge to be indefinite.

UNLESS ACCUSED HAS IN FACT MISLED.—The words "*in fact*" and "*it has occasioned a failure of justice*" were introduced in the Code of 1898. If the charge is drawn up in a somewhat informal manner but is sufficiently explicit to give the accused notice of the charge, the irregularity is cured by this section, 33 B. 77, see also 8 A. 668. The words "*a failure of justice has in fact occasioned*" occur in S. 535, *infra*. Also see the explanation to S. 537, *infra*, as to what determines whether an error, omission or irregularity has occasioned a failure of justice. Where in a charge of cheating the exact date when the offence alleged to have been committed is not stated but the time is approximately indicated the omission will not affect the legality of the trial if the accused has not been materially prejudiced, 27 Cr. L.J. 908=95 Ind. Cas. 221.

226. When any person is committed for trial without a charge, or with an imperfect or erroneous charge, the Court, or, in the case of a High Court, the Clerk of the Crown may frame a charge, or add to or otherwise alter the charge, as the case may be, having regard to the rules contained in this Code as to the form of charges.

Procedure on commitment without charge or with imperfect charge.

Illustrations.

(1). A is charged with the murder of C. A charge of abetting the murder of C may be added or substituted.

(2). A is charged with forging a valuable security under S. 467 of the Indian Penal Code. A charge of fabricating false evidence under S. 193 may be added.

(3). A is charged with receiving stolen property knowing it to be stolen. During the trial it incidentally appears that he has in his possession instruments for the purpose of counterfeiting coin. A charge under S. 295 of the Indian Penal Code cannot be added.

COMMITTED WITHOUT A CHARGE.—The words "*without a charge*" do not warrant a Magistrate from committing the accused without framing a charge. The words were intended to cover cases where through inadvertence no charge was framed. The words "*without charge*" will apply not only to a case in which there is no charge but also to a case in respect of such offence as the Sessions Judge or Clerk of the Crown may think the accused ought to be tried, 8 B. 200 ; 12 C.W.N. 577. A Court of Session may add charges under Ss. 497 and 498, I.P.O., under this section when the complaint of the husband also involved offences committed under those sections, 34 C.L.J. 51. But the addition of a charge which is not supported by the evidence before the committing Magistrate is *ultra vires* and not merely an error of procedure, 3 M. 351 ; 32 C. 22 ; 11 B.H.C.R. 278 ; 16 Cr.L.J. 673=30 Ind. Cas. 128. Under S. 497 and S. 526 Cl. (1) (iv) *infra* a commitment may be made without a charge against the accused, 27 M. 54 at 56. The illustrations to the section were added in the Code of 1898 to make the meaning of the section clear.

WITH AN IMPERFECT CHARGE.—Imperfect implies defect in form. A Judge's power to alter a charge after commitment is limited by this section to imperfect or erroneous charges, 28 Cr. L.J. 1162=81 Ind. Cas. 986 ; 8 A. 668.

COURT MAY FRAME A CHARGE, ETC.—A Sessions Judge can proceed under this section only on the facts appearing from the magisterial inquiry, 24 Cr. L.J. 177—71 Ind. Cas, 593.

MAY FRAME, ADD TO OR ALTER THE CHARGE.—A Sessions Judge ought to scrutinise the charges upon which accused persons are committed to his Court in the light of the fact disclosed in the Preliminary Register in order that additions or alterations may, if necessary, be made under this section before the accused are called upon to plead to the charge under S. 271, 18 Cr. L.J. 346—38 Ind. Cas, 730; 11 A.L.J. 188. The ultimate responsibility of settling the charge against the accused person committed to the Sessions Court rests on the Sessions Judge who can alter or change the same, 16 Bom. L.R. 80—18 Cr. L.J. 292—23 Ind. Cas, 500. A Sessions Court is not a Court of original jurisdiction and though vested with large powers for amending and adding to charges can only do so with reference to the immediate subject of the prosecution and committal and not with regard to matters not covered by the indictment. He has full discretionary power under this section to amend the charge 32 C. 22; 26 Cr. L.J. 5—33 Ind. Cas. 485, 21 Cr. L.J. 87 or add a completely new charge. See S. 237, *infra*. But the power to alter should be used with great caution, 6 B.H.C.R. (Cr. Ca.) 76. But under proper circumstances a Sessions Judge has power to add a charge distinct from the charges framed by the committing Magistrate, 28 C.W.N. 581. Any action under this section can be taken by the Sessions Judge only on the facts disclosed by the Magisterial inquiry and where the facts show there is any omission by the Magistrate, an additional charge may be framed by the Sessions Judge, 24 Cr. L.J. 177—71 Ind. Cas. 593. A Sessions Judge has no power under this section to expunge a charge before calling upon the accused to plead to it, 7 C.L.R. 143.

HAVING REGARD TO THE RULES IN THE CODE AS TO FRAMING OF CHARGES.—See Schedule V, form No. 38, *infra*, and the provisions contained in this Chapter.

227. (1) Any Court may alter or add to any charge at any time before judgment is pronounced or, in the case of trials before the Court of Session or High Court, before the verdict of the Jury is returned, or the opinions of the assessors are expressed.

Court may alter charge.

(2) Every such alteration or addition shall be read and explained to the accused.

SCOPE OF THE SECTION.—This section provides for amendment of the charge at a late stage, while S. 226, *supra*, provides for amendment of the charge at the commencement of the trial. This and S. 237 necessarily go together and it is not the intention of the Legislature to convict an accused person of an offence of which he has not been told anything, 23 A. L.J. 438—25 Cr. L.J. 1087—88 Ind. Cas. 1. An application for amendment of the charge should be made immediately the charge is read out and explained to the accused by the Court, 27 C. 839; 18 Cr. L.J. 346. The accused must know what he is charged with and what offence he has to answer, S. 237, *infra*, must be read with this section. A court cannot convict an accused person of an offence of which he has not been told anything. It is not just to convict a man without telling him his offence, 24 A.L.J. 168—27 Cr. L.J. 152—91 Ind. Cas. 888; see also 23 A.L.J. 436. An application under S. 226, *supra*, should be considered and decided at once and not postponed till the conclusion of the trial, 16 B. 414.

COURT MAY ALTER OR ADD TO ANY CHARGE.—These words were added in the Code of 1898 to meet the conflicting rulings in Bombay and Allahabad, 8 B. 200; 9 A. 526. A Sessions Judge cannot add to alter or amend the charge in such a way as to produce a charge in support of which evidence was not given before the Magistrate. A Sessions Judge should not alter a charge of dacoity into one of robbery without assigning a reason and before hearing the evidence, 16 C.W.N. 328—13 Cr. L.J. 127—13 Ind. Cas. 788. The Sessions Judge could without impropriety send the case down to the Magistrate and suggest that he should consider

whether there were or were not grounds for inquiring into a more serious charge and the course adopted by the judge by adding a new charge and calling evidence in support of the same was not merely an error of procedure but an improper assumption of jurisdiction and the conviction was quashed by the High Court, 3 M. 351. A Court of Session is not a Court of original jurisdiction and though vested with large powers of amending and altering the charges it can only do so with reference to the immediate subject of the prosecution and not with regard to a matter not covered by the indictment, (1920) M.W.N. 149-11 L.W. 317-21 Cr. L.J. 57-54 Ind. Cas. 409, although the law empowers a Sessions Judge to add a charge at any time before pronouncing judgment he must in doing so exercise a sound and wise discretion. When the Court drew up a charge of a compoundable offence read out and pleaded by the accused and on the day fixed for argument the parties put in a petition compounding the offence the Court should accept the compounding and has no power to alter the charge to a non-compoundable offence, 13 Cr. L.J. 540-24 Ind. Cas. 938. A grave charge like *dacoity* should not be suddenly added and the trial proceeded with at once and the accused called upon his defence immediately, 6 C.W.N. 73; 16 Cr. L.J. 573-30 Ind. Cas. 125, see also 31 B. 218; 29 C. 415, following 5 A. 233. When an application for amendment of a charge is made it should be decided immediately and not postponed, 16 B. 414 at 425; 16 Cr. L.J. 573-30 Ind. Cas. 123. An amendment of a charge at a very late stage to cure an illegality in the trial is not permitted by law. Where the charge originally framed was for more than three offences and after the case had been tried the illegality was brought to the notice of the Magistrate in the course of arguments of counsel and he amended the charge immediately as to include only three offences, held as the charge was bad on the face of it, it could not be cured by amending it by striking out one charge, as the mischief which the Legislature intended to safeguard against by enacting the provision of law may already have been done, 29 M. 569, followed in 49 M.L.J. 93, see also 25 M. 61 (P.C.). It was held in 12 A. 551 that the power to alter in this section may be taken to include the power to *withdraw* a charge. The word "alter" ought not to be taken as tantamount to expunge" 7 C.L.R. 143.

BEFORE THE VERDICT OF THE JURY.—On a trial by jury the Sessions Judge has no power to alter the charge after the jury returned their verdict, 5 B.H.C.R. (Cr. Ca.) 9. "Returning verdict" means return of the final verdict which the Judge was bound to accept, 6 B. 200. Under S. 303 *infra* the Judge is entitled to ask the jury such questions as are necessary to ascertain what the verdict is and when those questions are answered by the jury and accepted by the Judge the final verdict which the Judge is bound to record cannot be said to have been delivered.

SUB-SECTION (2).—This sub-section makes it imperative on the judge to read and explain to the accused every altered and added charge so that he may understand thoroughly the nature of the new charge which he is called up to plead, 5 C. 826; 7 C. 96; 9 M. 61; 8 B. 200.

228. If the charge framed or alteration or addition made under section 226 or section 227 is such that proceeding immediately with the trial is not likely, in the opinion of the Court to prejudice the accused in his defence, or the prosecutor in the conduct of the case, the Court may, in its discretion, after such charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered charge had been the original charge.

When trial may proceed immediately after alteration.

OBJECT OF THE SECTION.—This section lays down the procedure to be adopted after the charge is amended or altered or added to. The intention of the Legislature is, that whenever an amendment of the charge in any way tends to the prejudice of the prisoner, steps should be taken to prevent the consequence arising by ordering a new trial or suspending the trial going on, to enable him to make his defence, or to examine any material.

witness or to recall any witness already examined. It is only in the case of charges clearly related that a trial goes on forthwith after an amendment, 11 B.H.C.R. 278 at 280. Where there is a doubt as to whether the alteration or addition of a charge will or will not prejudice an accused person, the leaning of the Court should be in favour of the accused, 6 B.H.C.R. (Or. Ca.) 75. When a new grave charge like dacoity was added, the Judge will not be exercising a sound and judicial discretion in proceeding with the case immediately, 6 C.W.N. 73. A Sessions Court also cannot add a charge so as to take cognizance of an offence without a commitment to it by the Magistrate, 3 M. 331; 32 C. 22; 21 Cr. L. J. 57—54 Ind. Cas. 309.

NOT LIKELY TO PREJUDICE THE ACCUSED IN HIS DEFENCE.—It is difficult in some cases to say whether an amendment will prejudice a prisoner in his defence upon the merits; in some cases it is clear that an amendment will not have that effect; in others it is equally clear it will; and where it is doubtful whether an amendment will or will not prejudice the prisoner the leaning of the Court should be in favour of the prisoner, 6 B.H.C.R. (Or. Ca.) 76 at 81.

PROCEED WITH THE TRIAL.—The procedure allowed by this section will generally be adopted only where the charges are so closely related that they are only different ways of looking at the same facts so that the accused who has come prepared to meet the charge on which he was committed to stand his trial at the Sessions Court will be under no disadvantage in meeting the amended or new charge, 7 B.H.C.R. 278 at 280; where however the new charge will raise different questions of law or would admit of a different defence upon the facts, the Court is bound to act under S. 229, *infra*.

229. If the new or altered or added charge is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

When new trial may be directed, or trial suspended.

When the charge is altered or added to, different questions of law or an entirely new defence may be set up by the accused upon the facts and so the Court may without immediately proceeding with the trial either direct a new trial or adjourn the trial for a reasonable time to safeguard the interests of the accused or the prosecution, 11 B.H.C.R. 278. Where a Sessions Judge is of opinion that the charge framed by the committing Magistrate does not cover the gravity of the offence and any addition or alteration of the charge by him would not be supported by the evidence on record the Sessions Judge is to send back the records to the Magistrate to consider whether grounds exist for inquiring into a grave charge, 8 B. 200. When a new trial is directed under this section the Court holding the new trial is not justified in referring to the former record as a whole, but only such portions of it as have been specially put in evidence before it. 7 C.L.R. 193.

230. If the offence stated in the new or altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge is founded.

Stay of proceeding if prosecution of offence in altered charge requires previous sanction.

The word "sanction" in S. 195 is now omitted and "complaint" of Court or public servant in writing is the expression used. In S. 197 the expression "previous sanction" is used. Is this section confined to offences referred to in S. 197 only? This seems to be a case of oversight as the section clearly referred to S. 195 also. The words "complaint of Court", it is submitted, should be added after the word sanction to make the provisions of this section applicable to S. 195 *supra* as well. When once sanction is obtained for prosecution for the

substantive offence, no fresh sanction is necessary to prosecute for abetment of the offence under this section as the new charge is founded on any but the same facts as those on which the sanction was originally obtained, 30 C. 905; 21 Cr. L.J. 230=55 Ind. Cas. 102; 12 Cr. L.J. 217=10 Ind. Cas. 156.

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 who may have been examined, and also to all any further witness whom the Court may think to be material.

Recall of witnesses
when charge altered.

This section requires that when a charge is altered by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to recall or re-summon and examine the witnesses with reference to such altered or added charge and also examine further witnesses when the charge was altered at a very late stage and no commitment should be made without giving the accused an opportunity of re-examining the witnesses and adducing defence evidence. 27 A.L.J. 239=25 Cr. L.J. 798; 26 Cr. L.J. 1197=90 Ind. Cas. 153. When the charge is altered, the alteration should be entered formally in the record of the trial, 20 M.L.J. (Sh. n.) 1.

232. (1) If any Appellate Court or the High Court in the exercise of its powers of revision or of its powers under Chapter XXVII, is of opinion that any person convicted of an offence was misled in his defence by the absence of charge or by an error in the charge, it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit.

Effect of material
error.

(2) 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.

Illustration.

A is convicted of an offence under S. 126 of the Indian Penal Code, upon a charge which omits to state that he knew the evidence, which he corruptly used or attempted to use as true or genuine, was false or fabricated. If the Court thinks it probable that A had such knowledge, and that he was misled in his defence by the omission from the charge of the statement that he had, it shall direct a new trial upon an amended charge; but, if it appears probable from the proceedings that A had no such knowledge, it shall quash the conviction.

SCOPE OF THE SECTION.—This section covers a case of absence of charge or error in the framing of a charge while S. 535 *infra* deals only with absence of charge and the procedure to be followed when prejudice to the accused has been made out, is more clearly expressed in S. 535 *infra* than in this section. This section empowers the Appellate Court or the High Court to direct a new trial on the ground that an accused person convicted of an offence was misled in his defence by the absence of a charge or an error in the charge. This is quite apart from the general powers of an Appellate Court to order a retrial when hearing an appeal under S. 423 (1) (b), *infra*. When the Court is of opinion that on the facts no valid charge could be sustained against the accused, it shall quash the conviction. Where certain owners of land were convicted under Ss. 154 and 155, I. P. C., for acts or omissions on the part of their agents but the charge framed referred only to the knowledge or belief and acts or omissions of the owners themselves and not of their agents, and on appeal the Sessions Judge held that the omission in the charge "or their agents or managers" was material and seriously prejudiced their defence, it was held that the conviction was unsustainable and a retrial was ordered,

7 C.W.N. 301. When an accused person was summoned to appear for trial for two offences, under Ss. 143 and 379, I.P.C., and he was charged only with one of these offences, *vis.*, S. 379, I.P.C., he would have good reason to suppose that the other offence had been dropped by the Magistrate, and when he is convicted of the offence not charged under S. 143 I.P.C., he must have been misled in his defence by the absence of the charge under this section. As the petitioner had already undergone a considerable portion of the sentence no retrial was ordered, 28 C. 482. But when there was nothing on the record to show that any valid charge could be preferred against an accused person, the conviction shall be quashed and further proceedings in the matter should be stopped, 28 C. 63. An Appellate Court is not entitled to convict an accused person for an entirely different offence while acquitting him of the offence charged by the lower Court, 30 C. 288; 9 Cr. L.J. 406. Nor can an accused person be convicted of grievous hurt when he was originally charged of that offence read with S. 149, I.P.C., 16 C.W.N. 1077; 41 C. 662, but in 47 M. 745 (F.B.), it was pointed out that these decisions do not consider the effect of S. 437 *infra* upon omissions in the charge and the general statement that it was now settled law that when a person is charged by implication under S. 149, I.P.C., he cannot be convicted of the substantive offence, is not correct and the legality of the conviction had, depends upon whether the accused has or has not been materially prejudiced by the form of the charge. When a charge is amended, the accused is entitled to recall and cross-examine any of the prosecution witnesses and not merely those witnesses on whose evidence the charge was amended, 26 Cr. L.J. 1497—90 Ind. Cas. 153.

MISLED IN HIS DEFENCE.—Where the accused was charged with storing wool but convicted of storing loose cotton, and where the accused was charged with causing hurt *à dao* but convicted of using a *lathi* the convictions were set aside as the accused were misled in their defence, Ratanlal 539; 17 C.W.N. 419; 4 C.W.N. cxxix; 6 C.W.N. 599.

IN RESPECT OF THE FACTS PROVED.—In criminal cases it is for the prosecution to prove its case and an accused person cannot be convicted merely because he has set up a false defence. But where evidence is purely circumstantial and the facts proved by the prosecution unless explained by the accused would justify an inference of his guilt it is lawful for the Court to consider the accused's explanation which he has put forward in his defence, 17 Cr. L.J. 23—32 Ind. Cas. 151.

Joinder of Charges.

233. For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239.

Separate charges
for distinct offences.

Illustration.

A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and causing grievous hurt.

OBJECT OF THE SECTION.—In 49 B. 392 at 201, the High Court while setting aside a conviction for misjoinder of charges (accused being tried for three breaches of trust and three falsifications of accounts in respect of the same three amounts) at one trial, made the following suggestion as to the desirability of amending this section: "We wish to add that we think the attention of the Government should be drawn to this case with a view to its being considered whether the Government of India should not be moved to amend the Code in the form of an illustration to S. 234 or otherwise to obviate difficulties of the kind that have arisen in the present case. We think that obviously in this case (and probably in all such cases) there is no prejudice to the accused if he is allowed to be tried in one trial for three separate offences of breach of trust committed within one year and also three separate but unconnected offences of falsification of accounts in regard to those breaches of trust. Regrettable delay and expenditure are entailed by the present law as interpreted by the Courts which frequently necessitate the upsetting of trials and in consequence either retrial of the accused or his getting off scot-free." This section contains the general law, and the reason

for it is, that the mind of the Court might be prejudiced against the prisoner if he were tried in one trial upon different charges resting on different evidence. It might be difficult for the Court trying him on one of the charges not to be unfairly influenced by the evidence against him on the other charges, 7 A. 174 at 177; 19 C.W.N. 972. An accused also is likely to be bewildered in his defence by having to meet many disconnected charges and a fair trial is to be endangered by the production of a mass of evidence of different matters tending to create undue suspicion against the accused, 15 B. 491; 29 M. 569. The general rule is that there should be a separate trial for every distinct offence. The exceptions are the cases mentioned in Ss. 234-236 and 239, *infra*. These exceptions must be strictly construed so as not to defeat the right of independent trial conferred by the general law, 5 Pat. L.J. 11 at 13, non-compliance with the provisions of this section is not a mere irregularity but an illegality which vitiates the trial. Where two offences are quite distinct and separate and there is also an interval of time between their commission, they cannot be said to form the same transaction and a joint trial is illegal, 21 A.L.J. 859=23 Cr. L.J. 964=81 Ind. Cas. 612. A trial in contravention of the section unless justified by the exceptional sections is not an irregularity but an illegality, 11 A.L.J. 188=14 Cr. L.J. 116=18 Ind. Cas. 676.

FOR EVERY DISTINCT OFFENCE THERE SHALL BE A SEPARATE CHARGE.—

Where a charge has been framed under Ss. 326 and 149, I.P.C., a conviction under S. 326, I.P.C., is not necessarily bad, but it depends on whether the accused has or has not been prejudiced by the form of the charge. The omission of S. 149 from the charge does not create an illegality by reason of this section which provides that for each distinct offence there shall be a separate charge. S. 149, I.P.C., creates no offence but like S. 34, I.P.C., is merely declaratory of the principle of common law its object being to make it clear that the accused who comes within that section cannot put forward as a defence, that it was not his hand that committed the offence and a person cannot be tried and sentenced under S. 149, I.P.C., alone as no punishment is provided for under that section, 47 M. 745 (F.B.). The provisions of this section are *mandatory*, 40 C. 168; 28 M.L.J. 331; 38 A. 42. This section must be strictly followed save and except, where the law itself provides an exception, 41 C. 722 at 725; 39 M. 527. This section equally applies even to summons-cases where it is not necessary to have a written charge, 41 C. 694. Every act in breach of the conditions of the license or permit under the Opium Act is a distinct offence and under this section should be made the subject of a separate charge and tried separately, 30 Ind. Cas. 1005. When there are two distinct offences for each offence a separate charge ought to be made under this section. Though certain provisions of the Code provide that more than one charge may in certain circumstances be tried together, that does not justify the inclusion in one charge of several distinct offences which is an illegality, 40 C. 816 at 818. A joinder in one charge of two distinct offences though arising out of the same transaction is an illegality fatal to the trial, 10 C.W.N. 53 and 520 followed in 13 C.W.N. 1067=10 Cr. L.J. 469=4 Ind. Cas. 16. The exceptions to this section are Ss. 234, 235, 236 and 239; where the acts imputed to the accused namely of manufacturing the excisable article, seized and brought into Court and of possessing the same, and of selling from time to time various other and similar articles not before the Court and of attempting to render denatured spirit unfit for human consumption, do not constitute the same transaction; a trial in respect of all such acts is bad for misjoinder under this section, 41 C. 694. A joinder of three charges relating to different transactions is not warranted by this section and does not come under any of the exceptions provided in the Code and is therefore illegal, and such a misjoinder is absolutely fatal to the trial, 41 C. 722. S. 537, *infra* will not cure such an illegality. The disobedience of an express provision of law as to a mode of trial is not a mere irregularity; such a phrase as *irregularity* is not appropriate to the *illegality* of trying an accused person for many different offences at the same time. The remedying of mere irregularity is familiar to most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted, that this contravention of the Code comes within the description of error, omission or irregularity, 25 M. 61 at 97-98 (P.C.). These observations were made by their Lordships of the Judicial Committee with regard to S. 234, *infra*, but they

apply equally to cases falling under this section also. In 39 M. 527 the principle of the decision of the Privy Council was applied to a case falling under this section. See also 41 C. 722 and 17 C.W.N. 479. The decision of the Privy Council in 25 M. 61 has overruled the following decisions, 27 C. 839; 28 C. 10 at 11; 20 C. 537; 22 C. 276; 14 C. 395; 21 A. 127; 14 A. 502; 11 M. 441; 12 M. 273 and 10 M.L.J. 147. If the joinder of the charge was in violation of the law, the accused must have been considerably embarrassed in their defence on the remaining charges, and their acquittal on the charges which the prosecution failed to prove cannot make valid the trial held, as it was illegal *ab initio*, 33 M. 502 at 505. See also 20 M.L.J. 220; 39 M. 527; 29 M. 559; 1 M.L.T. 409; 14 C. 128. 5 Pat. L.J. 11; 21 A L J. 859—25 Cr. L.J. 984—81 Ind. Cas. 612. The joinder of two distinct offences under one charge is an illegality fatal to the proceedings, 14 Cr. L.J. 449—20 Ind. Cas. 609. The following offences are held to be distinct offences within this section :—(1) Public servant framing incorrect record, S. 166, and forgery of a Record of Court or Register, (S. 466, I.P.C.). S. C. 450; (2) dishonestly receiving stolen property, S. 411, and habitually dealing in stolen property, S. 413, I.P.C., S. C. 634; (3) theft in a building, S. 380, and dishonestly receiving stolen property, S. 411, I.P.C., 28 M.L.J. 381; 28 C. 10; 1 C.W.N. 35. Theft under S. 379 cannot be charged with an offence under S. 315, 12 Cr. L.J. 72—9 Ind. Cas. 421; (4) dishonestly receiving stolen property, S. 411 and using a false trade mark, S. 480, I.P.C., 6 C.W. N. 580; (5) three offences of breach of a trust by a servant, S. 409, and three falsification of accounts, S. 477 A, I.P.C., 30 M. 328; 41 C. 722; 26 C. 560; 49 B. 892; (6) kidnapping a boy under S. 365 I. P. C. and assaulting his mother when she went to get back the child, S. 353, I.P.C., 25 M. 454; (7) obstruction to a Railway line, S. 125, Railways Act, and resistance to lawful apprehension, S. 225, I.P.C., 29 C. 385; (8) theft in a building, Ss. 380 and resistance to lawful apprehension, S. 224, I.P.C., 4 Cr. L.J. 389; (9) offences under Ss. 372 and 373 of buying and selling a minor girl, 12 M. 273; (10) two attempts to cheat on different days are distinct offences requiring the drawing up of two charges, 2 C. L.J. 618. See also 24 A. L. J. 239 where 20 A.L.J. 320 and 32 A. 219 are referred; (11) forgery and using as genuine a forged document, 30 C. 822; (12) murder and causing disappearance of its evidence, 25 Bom. L.R. 231. But see the recent Privy Council decision reported in 6 Lah. 226 where it was held that persons charged with murder under S. 302, I.P.C., can be convicted under S. 201, I.P.C., of making away with the evidence of murder by assisting in the taking away of the dead body even though there was no formal charge under S. 201, I.P.C., if there was evidence on record to establish the charge. In two cross cases arising out of the same occurrence although two separate records are prepared, but in reality one joint trial in which the prosecution evidence in one case was treated as the defence evidence in the other, it was held that the procedure adopted was illegal and trials were set aside, 5 Cr. L.J. 351—81 Ind. Cas. 39.

SUCH CHARGE SHALL BE TRIED SEPARATELY.—This and the following sections relating to joinder of charges refer to the trial of the accused. The definite rule of law enacted herein cannot be disregarded to facilitate the disposal of a case against several accused, 39 M. 527; 41 C. 722; 40 C. 846. The Privy Council ruling in 25 M. 61 cannot be extended to preliminary inquiries held by Magistrates with a view to commit the accused to the Sessions and thus render a commitment made illegal for misjoinder of offences in the preliminary inquiry. It is open to the Sessions Court to frame separate charges and try separately as if there had been two commitments, 26 M. 592; 7 Bom. L.R. 487; 35 M.L.J. 259. But see the suggestion in 39 M. 527 at 533, that though the procedure is not obnoxious to this section, yet the procedure is not calculated to advance justice as the accused is practically on his trial the moment the prosecution starts the case. Two offences of being in possession of stolen properties belonging to different persons stolen on different days cannot be tried together in one trial, 13 C.W.N. 418—9 Cr. L.J. 277—1 Ind. Cas. 338 where 11 C.W.N. 1128 and 25 M. 61 (P.C.) are followed and 9 C. 371 not followed. Where a Magistrate framed separate charges and numbered them as distinct cases but when the witnesses were cross examined he lost the necessity of keeping the two trials separate and allowed the witnesses to be cross-examined promiscuously in respect of both the cases it was held the trial was illegal and the illegality cannot be cured by S. 537, *infra*, 29 M.L.J. 101 (F.B.)—(1915) M.W.N. 804—18 M.L.T. 95—18 Cr. L.J. 93—30 Ind. Cas. 116.

234. (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences *whether in respect of the same person or not* he may be charged with, and tried at one trial for, any number of them not exceeding three.

Three offences of same kind within a year may be charged together.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law :

Provided that, for the purpose of this section, an offence punishable under section 379 of the Indian Penal Code shall be deemed to be an offence of the same kind as an offence punishable under section 380 of the said Code, and that an offence punishable under any section of the Indian Penal Code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence.

AMENDMENT—In sub-section (1) the words 'whether in respect of the same person or not' have been added with the object of making it clear that offences of the same kind may be tried even if they were committed against different persons. The proviso is also new.

SCOPE AND OBJECT OF THE SECTION.—This section is the first exception to the previous section which requires a separate charge and separate trial for every distinct offence and allows three charges of three distinct offences of the same kind and committed within the space of one year of each other to be tried at the same time, but this does not mean that if at one time or within one year a man commits fifty distinct offences of the same kind he shall not in one day be prosecuted for more than three of such offences. See illustration (d) to S. 235, *infra*. This section merely places a statutory limit on the number of charges which may legally form part of a single trial. There is nothing in this section however to prevent an accused from being separately charged and tried on the same occasion for any number of distinct offences of the same kind committed within one year, S. C. 340. The reason for such provision is to see that the jury may not be prejudiced by the multitude of charges and the inconvenience of hearing together of such a number of instances of culpability and the consequent embarrassment both to the Judge and the accused. It is likely to cause confusion and interfere with the definite proof of distinct offences which it is the object of the Code to obtain. The policy of such a provision is manifest and the necessity of a system of written accusation specifying a definite criminal offence is the essence of Criminal Procedure, 23 M. 61 at 97-98. The exceptions to S. 233 are not mutually exclusive. The language of that section do not favour this view. If it had been intended that S. 235 (2) or S. 236 could not be made use of in co-operation with this section, this intention could have been easily expressed. If the exceptions are mutually exclusive, the provisions of S. 236 or 237 could never be invoked to prevent a miscarriage of justice arising from a failure to make good all the details of a charge joined with two other charges under this section. It is difficult to believe that the Legislature intended that a joint trial of three offences under this section should prevent the prosecutor from establishing at the same trial the minor alternative degree of criminality involved in the acts complained and therefore the exceptions are not mutually exclusive and Ss. 235 (2) and 236 may be resorted to in framing additional charges where the trial is of three offences of the same kind committed within one year, 33 B. 221 at 237-238. This section is not limited to cases where the offence has been committed against the same person; it applies also to cases where the complainants are different persons, 69 Ind. Can. 628 following 33 C. 13. This section refers only to the case of a single accused and is not applicable where more persons than one are tried jointly under S. 239, *infra*. According to the

General Clauses Act words in the singular include the plural only when there is nothing repugnant in the subject or context. Here it would be repugnant to the context to read the word "a person" as including several persons, 33 C. 292 ; 12 Cr. L. J. 288. To the general and broad rule contained in S. 239, *supra* which, applies to all trials for offence under the Criminal Law there are four exceptions, and a Court cannot and ought not to treat a case before it as an exception to the general and broad rule, unless it is satisfied that in the case before it, the charge should be brought within one of the four exceptions and it would be safer if the Magistrate or Sessions Judge would in the charge-sheet or in his judgment state that he had reasons for bringing the case under one of those separate sections. The four exceptions are contained in Ss. 234 to 239, *infra*, 11 A. L. J. 188 at 190.

OFFENCES OF THE SAME KIND WITHIN TWELVE MONTHS.—Offences are of the same kind when they are punishable under the same section and with the same amount of punishment, and when this is not the case neither S. 236 nor S. 237 can be read with this section, 20 Cr. L. J. 751—53 Ind. Cas. 169 ; 33 B. 77. When the appellant was tried on an indictment in which he was charged with no less than forty-one acts, these acts extending over a period of two years, it was held by the Privy Council that this was plainly in contravention of this section which provided that a person may only be tried for three offences of the same kind if committed within a period of twelve months and the course pursued was plainly illegal and cannot be amended by arranging afterwards what might or might not have been properly submitted to the jury, 25 M. 61 at 98 97. The word "offences" in this section cannot be held to mean not only the three offences mentioned there but also every act in itself an offence which is so connected with each of these offences as to form part of the same transaction, see 30 M. 328 ; 13 Cr. L. J. 21—13 Ind. Cas. 213 ; 4 Bom. L. R. 433 ; 41 C. 722 at 726 ; 21 Bom. L. R. 732 but see 33 B. 77 and 14 Bom. L. R. 308 ; 49 B. 892 ; which distinguished, 33 B. 221. The words "of the same kind" are not limited to offences against the same person. Where an accused was charged under one charge, four counts (1) housebreaking by night with intent to commit theft in A's house, (2) theft in A's house, (3) housebreaking by night to commit theft in B's house, (4) theft in B's house and where he pleaded guilty to the first and third counts, it was held that the words "offences of the same kind" are not limited by the explanation to this sub-section, but include a case like the present where a man has within one year committed two offences of housebreaking. 9 C. 371, *dissenting* from 4 A. 147, where it was held that a single trial is allowed only where the offences are committed in respect of one and the same person not against different complainants, within a period of one year. See also 19 C. W. N. 567 where it was held that this section is not limited to cases where the offences have been committed against the same person and it applies equally where the complainants are different persons ; But Fletcher, J., remarked that the power given by this section is however one that requires to be used with great care and caution when there are different complainants. Two acts of cheating by the same gang though against different individuals can be charged and tried at one trial, 2 Cr. L. Rev. 299 where 7 A. 171 is followed and 4 A. 147 *not followed*. The persons cannot jointly be tried for cheating, each having cheated a different person on a different date as the three acts of cheating were wholly, distinct as there was no continuity between the three acts each being a completed act in itself, 12 Cr. L. J. 208—10 Ind. Cas. 63, where 33 M. 502 and 33 C. 292 *are followed*. This section must be read subject to the special provision contained in S. 222 (2), *supra*. Embezzlement of two separate sums on two different occasions in regard to the same individual is one offence and could be included in one charge, 14 C. 128 ; 29 M. 558 ; 31 C. 928 ; 32 C. 1085 ; 27 A. 69 ; 33 A. 36, but see 12 Bom. L. R. 226. Offences of criminal breach of trust and falsification of accounts under Ss. 408 and 477A, I. P. C., are not offences of the same kind within the meaning of this section. Where three defalcations are committed on three different occasions, the false entries connected with one defalcation cannot be said to form part of the same transaction with the other defalcations or falsifications connected with them, within this section. 49 B. 892 ; 27 Cr. L. J. 305—92 Ind. Cas. 689 ; 30 M. 328 ; 41 C. 722. Waging war being a continuing offence a charge under S. 121 I. P. C. specifying more than three offences committed in the course of the same war and spread over more than one year does not contravene the provisions of this section and is not illegal. The question-

whether the various incidents formed parts of the same transaction or not must be judged by the facts of each case, 49 M. 74. The making of any number of false statements in the same deposition are not to be separately charged under this section, 35 C. 808, but once the provisions of this section are contravened the defect cannot be cured by merely striking out the offending charge after the mischief which the Legislature intended to safeguard by enacting the imperative provision has been done, 29 M. 889. See also 49 C. 858. In 41 C. 68 it was held that when the accused engaged in collecting rent was complained against by three tenants of cheating them, a single charge for all the three offences was framed, that the defect was one of duplicity and not misjoinder and there being no prejudice to the accused the trial was not bad. Where a person is charged of cheating three separate persons on three different occasions in the same month, it was held there was no misjoinder and the joint trial was justified by this section, 27 Cr. L.J. 909=96 Ind. Cas. 221, but the trial of an accused person on three charges under S. 408 and one under S. 477A, I.P.C., was held to be illegal having regard to the provisions of this and the next section, 44 A. 540 where 32 A. 219 is followed; 30 M. 328; 17 Cr. L.J. 369; 40 C. 318. See 41 C. 722; 30 A. 351; 44 A. 276 is no longer law. See the amendment in S. 299 (e).

THE PROVISIO TO SUB-SECTION (2)—Explains what is meant by "offences of the same kind" The word "section" in sub-section (2) is not invariably to be read in the singular. It is not the intention of this Code, either express or implied, to exclude from the operation of this section an offence because it is made the subject of more than one charge, 33 B. 77 at 86. The proper procedure in cases where the accused has committed numerous offences of the same kind is to select three typical cases and to confine the prosecution to them, 19 Cr. L.J. 161 and if the accused is acquitted then to proceed with the other charges. It was doubtful whether this section refers to the case of a single accused or to several accused also. In 33 C. 292, it was held that this section does not apply where several persons are jointly accused. S. 13 of the General Clauses Act was held not to apply. But in 25 M.L.T. 379 a different view was taken, See also 33 A. 467; 3 Pat. L.J. 124. Now S 299 (c) lends support to the view expressed in 25 M.L.T. 379; 38 A. 467; and 3 Pat L.J. 124.

- 235.** (1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried at one trial for, every such offence.
- Trial for more than one offence.
- (2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.
- Offence falling within two definitions.
- (3) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.
- Acts constituting one offence, but constituting when combined a different offence.
- (4) Nothing contained in this section shall affect the Indian Penal Code, section 71.

Illustrations.

To sub-section (1)—(a) A rescues B, a person in lawful custody, and in so doing causes grievous hurt to C, a constable in whose custody B was, A may be charged with, and convicted of, offences under Ss. 225 and 395 of the Indian Penal Code.

(b) A commits house-breaking by day with intent to commit adultery, and commits, in the house so entered, adultery with B's wife. A may be separately charged with, and convicted of, offences under Ss. 454 and 497 of the Indian Penal Code.

(c) A entices B, the wife of C, away from C, with intent to commit adultery with B, and then commits adultery with her. A may be separately charged with, and convicted of, offences under Ss. 498 and 497 of the Indian Penal Code.

(d) A has in his possession several seals, knowing them to be counterfeit and intending to use them for the purpose of committing several forgeries punishable under S. 466 of the Indian Penal Code. A may be separately charged with, and convicted of, the possession of each seal under S. 473 of the Indian Penal Code.

(e) With intent to cause injury to B, A institutes a criminal proceedings against him knowing that there is no just or lawful ground for such proceedings; and also falsely accuses B of having committed an offence, knowing that there is no just, or lawful ground, for such charges. A may be separately charged with, and convicted of, two offences under S. 211 of the Indian Penal Code.

(f) A, with intent to cause injury to B, falsely accuses him of having committed an offence, knowing that there is no just or lawful ground for such charge. On the trial, A gives false evidence against B, intending thereby to cause B to be convicted of a capital offence. A may be separately charged with, and convicted of, offences under Ss. 211 and 194 of the Indian Penal Code.

(g) A, with six others, commits the offences of rioting, grievous hurt and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot. A may be separately charged with, and convicted of, offences under S. 147, 325 and 152 of the Indian Penal Code.

(h) A threatens B, C and D at the same time with injury to their persons with intent to cause alarm to them. A may be separately charged with, and convicted of, each of the three offences under S. 506 of the Indian Penal Code.

The separate charges referred to in Illustrations (a) to (h) respectively may be tried at the same time.

To sub-section (2)—(4) A wrongfully strikes B with a cane. A may be separately charged with, and convicted of, offences under Ss. 352 and 328 of the Indian Penal Code.

(i) Several stolen sacks of corn are made over to A and B, who know they are stolen property, for the purpose of concealing them. A and B, thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain pit. A and B may be separately charged with, and convicted of, offences under Ss. 411 and 414 of the Indian Penal Code.

(k) A exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. A may be separately charged with, and convicted of, offences under Ss. 317 and 304 of the Indian Penal Code.

(l) A dishonestly uses a forged documents as genuine evidence in order to convict B a public servant, of an offence under S. 167 of the Indian Penal Code. A may be separately charged with, and convicted of offence under Ss. 471 (read with 466) and 196, of the same Code.

To sub-section (3).—(m) A commits robbery on B, and in doing so voluntarily causes hurt to him. A may be separately charged with, and convicted of, offences under Ss. 323, 392 and 394 of the Indian Penal Code.

SCOPE AND OBJECT OF THE SECTION.—The object of the section is to prevent the accused from being bewildered in his defence by having to meet many disconnected charges. The prospect of a fair trial is likely to be impaired by the production of a mass of evidence directed to many different matters tending to induce an undue suspicion against the accused, 15 B. 491; 15 B. 414. The provisions of this section and S. 299 are not imperative but merely enabling and if there is risk of embarrassing the defence such joinder of charges should not be resorted to. 52 C. 253 at 265. The language is "he may be charged with." It is not illegal to try an accused person for different offences committed, *vis.*, rioting and causing hurt separately, 8 C. 481. In considering whether this section applies, the Court has to consider carefully whether the series of acts with which the accused is charged are so

connected together to form the same transaction, 11 A.L.J. 188. This section should be read along with S. 35 *supra*, and S. 71, I.P.C. This section is very much akin in phraseology with S. 239, *infra*; S. 239, *infra*, appear to be order in scope than this section, but the main underlying principle governing these sections seem to be common, 5 Pat. L.J. 11 at 13, while this section prescribes rules for criminal pleading and procedure to be followed in the trial of offences falling within its purview, S. 35, *supra* and S. 71, I.P.C. deal with assessment of punishment for those offences. In cases falling under sub-section (1) the punishment is regulated by S. 35 *supra*, and in cases falling under sub-sections (2) and (3) of this section the punishment is regulated by S. 71, I.P.C. This section must be interpreted in a broad and common-sense way and not by a technical dissection of the language employed. There is a clear distinction between the three sub-sections of this section. Reading the whole section with S. 71, I.P.C., we get a *fourfold* result which may be stated thus :—

(1) A repetition in the same transaction of several acts of exactly the same character may constitute one crime, *e.g.*, a number of blows on one person, a number of lies in one continuous deposition, a number of articles stolen at one house-breaking. That is a case governed by S. 71, I.P.C.

(2) A single transaction may give rise to either—

(a) Several offences of different character each complete in itself and distinct from the other *e.g.*, criminal breach of trust accompanied by falsification of accounts as a preliminary or a sequel to such breach ; or,

(b) several offences of the same character affecting different persons, *e.g.*, a single-gunshot fired with criminal intent which injures two or more persons.

Such cases come within sub-section (1) of this section.

(3) The same series of acts may constitute different offences. All may be charged, but only one offence can be regarded as committed for the purpose of inflicting punishment, *e.g.*, a person who sets fire to a warehouse. Here his act is an offence under S. 435, I.P.C., and also under S. 433, I.P.C., and though he may be charged for both he cannot be punished for more than one of these offences. Here we have a case under sub-section (2) of this section and S. 71, I.P.C.

(4) An act in itself an offence may become either an aggravated form of that offence or a different offence when combined with some other acts, innocent or criminal. Here we have a compound offence which as well as its component minor offences may be charged under sub-section (3) of this section ; but again S. 71, I.P.C., controls the punishment.

These provisions of law must not be confused with the provisions of S. 35 *supra* ; separate offences which come under S. 71, I.P.C., and may be charged under sub-sections (2) and (3) of this section are not *distinct* offences within the purview of S. 35 *supra* ; while sub-section (1) of this section seems to refer to distinct offences which are separately punishable, 14 Cr. L.J. 185—18 Ind. Cas. 887. See also 33 C. 433 ; 50 C. 94.

ONE SERIES OF ACTS SO CONNECTED AS TO FORM THE SAME TRANSACTION.—The Joint Committee remarked thus : “ We think it will be dangerous, if not impossible to attempt any definition of the phrase ‘ *in the course of the same transaction.*’ An exhaustive definition is not feasible and if the phrase is altered, the Courts will be deprived of the guidance of a long series of rulings and we do not find any pronounced conflict of opinion on the rulings.” There is no definition of the expression “ *the same transaction.*” The meaning to be attached to it must be gathered from the context in which it occurs in various sections and illustrations. According to its etymological and dictionary meaning the word “ *transaction.*” means “ *carrying through* ” and suggests not necessarily proximity in time so much as continuity of action and purpose. The same metaphor implied by that word is continued in the illustrations, where the phrase used is “ *in the course of the same transaction.*” In S. 235 the phrase is used in a connection which implies that there may be a series of acts ; illus. (f) to that section indicates that the successive acts may be separated by an interval of time and that the essential progressive action, all pointing to the same object. In S. 239 a series of acts separated by intervals of time are not enclosed provided that those jointly tried have

throughout been directed to one and the same object, 30 B. 49 at 54-55. Two acts of kidnaping may be tried together under this section but the operation of this and S. 35, *supra*, cannot be combined, as by doing so the rule laid down in S. 233 *supra* would be frustrated. The main principle is, for every distinct offence there should be a separate trial and the two exceptions are enacted in this and S. 235, *infra*. Permitting a joint trial in respect of two sets of separate and independent transactions in which different offences have been committed would create such an amount of confusion as would in most cases end in a distraction of the minds of the judges and jury and the accused persons themselves. 24 A.L.J. 239-27 Cr. L. J. 133-91 Ind. Cas. 815. The real and substantial test for determining whether several offences are connected together so as to form the same transaction depends upon whether they are so related to one another in point of purpose, or as cause and effect or as principal and subsidiary acts as to constitute one continuous action. A mere interval of time between the commission of one offence and another does not by itself necessarily import want of continuity, though the length of the interval may be an important element in determining the question of connection between the two. For instance, proximity of time combined with the case as to intention and similarity of action and result was held to bring several offences as to fraudulent transfers of property within the meaning of the words "*the same transaction*" in this section, 27 B. 135 at 138. These two Bombay decisions were *approved* and *followed* in 42 C. 760; 1 Lah. 662, 27 Cr. L.J. 455-93 Ind. Cas. 248. See also 7 M.L.T. 387; 2 Cr.L. Rev. 484; 23 M.L.J. 397-(1918) M.W.N. 251-17 M.L.T. 252-16 Cr. L.J. 323-28 Ind. Cas. 659; 33 M. 502; 21 Cr. L.J. 237; 42 C. 957; 27 C.W.N. 626; 5 Pat. L.J. 11; 50 C. 1004; 13 C.W.N. 1113; 23 A.L.J. 8; 25 Cr. L.J. 533-77 Ind. Cas. 997. The idea conveyed by the words "*same transaction*" seems to be obvious enough and it may be doubted whether it can be compendiously expressed in simple and clearer language. And generally speaking there can be very little difficulty in arriving at a proper conclusion in a concrete case. For instance, in this case, what is said to connect the different acts charged into one transaction is the allegation that these acts were committed by the six persons in pursuance of a systematic scheme for defrauding those members of the public who might subscribe to the Fund. If this contention is sound then if the company was carried for ten or twenty years, and a hundred acts of embezzlement were committed during that period the accused would be liable to be tried at one trial for all these offences. Obviously this cannot be the scope of S. 235. No doubt proximity of time any more than unity of place is neither a necessary nor decisive test of what constitutes "*the same transaction*" though such proximity often furnishes good evidence of connection which unites several acts into one transaction, 33 M. 502; See 28 M. 125; 27 B. 135; 30 B. 49; 15 B. 491; 16 B. 414 at 424. *Community of purpose of design and continuity of action* are essential elements of the connection necessary to link together different acts into one and the same transaction. In such cases the acts alleged to be connected with each other must have been done in pursuance of a particular end in view and as accessory thereto or perhaps as suggested by the circumstances in which the acts in pursuance of the original design were done and in close proximity of time to these acts. For it may happen that an act is done with a particular object in view but the final aim is abandoned for some time and pursued afterwards. . . . As regards community of purpose it would be going too far to lay down that the mere existence of some general purpose of design is sufficient to make all acts done with that object in view, part of the same transaction. If that were so, the result would be startling, . . . the purpose in view must be something particular and definite such as where a man with the object of misappropriating a particular sum of money or of cheating a particular individual of a certain sum falsifies books of account or forges a number of documents, 33 M. 502 at 506-507; 38 C. 453; 19 C.W.N. 672; 16 Cr. L.J. 3-26 Ind. Cas. 307; 1 Lah. 862; 27 C.W.N. 626. Courts have not to concern themselves with the ultimate object of the offender in determining the nature of the transaction. The object may be to cause injury in some way or other to the complainant but it is the immediate purpose that determines the character of the particular transaction. . . . The criterion is, what was it that the offenders had in view as their immediate object? Mere interval of days will not disturb the oneness of the transaction; nor necessarily the fact that different sets of persons were engaged on different occasions. But if the aim of the accused on different occasions is directed towards effecting different purposes, the transactions are different,

28 M.L.J. 397 at 402—(1918) M.W.N. 241—17 M.L.T. 242—16 Cr.L.J. 323—28 Ind.Cas. 659. In each case it is a question of fact whether the acts are so connected together as to form part of the same transaction and the word "transaction" as is evident from the illustrations to the section should be read in the ordinary sense of a completed act, 7 M.L.T. 267 followed in 28 M.L.J. 397—16 Cr. L.J. 695—26 Ind. Cas. 133; 4 Cr. L. Rev. 484; 21 A.L.J. 820—25 Cr. L.J. 466—77 Ind. Cas. 818; 19 A.L.J. 392—22 Cr. L.J. 641—63 Ind. Cas. 401; 26 Cr. L.J. 1513—30 Ind. Cas. 297; 49 C. 578; 28 Cr. L.J. 1802—90 Ind. Cas. 706. Where an accused is charged with five murders in one day, three in one village in the forenoon and two in another village in the afternoon, one charge cannot be framed as the murders are not committed in the same transaction and the single charge is against the provision of this section, 17 A.L.J. 614—20 Cr. L.J. 353—50 Ind. Cas. 833. It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction; but circumstances which must bear on the determination of the question in an individual case may be easily indicated; they are—(1) *proximity of time*, (2) *unity or proximity of place*, (3) *continuity of action*, and (4) *community of purpose or design* 42 C. 957 at 983 following 21 C.L.J. 195 and 201. This appears to be a good working test of what should or should not be regarded as the same transaction, 35 C.L.J. 327 at 829. The expression "same transaction" used in this and S. 239 has been the subject of discussion in numerous cases. It has been held in some cases that if a series of acts are so connected together by proximity of time, community of criminal intention and continuity of action and purpose, or from the relation of cause and effect, as to constitute, in the opinion of the court one transaction, then the accused may be charged with and tried at one trial for every offence committed in such series of acts and if more persons than one are accused of different offences in a series of acts so connected, they may be tried together. In other cases it has been held the word "transaction" suggests not necessarily proximity in time so much as continuity of action and purpose, *i.e.*, it is not necessary that the act should have been committed all on the same occasion, but it is sufficient that though separated by a distinct interval of time they are closely connected by continuity of purpose or progressive action towards a single object. In accordance with the last mentioned view it has been held that, where the accusation against all the accused persons is that they carried out a single scheme by successive acts done at intervals and there was a complete unity of project and the whole series of acts were so linked together by one motive and design as to constitute one transaction within the meaning of S. 239, a joint trial is not only legal but is demanded in the interests of public time and convenience. In all these cases, however the foundation for the procedure is the association of two or more persons concerning from start to finish to attain the same end. 30 C. 1003 at 1008-9, Joint trial for offences falling in two distinct transactions is not permitted, 42 A. 12; 21 Bom. L.R. 732. The mere fact that complaints were made on the same day or that the motive of the commission of the offence was the same on all the four occurrences does not at all go to show that the offences were committed in the course of the same transaction, 18 Cr. L.J. 739—30 Ind. Cas. 739. The question whether certain offences specified in different charges were or were not so connected together that it might fairly be said that they had been committed in the course of the same transaction is substantially one of fact, 26 Cr. L.J. 29—83 Ind. Cas. 509.

INSTANCES OF CLEAR MISJOINDER OF CHARGES.—(1) act of permitting cattle to trespass, subsequent rioting and rescue, 7 M.L.T. 267—(1910) M.W.N. 531—11 Cr.L.J. 293—6 Ind. Cas. 242; (2) obstructing an Amin of a Civil Court in executing a decree and subsequent assault on the decree-holder's son, 13 C.W.N. 1113; (3) kidnapping a child, its wrongful confinement, and assault on its mother when she went to get back the child, 25 M. 434; (4) offences under S. 302 and S. 201, I.P.C. causing disappearance of evidence of the same, Weir II, 301; 8 A. 252; 22 C. 638. But this ruling is now obsolete owing to the Privy Council decision in 6 Lah. 226 where it was held that a person though not charged under S. 201, I.P.C., can be convicted thereunder in a trial on a charge under S. 302. Therefore there could be no illegality in charging him under both sections in the alternative, 30 C.W.N. 816; (5) misappropriation of the proceeds of a cheque and cheating and thereby inducing delivery of property from a Railway goods shed without payment, 13 C.W.N. 1039—10 Cr. L.J. 476—4 Ind. Cas. 28.

SUB-SECTION (2) deals with offences falling within two or more separate definitions of any law for the time being by which offences are punished, see S. 71 (2) and (3), I.P.C.

SUB-SECTION (3) deals with acts constituting one offence but constituting when combined a different offence, see S. 71 (3), I.P.C., 19 C. 105; 12 C. 495; 16 C. 442; 7 A. 414 and 29; 9 A. 645; 17 B. 250.

SUB-SECTION (4).—As a matter of adjective law this section confines itself to the question of trial till the stage of conviction while S. 71, I.P.C. as a matter of substantive law deals with the question of punishment, the necessary result of a conviction. A person tried and convicted of several offences under this section is liable to be punished for each of such offences unless the case falls within the provisions of S. 71, I.P.C.

ILLUSTRATIONS.—The illustration to the various sub-sections makes the meaning of the sub-section quite clear. Illustrations (a) to (h) deal with cases of various acts committed in the course of one transaction where though the ultimate object is one, different acts are committed in the course of attaining it, and those acts form by themselves, or when combined with other different offences, Causing grievous hurt for extorting information and making false entries to attribute another cause for the death of the injured person, for offences under Ss. 193, 218, 330 and 331, I.P.C., can be tried together and such a joinder of charges comes within illustration (f) to this section, 14 Bom. L.R. 41—13 Cr. L.J. 137—13 Ind. Cas. 825. Illustrations (i) to (l) deal with cases where though the act is one yet when viewed from different aspects it constitutes more offences than one. Illustration (j) to this section supplies a conclusive answer to the contention that a person who has dishonestly received stolen property cannot possibly be charged and convicted of voluntarily concealing or disposing of the property. The illustration says as plainly as possible that both of them may be separately charged with, and convicted of offences under Ss. 411 and 414, I.P.C. This is an illustration to the general principle embodied in sub-section (2) of this section, that if the acts alleged, constitute an offence falling within two or more separate definitions of any law in force by which offences are defined or punished the person accused of them may be charged and tried at one trial for each of such offences, 49 B. 878 at 887-8. Illustration (m) deals with a case where though the elements constituting the two offences are the same to some extent the result of their combination materially differs from its component parts.

236. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

Where it is doubtful what offence has been committed.

Illustrations.

(a) A is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating.

(b) A states on oath before the Magistrate that he saw B hit C with a club. Before the Sessions Court A states on oath that B never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false.

SCOPE OF THE SECTION.—This section refers to a series of acts which are of such a nature that it is doubtful which of the several offences the facts constitute, 40 C. 168. This section is intended to apply to cases where there is no doubt that the accused person must have committed one of two or more offences punishable under either the same or different

sections, but in which *without proof of further facts* it is not possible to say which offence has been committed. When on the prosecution evidence no doubt arises as to which of several offences the accused has committed, but it is only doubtful what part, if any, the accused has taken in the occurrence, this section can have no possible application, 18 C.L.J. 574 at 577-15 Cr. L.J. 41-22 Ind. Cas. 185; 40 B. 97; 21 C. 955. This section contemplates a state of facts constituting a single offence but it is doubtful whether the act or acts involved may amount to one or another of several cognate offences, 23 C. 174; 18 C.L.J. 574-15 Cr. L.J. 41-22 Ind. Cas. 185; 35 M 308. This section only permits a charge in the alternative when it is doubtful which of several offences the facts *which can be proved* will constitute and not when there may be a doubt as to the facts which constitute one of the elements of the offence, 21 C. 955. But it is unsatisfactory to have an alternative indictment one Court charging the accused as principal and the other as accessory after the fact, 20 C.W. N. 166 at 168; see 50 C. 564; 22 C.W.N. 199. An accused may be charged in the alternative under this section with offences under S. 380, I.P.O. and S. 54, *A Calcutta Police Act* (possession or offering for sale or pawn, property believed to be stolen), and convicted under S. 237, *infra*, of the latter offence though not separately charged therewith, 50 C. 564, where 22 C.W.N. 199 is followed. So also an accused may be charged in the alternative with mischief and rioting and when not so charged an acquittal for one of the offences is a bar to the trial of the other offence by virtue of S. 403 (1), *infra*, 19 L.W. 31. A joinder of charges under S. 411 and S. 414, I.P.C., is bad unless the charges are framed in the alternative under this section. But when no such alternative charge is framed, a Magistrate cannot remedy the error at the conclusion of the trial by stating in his judgment that he would proceed only on the charges legally joined; if any charge is to be struck out, it should be done before concluding the trial thus giving the accused an opportunity to defend himself on the amended charge, 24 Cr. L.J. 86-74 Ind. Cas. 214.

SERIES OF ACTS.—These words imply two or more acts connected by some more intimate relation than that of consecutiveness in time. Two acts of swearing to certain facts before the committing Magistrate and the Sessions Court occur in the preliminary and final stages of the same trial and therefore there is a clear connection between them other than mere temporal, and therefore two series acts of swearing would form a series, 25 Cr. L. J. 1195-82 Ind. Cas. 69.

WHICH OF SEVERAL OFFENCES.—The expression "*several offences*" applies to not only two or more offences punishable under different sections of any law but also applies to two or more offences punishable under different parts of the same section. The offences mentioned in this section are not in fact offences of the same kind but offences of different kinds arising out of a single act or series of acts and combined at one and the same time, 9 C. 371. This section contemplates a state of facts constituting a single offence, but where it is doubtful whether the act or acts involved may amount to one or another of several offences. When that is the case, the accused may be simultaneously charged with and tried for the commission of all or any of the charges and after acquittal or conviction cannot be again tried on the same facts, either for the specific offence or offences for which he has already been tried or for any other offence for which he might have been tried under the provisions of this section, 23 C. 174 at 178, but if on a reversal of the conviction on one of two alternative charges, a retrial is ordered, then the retrial must be taken to be on all the charges originally framed and the acquittal by the jury at the previous trial on some of the charges is no bar to the retrial on all the charges, 23 C. 377; 23 C. 975.

MAY BE CHARGED WITH ALL OR ANY OF SUCH OFFENCES.—This section applies only to cases in which the prosecution is not in a position to establish conclusively any one offence but is able on the facts proved to exclude the innocence of the accused and to show that he must have committed one of two or more offences.

MAY BE CHARGED IN THE ALTERNATIVE, ETC.—The word "alternative" means a choice between two things so that if one is taken out the other must remain. An accused cannot be charged alternatively in respect of distinct offences or even in respect of cognate offences when the difference is only one of degree, i.e., as to the intention imputed to the

accused, or as to some circumstance of aggravation. An alternative charge cannot be framed in respect of an offence under the Indian Penal Code and one under a Special law, nor can a Court inflict a sentence on a person found guilty in the alternative of an offence under the Indian Penal Code and another under a Special Act, 12 Cr. L.J. 224=10 Ind. Cas. 168. Alternative charges may properly be framed against an accused person on the same set of facts but alternative charges which include offences which do not arise out of the same set of facts as those with which they are united even though tried in the same proceedings ought to be made clear to the accused before trial, and dealt with by the Court in its final decision, 23 Cr. L.J. 692=61 Ind. Cas. 80. When no such alternative charge is framed a Magistrate cannot remedy the error at the conclusion of the trial by stating in his judgment that he would proceed only on charges legally joined. If any charge is to be struck out it should be done before conclusion of trial thus affording the accused an opportunity to defend himself on the amended charge, 21 Cr. L. J. 86=71 Ind. Cas. 214. An accused may be charged in the alternative of mischief and rioting; when not so charged an acquittal of one of the offences is a bar to the trial of the other offence by virtue of S. 403 (1), *infra*, 19 L.W. 31; see also, 50 C. 563. If two contradictory statements recorded in two utterly unconnected cases one, a deposition as an approver in a Sessions case and the second as a defendant in a civil suit, they cannot form the basis of an alternative charge for perjury, 25 Cr. L.J. 1195=82 Ind. Cas. 59. Where a person makes contradictory statements at the Police investigation under S. 164, *supra* and subsequently at the inquiry before a competent Magistrate, the two statements constitute a series of acts within the section on which an alternative charge for perjury can be framed, 28 Cr. L. 1457=89 Ind. Cas. 1025 where 43 B. 824 (F.B.) is followed.

ALTERNATIVE CHARGE.—Alternative charges are not only permissible but also 30 C.W.N. 816 following 6 Lah. 226 (P.O.) Alternative charges under this section cannot be framed in respect of distinct offences, not even in respect of cognate offences when the difference is one of degree, *i.e.*, as to the intention imputed to the accused or as to some circumstance of aggravation. An alternative charge cannot be framed in respect of an offence under the Indian Penal Code and an offence under a Special law, nor can a Court inflict a sentence on a person found guilty in the alternative of an offence under the I.P.O. and another under a Special Act, 12 Cr. L.J. 224=10 Ind. Cas. 168. A joinder of charges of murder and causing disappearance of evidence of murder in the alternative is legal, 11 Cr. L.J. 731=8 Ind. Cas. 938; 30 C.W.N. 816. An alternative conviction is permissible only if on the facts found the law is doubtful, 21 Ind. Cas. 903. A person cannot be convicted in the alternative with having committed an offence under S. 182, I.P.O., and another under S. 211, I.P.O., 11 Cr. L.J. 420=3 Ind. Cas. 944 where 32 C. 180 and 31 B. 204 are followed. For form of charge in the alternative under S. 193, I.P.O., see Sch. V, Form No. XXVIII (11) (4), *infra*.

Illustrations (a) and (b) make the meaning of the section clear. Illustration (b) was added in the Code of 1893 to settle the law that contradictory statements by a witness which are irreconcilable constitute the offence of intentionally giving false evidence, though it cannot be proved which of the two statements is false. The illustration adopts the view in, 13 B.L.R. 324=21 W.R. (Or.) 72 (F.B.); see also 7 A. 44; Weir II, 300. Omission to frame an alternative charge comes within the expression "error or irregularity in any inquiry or other proceedings" in S. 537. [1916] 2 M.W.N. 267; 26 B. 533.

237. (1) If, in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

When a person is charged with one offence, he can be convicted of another.

(2) Omitted by Act XVIII of 1923, section 63.

Illustration.

A is charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may be convicted of criminal breach of trust, or of receiving stolen goods as the case may be, though he was not charged with such offence.

SCOPE OF THE SECTION.—This section and S. 227, *supra* necessarily go together and it is not the intention of the Legislature to convict an accused person of an offence of which he has not been told anything, 26 Cr. L.J. 1087=88 Ind. Cas. 1; 24 A.L.J. 168=27 Cr. L.J. 152=91 Ind. Cas. 888. The application of this section is by its express terms restricted to the case mentioned in S. 236, *supra*, 18 C.L.J. 873 at 877=15 Cr. L.J. 41=23 Ind. Cas. 188. Where on the evidence there is no doubt as to the facts although it may be doubtful what precise offence the accused has committed on the facts, alleged, it was held to such a case the provisions of this section are applicable and the accused may therefore be convicted of the offence which he is shown to have committed although he is not charged with it, 41 C. 537 at 548. This section is to be read with S. 236, *supra*. If the facts of the case do not fall under that section, this section has got no application. Where therefore the petitioners were convicted for rioting under S. 147, I.P.C., but in appeal the Judge while setting aside the conviction convicted them for causing hurt under S. 323, I.P.C., an offence for which they were not charged, it was held that the accused had no opportunity to defend themselves on the charge of hurt and the conviction was bad in law, 18 C.W.N. 1276, but a person charged constructively under S. 149, I.P.C. cannot be convicted of the substantive offence, 21 Cr. L.J. 439; 34 C. 698; 6 C.W.N. 98; 50 C. 94. A person charged under Ss. 147 and 323, I.P.C. cannot be convicted under S. 160, I.P.C. unless a proper charge is framed and the accused tried on the latter charge, 47 M. 61. This section deals with a case where in the case mentioned in S. 236, *supra*, the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of S. 236; but this does not apply, because S. 236 only refers to a series of acts which are of such a nature that it is doubtful which of the several offences the facts constitute. Where there was no doubt whatever about what was charged nor on the evidence about hurt being caused to one person, the conviction for rioting and causing hurt to another person are questions totally different and independent and the trial should have been on a distinct and separate charge, 40 C. 168 at 172. Where a Court finds it necessary to make use of this section in order to convict an accused of an offence with which he has not been charged, the Court should be particularly careful to formulate to its own mind the charge it had duly framed, and on which it proposed to convict, 17 Cr. L.J. 64=32 Ind. Cas. 656. The operation of this section is limited to cognate offences but do not relate to offences of so distinct a character as murder and theft, 1888 A.W.N. 95. Persons tried for theft can be convicted as receivers if the acts proved lead to the inference that receipt rather than theft has been committed, 17 M.L.J. 219. So also a person charged with forgery may be convicted of user even though not charged, 21 Cr. L.J. 410; see 33 M. 264; 11 B.H.C.R. 240; 15 L.W. 583=(1922) M.W.N. 182. A person 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. Three men were convicted of making away with the evidence of the crime of murder 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 this section. Their Lordships of the Privy Council held that they entertained no doubt that the procedure was a proper procedure and one warranted by the Code of Criminal Procedure, 6 Lah. 226 (P.C.). It is now settled law that a person may be convicted under S. 201, I.P.C. even though he is charged only under S. 302, I.P.C. Therefore there cannot be an illegality in charging the accused under both these sections alternatively, 27 Cr. L.J. 1011=98 Ind. Cas. 867, where 6 Lah. 226 is followed. See 30 C.W.N. 816. When a person is charged with murder and convicted of that offence it is not open to the appellate Court to alter the conviction under S. 302, I.P.C. to one under one of the sections dealing with offences against property, 4 Lah. 373. See also 27 Cr. L.J. 1004=98 Ind. Cas. 860 where 4 Lah. 373 is followed and 6 Lah. 226 was distinguished on the ground that the observations of their Lordships of the Privy Council in the latter case must be read with the facts of that particular case and not to be taken as laying down any rule of general application. On a

charge of abetment of forgery accused cannot be convicted of an offence of using as genuine a forged document. The offence of abetment of forgery is complete when the document is written and signed but the user is a distinct and different offence for which the accused is entitled to be charged separately, 53 C. 466.

Sub-section (2) which existed previously has been omitted here but is added to S. 238, where it is more appropriate. It was held in a number of decisions that when a person is charged with the principal offence the Court cannot convict him of abetment, as provision is made in sub-section (2A.) of S. 238 *intra* to attempts and not to abetments of offences the only inference that abetment should be specifically is charged and without which a conviction is illegal, 33 M. 264; 15 L.W. 883=(1922) M. W. N. 162; 13 Cr. L.J. 203 and 223; 1921 Patna 96; 25 Cr. L. J. 1292; 26 Bom. L.R. 323=25 Cr. L.J. 1135=81 Ind. Cas. 959; 41 C.L.J. 414; 27 Cr. L.J. 1118=97 Ind. Cas. 430.

238. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

(2A) *When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.*

(3) Nothing in this section shall be deemed to authorise a conviction of any offence referred to in section 198 or section 199 when no complaint has been made as required by that section.

Illustrations.

(a) A is charged, under S. 407 of the Indian Penal Code, with criminal breach of trust in respect of property entrusted to him as a carrier. It appears that he did commit criminal breach of trust under S. 406 in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under S. 406.

(b) A is charged, under S. 325 of the Indian Penal Code, with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under S. 325 of the Code.

AMENDMENT.—Sub-section (2A) is newly added; it was previously sub-section (2) to S. 237, *supra*.

SCOPE OF THE SECTION.—The powers given by this section to convict for a minor offence are not controlled by those sections which prescribe the procedure to be followed in trying the offence charged, 44 C. L. J. 239. So on the trial of an accused by a Sessions Judge for an offence so triable it is competent to the Judge to convict the accused of a minor offence though the minor offence is triable only by a jury, 12 Bom. L.R. 1241. This section applies to cases in which a charge is for an offence which consists of several particulars a combination of some only of which constitutes a complete minor offence. Though the Magistrate has power under this section to convict the accused of a different charge from what was originally formulated, this must be done only in cases where the accused is not prejudiced by a conviction on the new charge. The accused is entitled to know with certainty and accuracy the exact nature of the charge brought against

him, and unless he knows this he must be seriously prejudiced, 23 Cr. L.J. 114=65 Ind. Cas. 546; 44 C. 358; 11 C. 106. The grave charge gives to the accused notice of all the circumstances going to constitute the minor one of which he may be convicted. The latter is arrived at by mere subtraction from the former, 11 B.H.C.R. 240 at 241. In such cases the only consideration is whether the accused has been prejudiced by being convicted for a minor offence. In determining this question, the nature of the case made at the trial against the accused, the evidence that was given and the line of defence set up are all matters to be considered, 20 C.W.N. 1075. An accused can not be convicted of abetment when charged only with the substantive offence. Sub-section (2A) newly added expressly mentions an attempt to commit an offence and the inference is in the case of abetment, a charge should be framed and without which a conviction of abetment cannot stand, 44 C.L.J. 214; 33 M. 264; 1921 Pat. 96.

CONSTITUTE A COMPLETE MINOR OFFENCE.—What is regarded as a *minor offence* when compared with another has not been defined by law and the words "*minor offence*" may be taken in their ordinary sense, e.g., an offence under S. 365 would be a minor offence as compared with that punishable under S. 366, I.P.C. The words "*minor offence*" are to be taken not in any technical sense but in their ordinary sense, 23 C. 1006 at 1010. Conviction for minor offences though not expressly charged is allowed by this section, 44 C.L.J. 239. Where an accused person is charged with an offence under S. 412, I.P.C., an offence triable by a jury, the jury is entitled to return a verdict of guilty on the minor offence under S. 411, I.P.C. although such minor offence is triable with the aid of assessors, and under this section a conviction under S. 411, I.P.C. is legal and the accused cannot complain of the verdict being given by the jury of an assessor offence when such a verdict is accepted by the Judge, 27 Bom. L.R. 1461=27 Cr. L.J. 650=94 Ind. Cas. 802 where 33 B. 423; 45 B. 619; 25 B. 680 and 26 M. 243 are referred to. The following are held to be minor offences.—(1) Offence under S. 304 when charged with an offence under S. 303, I.P.C., 20 B. 218; (2) offence under S. 335 when charged with S. 325, 28 W.R. (Cr.) 61; (3) offence under S. 412 when charged with offence under S. 305, 1 B. 80; and the following were held not minor offences:—(1) Offence under S. 366 is not minor to an offence under S. 376, I.P.C. 8 Bom. L.R. 120; (2) offence of kidnapping from lawful guardianship, S. 363 is not minor to the offence of murder, S. 302, I.P.C., Weir II, 302; (3) offence under S. 498 is not minor to the offences under Ss. 363 and 366, I.P.C., 31 B. 218; when a person is charged with robbery he cannot be convicted without the charge being altered, of an offence of house-breaking by night, as robbery cannot include the later offence, but house-breaking by night is a graver offence than one of robbery, 13 Cr. L.J. 429=14 Ind. Cas. 978.

SUB-SECTION (2).—This sub-section invests the Court trying the offence (however constituted) with authority to find as an incident to such trial that certain facts only are proved in the trial, which facts constitute a minor offence though such minor offence is not triable by the court as constituted, 23 Bom. L.R. 1241 at 1243. Ordinarily a charge ought to be framed under the provisions of the code, but in the case of a minor offence a conviction can be recorded without a charge being framed, *ibid* at 1245. The necessary implication of this section appears to be that there need not be a separate trial with reference to a minor offence, *ibid* at 1246; when a person was originally charged under S. 462, I.P.C. but the facts proved established a case under S. 426, I.P.C. a conviction under the latter section is justified under the provisions of this sub-section, 25 Cr. L.J. 1037=81 Ind. Cas. 911. When certain persons were charged under S. 147, I.P.C., with the common object of taking forcible possession of complainant's land and of assaulting him, and were convicted of criminal trespass under S. 447, I.P.C., without any charge being framed against them, or without their being called upon to plead to such a charge and this sub-section was invoked to maintain the conviction, it was held that inasmuch as the common object charged, was not to commit criminal trespass, the conviction was clearly bad, 18 C.W.N. 992=15 Cr. L.J. 188=22 Ind. Cas. 764. Similarly a person charged with dacoity and rioting cannot properly be convicted with criminal trespass as that offence is no part of the offence of dacoity or rioting, 23 W.R. (Cr.) 89. A person charged with rape on a married woman cannot be convicted of having committed adultery with the same woman on the same facts, 5 A. 233; 27 M. 51. But an accused charged under Ss. 304 and 325, I.P.C., can properly be convicted under

S. 323, I.P.C., without any specific charge under that section; when certain persons are charged under Ss. 304 and 325 read with S. 149, I.P.C., with regard to an offence alleged to have been committed by another person and the evidence as to the riot is disbelieved, they cannot be convicted under S. 323, I.P.C., in respect of their individual acts with which they were not charged and which were not imputed to them in the Judge's charge to the jury, 34 C. 328. Similarly where certain persons were charged with rioting, culpable homicide and causing grievous hurt not by themselves but through others constructively under S. 149, I.P.C., and they were convicted under S. 325, I.P.C., it was held that under no reasonable construction of Ss. 236 to 239 can it be said that the offences of causing grievous hurt is minor to, or included in a charge under S. 325 read with S. 149, I.P.C., 34 C. 698 at 703, where S.C.W.N. 98 is followed. See in this connection the Full Bench ruling, 47 M. 746.

SUB-SECTION (2A).—Sub-section (2) of S. 237 is omitted from that section and now added to this section as this is thought to be the proper place for it. This sub-section relates only to attempts and a conviction for abetment unless separately charged is not valid, 33 M. 264; 15 L.W. 583—(1922) M.W.N. 182; 26 Bom. L. R. 323—28 Cr. L.J. 1135—61 Ind. Cas. 959; 13 Cr. L.J. 203 and 223; 1021 Pat. 96; 44 C.L. J. 414; 27 Cr. L.J. 1118—97 Ind. Cas. 430. This sub-section allows an accused person charged with a substantive offence to be convicted of an attempt to commit that offence without a separate charge and trial when the lower courts found that a person was not actually deceived by the accused and so the offence of cheating was not made out it was open to the High Court to convict of an attempt to cheat when such attempt to cheat was made out by the evidence and S. 439 (4), *infra*, has no application to such a case as there was no acquittal by the lower Court of any attempt to cheat, 48 M. 774.

What persons may be charged jointly.

239. *The following persons may be charged and tried together, namely:—*

(a) *persons accused of the same offence committed in the course of the same transaction;*

(b) *persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence;*

(c) *persons accused of more than one offence of the same kind within the meaning of section 234 committed by them jointly within the period of twelve months;*

(d) *persons accused of different offences committed in the course of the same transaction;*

(e) *persons accused of an offence which includes theft, extortion, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last-named offence;*

(f) *persons accused of offences under sections 411 and 414 of the Indian Penal Code or either of those sections in respect of stolen property the possession of which has been transferred by one offence; and*

(g) *persons accused of any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin, and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence;*

and the provisions contained in the former part of this chapter shall, so far as may be, apply to all such charges.

AMENDMENT.—This section which defines what persons may be charged jointly is re-drafted and the amendments are as follows :—(1) It is provided that when two or more persons are accused of offences of the same kind committed by them jointly during the space of one year they may be tried for the same at one trial. (2) It is directed that when one person is accused of any offence which includes theft, extortion or criminal misappropriation and another of receiving, retaining or disposing of the stolen property or abetment or attempt to commit the latter offences they may be tried jointly. (3) Provision is made for the joint trial of one person accused of counterfeiting coin and another of fraudulently possessing or uttering it. The illustrations have been repealed by the amendment.

OBJECT OF THE SECTION.—This section deals with the joint trial of accused persons. The foundation for the procedure sanctioned by this section is the association of two or more persons concurring from start to finish to attain the same end, 23 Cr. L.J. 268-66 Ind. Cas. 332. A separate trial is the rule and a joint trial is the exception and it is always for the prosecution to justify a joint trial. Where the accused committed offences not of the same kind on two different dates, a joint trial is illegal. 46 A. 54 where 40 C. 318 and 30 A. 251 are followed. 9 A. 452; 24 Cr.L.J. 149-71 Ind. Cas. 501. It should be remembered that the provisions of S. 235 *supra* and this section are merely enabling ones and if there is a risk of embarrassing the defence such joinder of charges should not be resorted to. 52 C. 253 at 265. To enable the Court in the same trial to try more persons than one, they must be accused of the same offence, or they must be related as principals and abettors or persons attempting to commit such offences, or persons accused of more than one offence of the same kind within S. 234, *supra* or persons accused of different offences committed in the same transaction or persons accused of theft, extortion or misappropriation and persons receiving, retaining or disposing of the same stolen property or person accused of counterfeiting coins and person fraudulently possessing or uttering it except as provided by this section, the joint trial of several accused is not permitted by law and is an illegality which cannot be cured by S. 537, *infra*. A good working test of what should or should not be regarded as the same transaction within the meaning of this section is (1) proximity of time, (2) unity or proximity of place, (3) continuity of action (4) community of purpose or design, 35 C.L.J. 527 where 42 C. 937 is followed. S. 234, *supra* will not control the provisions of this section. 26 Cr. L.J. 1602-90 Ind. Cas. 706. The question whether certain offences specified in different charges were or were not so connected together that it might fairly be said that they were committed in the same transaction is substantially one of fact and admissions on a question of fact made by accused persons may undoubtedly be received and acted upon by the trial Court. The law on the point is correctly laid down in, 19 A.L.J. 392; 26 Cr. L.J. 29-83 Ind. Cas. 509. This section cannot give jurisdiction to a Magistrate who has not jurisdiction under the provisions of any of the sections in Chapter XV of the Code. The mere fact that the offences could have been tried jointly under this section if committed within the jurisdiction of the Magistrate to try the offences committed outside his jurisdiction. 28 C.W.N. 975 and 119.

MAY BE CHARGED AND TRIED TOGETHER.—This section is merely an enabling section and does not in any way trammel the discretion of the Court, 19 C.W.N. 672 at 673; 28 M. 592; 11 W.R. (Cr.) 16; under this section a judicial discretion has been given to the Court to try a principal offender and the abettor either jointly or separately, and the manner in which this discretion should be exercised must depend on the facts of each case. A joint trial of the owner of a common gaming house with those found gaming therein or present for the purpose of gaming is permitted as the offences are committed in the same transaction, 25 Cr. L.J. 155-71 Ind. Cas. 507. But this section does not apply to preliminary inquiries, prior to commitment, 7 Bom. L.R. 437; 42 M. 861; 26 M. 592.

CLAUSE (a).—The expression "same offence" refers not merely to the nature of the offence but to one and the same physical act of crime, 8 Cr. L.J. 11. If several witnesses

summoned to appear give evidence on the same day in a case and all of them fail to appear they cannot be tried together as each has committed a separate and distinct offence though punishable under the same section of the Penal Code, S. 174, I.P.C., 1888 A.W.N. 25. So also if several witnesses on the same side give false evidence in the same case. The lie told by one witness is none the less his own particular lie because other witnesses at the same time have told similar lies. It is each man's own lie and not his neighbours that can alone be used against him. The perjury of one witness is a transaction complete in itself and cannot be connected with the false evidence given by another witness in the same case and on the same point, 16 W.R. (Cr.) 47; 13 Cr. L.J. 23-13 Ind. Cas. 215; 4 A. 293; 6 M. 352; 10 C. 405; 4 Bom. L.R. 53; 14 Bom. L.R. 972; 14 W.R. (Cr.) 16; 7 B.L.R. Appx. 66; 48 A. 323. The joint trial of four persons living separately, under the Municipal Act contravened the provisions of this section as the accused cannot be said to have committed the same offence in the course of the same transaction, 7 Lah. 168. The expression "same offence" implies that persons jointly tried and acted in concert or association, 15 Cr. L.J. 698-26 Ind. Cas. 153; 17 Cr. L.J. 30-32 Ind. Cas. 158; 1 Patna L.J. 64; 42 C. 957 and 1153; 1 M.L.T. 17; 42 C. 760; 38 A. 487; 19 C.W.N. 672. It does not apply to a case in which the allegations against the two accused are mutually exclusive. It is not permissible for the prosecution at the same trial to adduce some evidence that A committed the act complained of and some evidence that it was not A but B that did the act. In such a case S. 233, *supra*, requires separate trial, 2 Cr. L. Rev. 397-14 Cr. L.J. 683-24 Ind. Cas. 163 there is no objection if A and B are concerned in a common enterprise though each in defending himself might try to throw the blame on the other, 12 Cr. L.J. 662; when one of the accused jointly tried with others makes a confession, it is improper to hold a joint trial, 5 C.W.N. 294; opposing factions in cases of rioting cannot be brought under this clause or any other clauses of this section, though each party uses force they are not guilty of the same offence within this clause as the common objects of the rioters on one side is necessarily different from that imputed to the other, 20 C. 537; 6 C. 98; 9 W.R. (Cr.) 38; 12 W.R. (Cr.) 75; 1 N.W.P.H.C.R. 298. When in the course of a joint trial of the accused it is found to prejudice them in their defence, it is the duty of the Court to stop the trial and to proceed to try them separately, 3 Cr. L.J. 76. In 28 C.W.N. 487-26 Cr. L.J. 68-83 Ind. Cas. 625, it was held that counter cases should be tried simultaneously and contemporaneously and should be dealt with wholly separately from each other, each on its own merits and upon facts and circumstances appearing therein, and the judgment in both being pronounced if possible after both the trials are over. The Code is silent with regard to the procedure in the trial of counter criminal cases. It cannot be laid down as an absolute rule of law that a particular course must be adopted in such cases and each case has to be decided according to its requirements, 26 Cr. L.J. 1618-90 Ind. Cas. 719. See pages 336 to 338 as to the exact significance of the expression "offences committed in the course of the same transaction". An offence cannot be treated necessarily as one transaction merely because it is a continuing offence. On the contrary this section implies a continuing offence and may embrace more than one transaction. But only so far as it is concerned with one transaction can more persons than one be tried together for it. The section allows the trial of several persons for the same continuing offence within the limits of one transaction only and under cl. (d) several persons may be charged and tried together when accused of different offences committed in one transaction and the word "transaction" must have the same meaning as in cl. (a). The provisions of the charges are designed to simplify and define the charges that may be tried at one trial and to avoid embarrassment to the accused. It is very desirable that Public Prosecutors and the Courts should give full effect to the spirit of the provisions of the Code instead of straining them to cover doubtful cases, 26 Cr. L.J. 1618-90 Ind. Cas. 297; See also 5 Pat. L.J. 11; 39 C.L.J. 331; 37 C.L.J. 410-27 C.W.N. 700. Where in the course of a riot a person's death is caused and subsequently one of the rioters takes away and causes the disappearance of the dead body, a joint trial of that person for an offence under Ss. 148 and 804, I.P.C., is not warranted by law, as offence under S. 201, I.P.C. cannot be said to have been committed in the same transaction in which the other offences charged were committed, 26 Cr. L.J. 467-85 Ind. Cas. 147; 48 A. 325. See in this connection 6 Lah. 226 (P.C.) where conviction under S. 201 I. P. C. was upheld when charged only under S. 802, I. P. C.

CLAUSE (b).—This clause empowers a joint trial of the principal offender, the abettor or one who attempts to commit the offence, 19 C.W.N. 121 ; 27 Cr. L.J. 291—93 Ind. Cas. 42. This clause would equally apply to a joint trial of several abettors or of an abettor and one who makes an attempt to commit the offence, 38 C. 433. Where several persons conspiring to commit an offence and one of them achieves the object of the conspiracy, a joint trial is permitted by this clause although there are two offences or ol. (d) may permit such a joint trial, 42 C. 957 at 983 ; 42 C. 1153 ; 19 C.W.N. 672 and 703 at 713 ; 21 C.L.J. 193—16 Cr. L.J. 3—26 Ind. Cas. 307. A keeper of a common gaming-house may be jointly tried with those found gaming therein as the keeper may be considered to abet those who were found gambling under this clause, 14 Cr. L.J. 233—19 Ind. Cas 949.

CLAUSE (c).—This clause makes it clear that the exception embodied in S. 234, *infra* is not confined to cases where there is only a single accused but is also applicable to cases where several persons are jointly tried. This clause refers to joint trial of different connected offences of the same kind as defined in S.234 (2), *supra*. S. 234, *supra* requires that the accused may be tried for three selected offences, but in the language of this clause there is no such limitation as regards the number of offences. Where there was no joint action on the part of the accused and each acted independently of the other and made separate defences, it was held that a joint trial of the charges against 62 persons in one trial was bad. *Welfr II*, 303. Similarly, where fifteen persons in one trial were jointly tried and convicted of distinct offences of committing public nuisance in a village it was held that the trial was bad and the accused were really prejudiced in their defence, 5 M. 20. If several witnesses were summoned to give evidence in a case on the same day and all of them fail to attend they cannot be tried together for an offence under S. 174, I.P.C., 1883 A.W.N. 35. Where four persons were charged with giving false evidence in the same proceedings they cannot be tried together and it is an illegality vitiating the trial, 10 C. 405 ; 6 M. 252 ; 26 M. 592 ; 4 A. 293 ; 5 A. 17 ; 13 Cr. L.J. 23—13 Ind. Cas. 129, but see 48 A. 325. A lie by a witness is none the less his own particular lie and it is his own and not another's lie that can alone be used against him or be the subject of a prosecution on that account, 7 B.L.R. Appx. 68. Where several persons jointly filed a written statement signed by all, and one of them gave evidence in support thereof, it was held a joint trial for all of them, the deponent under S. 193 and the others for abetting him was good, 1864 A.W.N. 52. The identity of the persons committing the offence must be the same on each occasion, 1 C.L.J. 475. Unless a case fell strictly within this clause the fact that the same body of men are concerned in two distinct offences of the same kind, it could not render them liable to be jointly tried, 14 C.W.N. 395. See 51 M.L.J 692, referring to 28 M.L.J. 361, 33 M. 502 and 48 A. 325.

CLAUSE (d).—For the meaning of the expression "*offences committed in the same transaction*," see cases discussed under S. 235, *supra* at pages 336 to 338. The circumstances in different cases may vary to an infinite degree. Where three accused persons, *vis.*, witnesses on the same side in a case of communal riot, all giving evidence on the same point and to the same effect to prove the same fact, *vis.*, the manner in which a certain person met with his death, there is no hesitation in holding that the evidence of the three witnesses was given in the course of the same transaction. There was the most obvious identity of purpose. The phrase "*community of purpose*" is ambiguous inasmuch as it suggests a conspiracy which is not a necessary element supporting a finding whether the offences were committed in the same transaction. It is clear that the framers of the Code could never have had in mind the necessity for any proof of conspiracy before the terms of the section could be applied. The section has been in the Code for a very large number of years and long before Ss. 120A and 120B. I.P.C. were added. We have to look to this section and this section only. If the several acts of the accused are committed in the same transaction there is an end of the matter and they can legally and properly be tried together. Much confusion has arisen owing to failure to distinguish between different acts of the accused and different transactions. The act of one accused may be wholly independent of the act of the other and in that sense there may be no community, whatever, but there may still be community of purpose in the sense of identity of purpose and the acts committed in the same transaction, 48 A. 325. To justify a joint trial of persons concerned in two different offences, their acts

must constitute parts of the same transaction. If the different offences were committed in different transactions a joint trial is wholly illegal, 32 A. 12; 28 M.L.J. 381; (1910) M.W.N. 511; 31 C. 1013; 13 C.W.N. 1113; 10 Cr. L.J. 382; 4 Ind. Cas. 1; 21 Bom. L.R. 732; 11 A.L.J. 188; 17 C.W.N. 419; 33 C.L.J. 527; 20 A.L.J. 981; 26 Cr. L.J. 1513=90 Ind. Cas. 297. In considering the nature of the transaction Courts must have regard to the immediate and not to the ultimate object of the offenders. When certain persons were jointly tried for offences committed at two different points of time, the object for the commission of the offences at one point being to coerce the complainant to hand over certain valuable securities, etc., and at the other point to prevent the complainant's party from proceeding to the Magistrate to lodge a complaint in respect of the first occurrence, it was held that the two series of acts lacked the essential elements of community of purpose and continuity of action to make them parts of the same transaction within the meaning of this section, 28 M.L.J. 397. If it is established that the offences of the several accused do not form parts of the same transaction, the case is outside the scope of this clause and the joint trial is bad, 26 M.L.J. 598. When the offence of each of the accused is separate and there is no common offence in which all join, it is quite irregular to try them jointly, 11 M. 431. Joint trial of an offender and those who rescue him from custody is bad, 29 C. 385; 13 C.W.N. 805; 31 C. 1053. Where several people commit different offences on their own account with a common intent, say, during a car festival it cannot be said they committed offences in the same transaction. The expression same transaction implies oneness of purpose which is wanting here. If persons who are collected at a festival quarrel accidentally there among themselves and there happens to be a fight, injuries inflicted by some on others, without a common object they would be committing different offences of hurt, 23 A.L.J. 8=26 Cr.L.J. 734=86 Ind. Cas. 222. Where several persons abduct a girl and she was raped by one of the accused, the offence of rape constituted a separate transaction from that of abduction and the person who committed rape cannot be tried jointly with the others who had taken no part in it. But where a joint trial is held, a retrial is not necessary where the accused has not been prejudiced and does not wish to be retried, 25 Cr.L.J. 533=77 Ind. Cas. 297.

CLAUSE (e).—This clause permits a joint trial of persons accused of theft, extortion or criminal misappropriation only. This clause now permits joint trial of a thief or receiver or retainer of stolen property even though the offences are not committed in the same transaction; see 38 A. 311; 45 A. 223; 8 Bom. L.R. 517; 28 B. 412. If the thief and receiver could be jointly tried now, there is no reason why several receivers could not be jointly tried. The decisions in 29 B. 449; 28 C. 101; 33 C. 1236; 21 C.W.N. 111; 45 C. 741 are no longer law. When two persons were jointly tried under this clause and convicted of two distinct offences, it is open to the Appellate Court to convict one of them of some other offence on the same facts applying the general principles of Ss. 236 to 238, 15 Cr. L.J. 680=25 Ind. Cas. 1008.

CLAUSE (f) deals with joint trial of persons accused of counterfeiting coin and persons accused of fraudulently possessing or uttering it. A person who was in possession of 104 counterfeit coins, delivered 50 of them to another to pass them off from him. The two were jointly tried for offences under Ss. 240 and 243, I.P.C. It was held the joint trial was valid under this section read with S. 235 (1), *supra*, 31 C. 1007. This sub-section mentions only Ss. 411 and 414, I.P.C. and where definite sections are mentioned the provisions cannot be extended by analogy to other sections. Therefore a joint trial of persons accused under S. 412, I.P.C. is illegal, 26 Cr. L.J. 1291=89 Ind. Cas. 155 where 16 Cr. L.J. 270=28 Ind. Cas. 159 is followed; see also 28 Cr. L.J. 1351=89 Ind. Cas. 449.

PROVISIONS IN THE FORMER PART OF THE CHAPTER APPLY TO ALL SUCH CHARGES.—This section cannot apply to a joint trial of accused unconcerned in acts which are independent of one another. Three persons each charged with cheating a separate individual cannot be tried together, 12 Cr. L.J. 208=10 Ind. Cas. 63. When three persons at a meeting of the caste passed a resolution defaming the complainant and a fourth sent a resolution of his own accord for publication in a news paper, the joint trial of the four accused was held bad, 30 M.L.J. 423=7 M.L.T. 127=11 Cr. L.J. 135=5 Ind. Cas. 426. Where four persons were tried jointly, two of them being convicted under S. 188, I.P.C., and S. 8 of the Epidemic

Diseases Act, while the other two were convicted under S. 419, I.P.O., for attempting to cheat by personation, an altogether distinct offence not connected with the former, it was held that the joint trial was illegal, 4 Cr. L.J. 479.

OBJECTION AS TO MISJOINDER.—Where a joint trial is held contrary to law it is open to an accused person who has been convicted at such trial to raise the objection of misjoinder in Revision, even if the objection was not taken in the Courts below. There is no obligation on the accused to prove prejudice in such a case. The trial is either good or bad and if it is bad no question of prejudice arises and the conviction could not be sustained, 23 Cr. L.J. 807=81 Ind. Cas. 343. After the decision the Privy Council in 25 M. 61, it cannot be contended that S. 537 could cure a defect as to misjoinder because it is a disobedience to an express provision as to the mode of trial which is not a mere irregularity but an illegality. See also 62 C. 159; 23 C.W.N. 119; 52 C. 1. Where criminal proceedings are substantially bad in themselves the defect cannot be cured by any waiver or consent on the part of the accused or their pleaders, 6 C. 96; 2 C. 23; 6 C.W.N. 202; 11 C.W.N. 1128; 12 W.R. (Cr.) 59; 16 W.R. (Cr.) 63, 23 W.R. (Cr.) 59; 43 M. 117; 28 M.L.J. 329=(1918) M. W.N. 229; 18 M.L.J. 330; 25 M. 125; 7 M.L.T. 229; 27 M. 127; 4 Bom. L.R. 63; 7 Bom. L.R. 527; 21 A.L.J. 89; 13 A.L.J. 345; 11 A.L.J. 168; 4 Lab. 376; 23 Cr. L.J. 68=75 Ind. Cas. 980; 2 Pat. 793 at 795. In case of misjoinder of charges, the trial is wholly void and quashing the charges against one accused would not validate the trial of the other, 27 Cr. L.J. 1099=97 Ind. Cas. 363.

RE-TRIAL.—When a trial is set aside on account of misjoinder, the High Court is not bound to order a re-trial. It rests with the prosecution to consider whether a re-trial should be had, 12 C.W.N. 246.

240. When a charge containing more heads than one is framed against the same person, and when a conviction has been had on one or more of them, the complainant, or the officer conducting the prosecution, may, with the consent of the Court, withdraw the remaining charge or charges, or the Court of its own accord may stay the inquiry into, or trial of such charge or charges. Such withdrawal shall have the effect of an acquittal on such charge or charges, unless the conviction be set aside, in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry into or trial of the charge or charges so withdrawn.

Withdrawal of remaining charges on conviction on one of several charges.

SCOPE OF THE SECTION.—This section deals with a case where a person is accused of several offences and also a case where there are a number of charges relating to distinct offences constituted by separate acts but it does not apply to cases where there are several charges founded on the same fact dealt with in Ss. 235 (2) and (3) and S. 236, *supra*; in the latter case there is only one charge with several heads and there can only one trial. In the former case the charges are distinct capable of being tried separately and a withdrawal of the remaining charges on a conviction in one of the several charges is permitted by the section and such withdrawal has the effect of an acquittal.

A CHARGE CONTAINING MORE HEADS THAN ONE IS FRAMED.—These words were substituted in the Code of 1893 for the then existing words "*more charges than one are made*" and the change is in accordance with the definition of "charge" in S. 4 (1) (c) *supra*. The opening words of the section make it clear that it is only applicable to joinder of charges in the same case and not to separate charges for distinct offences tried separately as distinct Sessions cases. In such a case the Judge might act under S. 314 *infra* or ask the Public Prosecutor to withdraw from the prosecution under S. 491 *infra*, but he cannot act unless

this section, 8 M.L.T. 90; Ratanlal 977. A Criminal Court has power to permit the prosecution to withdraw charges the joinder of which is objected to as illegal, 18 C.W.N. 1105 (Sp. B). Similarly it was held by the Madras High Court in 3 Cr. L. Rev. 149 that this section will not enable a Magistrate to stay the trial of a charge in cases with different offences committed in the same night and the order of the Magistrate staying the trial was set aside by the High Court.

WITHDRAWAL OF THE REMAINING CHARGES.—A charge cannot be permitted to be withdrawn after the Judge had summed up and the jury had returned their verdict, Ratanlal 286, and the Judge is bound to sum up on all the charges, and the jury should be required to return a verdict on all the charges when evidence had been let in on all the charges and pleaders heard on the whole evidence, Ratanlal 288. Where a Judge at the commencement of a trial himself framed an additional charge and subsequently on acquitting the accused of the charge for which he was committed to stand his trial considers the additional charge framed by him to be improper there is no express provision of law which prohibits such a course. To this extent the word "alter" occurring in S. 227 *supra* must be taken to include "withdraw." 12 A. 551 at 552. See Ss. 494 and 273 *infra* which also provide for cases of withdrawal.

CHAPTER XX.

OF THE TRIAL OF SUMMONS CASES BY MAGISTRATES.

Procedure in summons cases.

241. The following procedure shall be observed by Magistrates in the trial of summons cases.

For the definition of the word "summons cases" see S. 4 (1) (v). This Chapter deals with the procedure in summons-cases while the next chapter deals with the trial of warrant cases. The general provisions of the Code found in other chapters apply equally to the procedure in summons and warrant cases, 43 M. 511 (F.B.) at 528. A warrant case being a graver offence cannot be tried under this Chapter, 7 M. 454. When of the two offences charged, one is a summons-case and the other a warrant-case, the procedure which the Magistrate ought to adopt is the one prescribed for a warrant-case, 11 C. 91 followed in 39 M. 503; 41 M. 727, and if he fails to follow the procedure prescribed for a warrant-case and convicts the accused of the offence triable as a warrant-case, the conviction is bad in law, 29 M. 372; 5 M.L.T. 204. When a summons-case was committed to the Court of Sessions the commitment was quashed by the High Court on the ground that there was no warrant for such a commitment, as the Magistrate could adequately punish the offenders, 1906 A.W.N. 28-3 A.L.J. 14. When a complainant is absent, the proper course is to discharge the accused under S. 259 *infra* and not to acquit the accused under S. 247 *infra*, 11 C. 91; 22 B. 711. When the accused is tried for two offences in the same trial, one being a summons case and the other a warrant case the proper procedure to be adopted is that prescribed for warrant case, 39 M. 503; 41 M. 727; 11 C. 91; 29 C. 481; 22 B. 711.

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 if he has any cause to show why he should not be convicted; but it shall not be necessary to frame a formal charge.

Substance of accusation to be stated.

PARTICULARS OF THE OFFENCES SHALL BE STATED.—It is necessary that the accused should have a clear statement made to him that he is about to be put on his trial and the facts constituting the offence with the commission of which he is accused, 4 C. 603 - 3 C.L.R. 87. In summons cases the statement to the accused of the particulars of the offence of which he is accused takes the place of the formal charge, 2 Cr. L.J. 739 at p. 742 and the answers which the accused gives to the questions put to him takes the place of the

plea of the accused to a formal charge. This section applies to security proceedings and the Magistrate is bound to state to the person proceeded against particulars of the matter against him and ask him to show cause why he should not furnish security, 7 M.L.T. 304. See also 17 M.L.J. 438. Where a Court dispenses with the presence of the accused and allows a pleader to appear for him, the Court can act on the plea of the pleader under this section and the record must show the person appearing for the accused was duly instructed. 50 B. 250. A conviction based on an admission made by the counsel for the accused without examining or recording any evidence in a summons case is illegal and cannot stand. 26 Cr. L.J. 179—83 Ind. Cas. 883.

SHALL NOT BE NECESSARY TO FRAME A CHARGE.—These words indicate that in a summons case there is a charge of an offence. Although it is not necessary to have a written charge in accordance with the provisions of Ss. 222, 223 *supra*, and the provision as to joinder of charges equally apply to summons-cases also, 41 C. 722 at 723. If commitment is made in a summons case it cannot be quashed as illegal, 3 A.L.J. 14. When a case is being tried as a warrant-case, if it is intended to proceed against the accused also for an offence triable as a summons-case, that offence should also form part of the charge. Where therefore the accused who were summoned for an offence under Ss. 143 and 379, I.P.C. were tried on a charge drawn up only for an offence under S. 379, I.P.C., but were convicted of the offence under S. 143 the conviction was set aside as bad in law as the accused were misled in their defence by the absence of a charge under S. 143, I.P.C., 29 C. 481.

243. If the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by him; and, if he shows no sufficient cause why he should not be convicted, the Magistrate *may* convict him accordingly.

Conviction on admission of truth of accusation.

AMENDMENT.—“Shall convict” has been altered into “may convict”. This alteration gives the Magistrate a discretion which he did not possess before as to convicting an accused who pleads guilty in a summons-case, and the Court is thus able to refuse to accept a plea of guilty which it believes to be untrue. The Magistrate has an option now under this section similar to the one provided by Ss. 265 (2) and 271 (3), *infra*.

ADMISSION SHALL BE RECORDED AS NEARLY AS POSSIBLE IN THE WORDS USED BY HIM.—The plea of the accused has to be recorded at once by the Magistrate and not afterwards from rough notes taken from the Magistrate's memory, 15 M. 83, and it shall be recorded as nearly as possible in the words used by him so as to show whether the statement recorded by the Magistrate is really an admission by the accused that he has committed the offence charged. It is of the utmost importance that the terms of this section should be strictly complied with, because the accused's right of appeal depends on whether he has really pleaded guilty or not. It was no doubt for that reason that the Legislature required the exact words used by the accused in his plea to be as nearly as possible recorded, 1889 A.W.N. 81. To save all misapprehension and mistake, it is desirable that the plea of guilty should be recorded as far as possible in the words used by the accused, 5 Bom. L.R. 899. This section allows a conviction if the accused admits that he has committed the offence of which he is accused. But S. 204 says that a Magistrate taking cognizance of an offence in a case where summons should issue in the first instance, shall issue his summons for accused's attendance under form No. 1 in Sch. V; the person summoned is required to appear in person or by pleader. Of course the form cannot itself override any express provision of the Code. But in the absence of a clear provision that only accused's own plea should be accepted for the purpose of this section the Court must give due weight to the form of summons permitting appearance of the accused by pleader; moreover, S. 205 *supra*, permits a Magistrate to dispense with personal attendance of the accused and allow appearance by pleader whenever he issues a summons, and the words “or by pleader” in the form prescribed may have been inserted

with reference to this provision. The Magistrate may also allow appearance by pleader even after the issue of summons. There is no sufficient ground for holding in spite of the fact that S. 242, *supra*, and this section speak of the accused only, that a pleader representing the accused may not make the necessary answers and plead 'guilty' or 'not guilty' on his behalf. This view is in accordance with provisions of the summary jurisdiction Act XI and XII, Vict. Ch. 49, S. 14 on which the provisions of S. 242 and this section are based, 50 B. 250, where 14 Cr. L.J. 272—19 Ind. Cas. 544 is referred to. When a Magistrate in a warrant case with out recording evidence called upon the accused to plead to the charge and convicted him on his own admission as under this section, *held* that the procedure was illegal and prejudiced the accused and the conviction was set aside, 29 M. 372. See 27 C.W.N. 923. This section applies to security proceedings also; the statement of the person expressing his willingness to furnish security should be duly recorded, otherwise the order passed is illegal, 17 M.L. J. 438.

MAY CONVICT.—The alteration of "shall" into "may" is new and allows the Magistrate a discretion as the one allowed in the trial of Sessions cases by S. 271 (2) *infra* and in the trial of warrant cases by S. 255 (2) *infra*. By the amendment the Court is further empowered to refuse to accept a plea of guilty which is not accepted by the Court as true.

244. (1) *If the Magistrate does not convict the accused under the preceding section or if the accused does not make such admission, the Magistrate shall proceed to hear the complainant (if any), 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.*

Procedure when no such admission is made.

Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.

(2) The Magistrate may, if he thinks fit, on the application of the complainant or accused, issue a *summons to any witness directing him to attend or to produce any document or other thing.*

(3) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses, incurred in attending for the purposes of the trial, be deposited in Court.

AMENDMENT.—In sub-section (1) the words "if the Magistrate does not convict the accused under the preceding section" have been added and the proviso is also new, making it unnecessary to hear the complainant where a complaint is made by a Court. In sub-section (2) the words "a summons to any witness directing him to attend or to produce" have been substituted for the words "process to compel the attendance of any witness or the production of," thus making it clear that a Magistrate is not bound to compel the attendance of a witness to give evidence on the application of the complainant; See 30 C. 121; 6 C.W.N. 548.

SHALL PROCEED TO HEAR COMPLAINANT AND TAKE ALL SUCH PROSECUTION EVIDENCE.—This section does not say that the complainant himself is to be examined but only says he shall be heard. Non-examination of the complainant will not vitiate proceedings, 21 Cr. L.J. 232—55 Ind. Cas. 204. When an accused does not admit the truth of the accusation against him, the Magistrate is bound under this section to hear the complainant and his witnesses in support of his complaint and also the accused and his witnesses in his defence, 6 W.R. (Cr.) 75. It is the *prima facie* duty of the prosecution to call as witnesses

all persons who must be able to give important information, and if they are not called sufficient explanation must be given for not doing so. If no satisfactory reasons are given, the Court may draw an inference adverse to the prosecution, 8 C. 121; 14 A. 321; 14 C. 245; 13 A. 5, but no such inference could be drawn as against the accused for not calling defence witnesses, 7 A. 304; 8 C. 121. Right to cross-examine is not expressly provided for in this section as in S. 208 (1) *supra*. When complainant's witnesses are summoned, a Magistrate is not justified in dismissing the complaint on a consideration of the statement of the complainant alone without examining his witnesses, 20 M. 388; Weir II, 303.

HEAR ACCUSED AND TAKE ALL EVIDENCE HE PRODUCES IN HIS DEFENCE.

The Magistrate is bound to take down the evidence in open Court and he cannot rely on statements made to him out of Court, 14 B. 572. It is the duty of the accused to produce his witnesses on the day of trial, 134 W.R. (Cr.) 76. A Magistrate is bound to examine all the witnesses whom an accused person may produce for his defence, 13 W.R. (Cr.) 63; 18 A. 221; 4 M.H.C.R. Appx. 29; and a conviction had without such examination of witnesses is liable to be set aside, 4 B.L.R. Appx. 77—13 W.R. (Cr.) 77. No inference adverse to the accused ought to be drawn from his failure to call defence witnesses, 10 C. 140; 8 C. 121; Ratanlal 686; 7 A. 304.

SUB SECTION (1).—Under the old Code there was the phrase “compel the attendance of a witness” etc. but in the present Code the words used are “summon any witness directing him to attend” etc. Evidently now the Court cannot compel a witness to appear before it, if the witness refuses to appear, in which case he may be liable for disobedience of summons but the party is not entitled to ask the Court as a matter of right to compel the attendance of any witness who does not care to attend in obedience to summons. It is in the discretion of the Magistrate to issue fresh summons, but the Code does not compel him to issue fresh summons to a witness who has once been summoned, 27 Cr. L.J. 78—91 Ind. Cas. 252, where 30 C. 121 is distinguished and held to be no longer law. The new amendment which gives ample discretion to refuse to issue further process is already noted above. See 21 Cr. L.J. 385—85 Ind. Cas. 393. But a Magistrate has no such discretion to refuse to compel the attendance of a witness to whom he had already issued process, 30 C. 121.

SUB SECTION (3).—When the complainant fails to pay the necessary fee for summoning witnesses, the Magistrate cannot dismiss the case for default. He is bound to deal with the case on such evidence as he may have before him, 5 M. 160.

245. (1) If the Magistrate upon taking the evidence referred to in section 244 and such further evidence (if any) as he may, of his own motion, cause to be produced, and (if he thinks fit) examining the accused, finds the accused not guilty, he shall record an order of acquittal.

(2) *Where the Magistrate does not proceed in accordance with the provisions of section 349 or section 562, he shall if he finds the accused guilty, pass sentence upon him according to law.*

AMENDMENT.—Sub-section (2) has been redrafted. The words “unless he proceeds under S. 349 or S. 562” have been newly added.

SHALL RECORD AN ORDER OF ACQUITTAL.—An order of acquittal without a charge having been framed against an accused, is justified only in summons cases by the operation of S. 248, *infra*, 24 Cr. L.J. 120—71 Ind. Cas. 248. It may be done also under S. 245, *infra* when there is a composition or when the Advocate-General withdraws the case under S. 333, *infra*.

No order of discharge can be passed in a summons case. The Magistrate is bound to record an order of acquittal, 21 C. 329, and an order of acquittal passed under this section will not operate as such with regard to an offence triable as a warrant-case, 1888 A.W.N. 260. If a Magistrate trying a summons-case, whatever procedure he adopts, finds no case is made out and let the accused go unconditionally he acquits him although he heads his order an order of discharge and mentions the section of the Code dealing with discharge, 8 M.L.T. 78 = (1910) M.W.N. 443 = 11 Cr. L.J. 330 = 6 Ind. Cas. 385. A Magistrate has no power and no jurisdiction to record an order of acquittal under this section until he has heard the complainant and taken all the evidence that he produces in support of the prosecution and also heard the accused and taken all such evidence as he may produce, and an order of acquittal passed without complying with the provisions of law is not an acquittal within the meaning of the section and will be set aside, 18 A. 221 at 223. Again once a Magistrate issues process to complainant's witnesses he cannot acquit the accused under this section without examining them, 20 M. 383; 30 C. 121. A Sessions Judge has no power in such a case to order further inquiry. The High Court cannot in revision convert an acquittal into a conviction, 8 M.L.T. 380.

SUB-SECTION (2).—After the word "shall" the words "unless he proceeds under S. 349 or S. 562" have been newly added. S. 349 deals with a case in which a Magistrate cannot adequately punish; and S. 562 deals with the case of first offenders being released on probation of good conduct or on admonition. A finding of guilty must be followed by a sentence, 4 M.H. C.R. Appx Ixvi; 2 Bom. L.R. 611, unless Magistrate acts under S. 562 *infra*.

FURTHER INQUIRY AND REVISION.—The Sessions Judge or District Magistrate cannot order further inquiry under S. 436, *infra*, 8 M.L.T. 380, but the High Court in revision has power to direct a retrial in very exceptional cases, 16 M.L.J. 223 and generally without an order for retrial no fresh complaint can be entertained, 22 Cr. L.J. 331 = 61 Ind. Cas. 59.

For form of warrant of commitment on a sentence of imprisonment or fine. See Sch. V, No. 29.

246. A Magistrate may, under section 243 or section 245, 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.

Finding not limited by complaint or summons.

This section does not mean that an accused in a summons-case can be convicted of an offence alleged to have been committed on a date to which reference has been made in the complaint or summons, 22 Cr. L.J. 359 = 62 Ind. Cas. 675. This section empowers a Magistrate to convict the accused in regard to any other offence *prima facie* established by the evidence adduced by the prosecution, but he is bound in such a case to proceed under S. 242, *supra*, and state the particulars of such offence to the accused so as to enable him to defend himself, 22 W.R. (Cr.) 40, where certain accused persons were summoned to answer a charge of criminal trespass, but the Magistrate convicted them under this section of the offence of mischief and assault, it was objected that the Magistrate could not so convict the accused without reopening the trial and following the procedure laid down in Ss. 243 and 244 *supra*, the High Court held that the conviction was legal, 36 C. 369. This section authorises a Magistrate to convict an accused person of a non-cognizable offence like assault when he was sent by the police for trial under the City Municipal Act even without a formal complaint from the person assaulted when the police took action at the instance of the person assaulted and as a witness he evinced a desire that the accused should be proceeded against, S. 529 (e) *infra* also supports this view. 23 Bom. L.R. 291 = 27 Cr. L.J. 493 = 93 Ind. Cas. 898 following 36 C. 339. A conviction for an offence other than that shown in the complaint is illegal, 22 Cr. L.J. 331 = 61 Ind. Cas. 59.

247. 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 proper to adjourn the hearing of the case to some other day :

Non-appearance of complainant,

Provided that where the complainant is a public servant and his personal attendance is not required, the Magistrate may dispense with his attendance and proceed with the case.

SCOPE OF THE SECTION.—This section lays down a general principle that a person charged with a summons-case offence is entitled to an acquittal if the complainant is absent without sufficient cause and there is no reason why the right should be denied when the Magistrate follows a particular procedure, 44 M L.J. 119=17 L.W. 229. This section merely authorises a Magistrate to adjourn the case to enable the complainant to appear. It does not authorise him to dispense with the appearance of the complainant except when he is a public servant. In a summons case where the complainant had gone to England and it was unfair to the accused to keep such a petty case pending till the complainant returned the Magistrate was right in acquitting the accused, 27 Cr. L.J. 1022=96 Ind. Cas. 878. This section lays down that if a summons has been issued on complaint and on a date to which the hearing is adjourned the complainant does not appear the Magistrate shall acquit the accused unless for some reason he thinks it proper to adjourn the hearing for some other day. The question is what is the legal consequence of the case not having been taken up on the day fixed for hearing at all. The right to an order of acquittal accrues to the accused upon two conditions and is dependent first on the absence of the complainant, and secondly, on the court not adjourning the case. If a case is not taken up at all it cannot be said that the second condition is fulfilled, for, there is no knowing in what way the court's discretion would have been exercised if it had been taken up. To adopt any other view would result in unnecessary hardship to the complainant and undue leniency to the accused. If therefore the complainant fails to appear on the date fixed for hearing and the Magistrate omits to take up the case, the accused is not entitled to an acquittal, 26 Cr. L.J. 1080=87 Ind. Cas. 970 where 25 Cr. L.J. 492=77 Ind. Cas. 892 is followed. A Magistrate is not bound to wait till the close of the day in the trial of a case. If the complainant is absent when the case is called on for hearing the Magistrate is justified in dealing with the case under this section and acquitting the accused. The presence of the complainant's vakil alone is not sufficient compliance with the requirements of the section. In criminal cases, unlike as in Civil cases the presence of a party's Vakil is not considered as the presence of the party. Except where the court dispenses with the personal attendance of the accused and allows him to appear by pleader or agent his presence is essential. A complainant cannot be represented by a pleader in order to take away the jurisdiction of a Magistrate to proceed under this section. The object of the section is to prevent a complainant from being dilatory in the prosecution of the case and if he does not care to be present when the case is called on the accused is entitled to an acquittal unless, the Magistrate chooses for reasons he thinks proper to adjourn the case, 24 L.W. 689=27 Cr.L.J. 988=86 Ind.Cas. 652 following 7 M. 213 and 356. This section is applicable only to a case where summons is issued to the accused on a complaint and not to a case taken, upon a police report. Appearance of the vakil for the complainant is not an appearance of the complainant within the meaning of this section, Weir II, 309. Where after the examination of the witnesses for the prosecution and the defence the Magistrate adjourned the case for argument for the purpose of the documentary and oral evidence being explained to him and on that adjourned date the complainant did not appear and the Magistrate dismissed the complaint and acquitted the accused under this section, it was held that the acquittal was proper, 18 C.W.N. 584=15 Cr. L.J. 731=22 Ind. Cas. 732. Where a case was called by mistake on a date not fixed for hearing and the complaint was

Dismissed and accused acquitted on account of the absence of the complainant under this section, and the Magistrate having found out the mistake on the date really fixed for hearing ignored the previous order wrongly passed, and proceeded with the case which ended in a conviction, it was held that the procedure of the Magistrate was proper and he had jurisdiction to ignore his previous order of acquittal which was a nullity, 47 C. 147 following *Wair II, 307*; 42 C. 365. It was held that an order of acquittal passed owing to the non-appearance of the complainant on the date fixed for disposal of the case is wholly without jurisdiction; when to the knowledge of the Magistrate the complainant had died before such date, and such an order is no bar to the Magistrate taking cognizance of a fresh complaint made by another servant of the master, for mischief to whose property the deceased had preferred the first complaint, 18 C.W.N. 1211—15 Cr L.J. 726—23 Ind. Cas. 174. Where a Magistrate adjourned a case for pronouncing judgment and on the adjourned date acquitted the accused on account of the absence of complainant to hear judgment, it was held that the case did not fall within the provisions of this section as the hearing of the case had already been concluded, 46 C. 867. When in a compoundable offence, after the death of the complainant, his nephew applied for substitution of his name in his place and the Magistrate directed the case to be proceeded with on the ground that the accused had been guilty of contempt of the process of the Court, it was held that the Magistrate ought to have passed an order of acquittal under this section on failure of complainant to appear at the hearing of the case unless he thinks proper to adjourn the case to some other day, and the ground on which the Magistrate chose to proceed with the case was not valid, and the High Court acquitted the accused, 19 C.W.N. 333—16 Cr. L.J. 322—28 Ind. Cas. 658. But see 20 C.W.N. 862 where it was held distinguishing the above cases that this section was primarily intended to apply to a complainant who is alive but does not appear. The closing words of the first paragraph seem to suggest that the case should be adjourned in order to enable the complainant to appear. When a case was disposed of under this section, the complainant and the accused both being absent, the order under this section operates as a bar to further proceedings. An acquittal under this section acts as a bar to further proceedings equally with an acquittal on the merits under S. 403, 45 A. 88. The provisions of S. 403 that a fresh trial will not be barred unless the accused has in the first case been "tried" does not limit the effect of an order of acquittal under this section, 35 M. 263, where 4 C.W.N. 346 and 7 C.W.N. 711 and 493 followed; 40 M, 976. An order of acquittal under this section on a date other than the date fixed for hearing is no order at all and is a nullity, 43 C. 383; *Wair II, 307*; under this section the Magistrate is given a discretion to acquit the accused in the absence of the complainant. But mere absence of the complainant cannot result in the acquittal of the accused without the Magistrate passing an order in the exercise of that discretion, 25 Cr. L.J. 492—77 Ind. Cas 892. When a Magistrate acting under this section dismisses a summons-case on account of the non-appearance of the complainant under S. 203, *supra*, the effect of his order is to bar all subsequent proceedings on the same complaint or based on the same fact until his order is set aside by a competent authority, 3 C.W.N. 760. On account of the absence of the complainant the accused who was charged with mischief was acquitted but on the complainant's motion the District Magistrate revived the complaint and directed that the accused should be proceeded against for theft. It was held the acquittal on the charge of mischief was a bar under S. 403 *infra* to his being put on his trial again on the same facts for theft and that the order of the District Magistrate was illegal, 28 Cr. L.J. 149—78 Ind. Cas. 293. In a case in which the complainant being absent, the Magistrate acquitted the accused under this section, it subsequently transpired that the absence of the complainant had been procured by the fraud of the accused who had him arrested and kept in custody on a false charge, held that the High Court as a Court of revision will not on the District Magistrate's reference under S. 438 *infra* set aside the acquittal, as an appeal lay from the order of acquittal, and no appeal having been preferred by the Government no provision is made in the Code for the Court which passed an order of acquittal under this section to vacate its order, even though such order was obtained by a fraud practised on the Court by the accused, 38 M. 1028. In the case of cognizable offences where a complainant and a complaint are not necessary, the death of the injured person makes no difference to the criminal proceedings which are a matter for the State and which are undertaken by the Government. But even in the case of non-cognizable

offences such as, bribery, the Code does not intend to confine prosecution to persons directly injured. The section was intended to apply to the case of a complainant who is alive but does not appear in Court. In the case of a non-cognizable offence instituted upon complaint the maxim "*actio personalis moritur cum persona*" does not apply and the trying Magistrate has a discretion in proper cases to allow a complainant to continue by a proper and fit complaint if the latter is willing. Courts should always be on their guard against needless harassment of an accused by substituting a complainant who is not a fit person, 28 Bom. L.R. 288=27 Cr. L. J. 491=93 Ind. Cas. 891.

UNLESS HE THINKS PROPER TO ADJOURN.—This section gives a Magistrate a discretion to adjourn the hearing when complainant is absent and examination of witnesses on any such day during complainant's absence does not necessarily vitiate proceedings, 24 C.W.N. 199. A Court is not bound to wait till the Court is about to close for the day, 7 M. 386. See also the recent decision of the Madras High Court, 24 L.W. 669=27 Cr. L.J. 988=96 Ind. Cas. 692 followed in 24 L.W. 715. But the Court is bound to use some discretion when a complainant was prevented by heavy floods which cut off all communications; and in such a case the acquittal will be an improper exercise of discretion, 24 W.R. (Cr.) 64.

FURTHER INQUIRY.—A District Magistrate or Sessions Judge cannot direct further inquiry or re-hear a case dealt with under this section, 7 M. 213; Weir II, 308; 7 C.W.N. 711 and 498; 4 C.W.N. 348. An acquittal of an offence arising out of a certain set of facts under a wrong section will prevent a further inquiry being directed into any offence disclosed on the same facts until that acquittal is set aside, 25 Cr. L.J. 794=81 Ind. Cas. 314; see also 25 Cr. L.J. 359=77 Ind. Cas. 295.

REVISION.—The High Court will not ordinarily interfere in revision with an acquittal as the local Government could appeal under S.417, *infra*, if the acquittal is wrong or perverse, but this rule does not properly apply to an acquittal under this section and in any case the rule will not preclude interference by the High Court when the acquittal is the result of an improper clutching at jurisdiction, 25 Cr. L.J. 794=81 Ind. Cas. 314. See in this connection the decision in 38 M. 1028 where the High Court refused to interfere in revision even in a case where a trick was played upon the Court by the accused getting the complainant arrested on a charge of nuisance and thereby getting an acquittal under this section. The only remedy open when an order of acquittal has been passed under this section is to have it set aside by the High Court. A Magistrate has no jurisdiction to set aside the order of acquittal passed by him and revive the proceedings against the accused, as the order under this section operates as a bar to revival, 38 C.L.J. 195.

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, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused.

SCOPE OF THE SECTION.—This section deals with the withdrawal of complaint in summons-cases, 6 M. 316; 37 B. 369 at 372. This section has no application to warrant-cases. Where therefore the offence charged is a warrant-case, a Magistrate ought to proceed with the inquiry or trial in spite of the withdrawal by the complainant, if he finds the elements of an offence are made out, 3 C.W.N. 548; 13 B. 600; 37 B. 339. This section contemplates the withdrawal of the complaint, that is the complaint as a whole. When the complaint is against two accused and the withdrawal-petition mentioned only one of the accused, it is a withdrawal of the whole complaint and consequently a withdrawal of the complaint in respect of both the accused, [1921] Patna 144. This view was based on the analogy of the decision in 7 C.W.N. 176, which held that the compounding of an offence with regard to one is a compounding with regard to all the accused, but this view was dissented from in 41-

M. 323 and 1 Lah. 159. The analogy will not hold good now as the amendment in sub-section (6) of S. 345 is in accordance with the view in 41 M. 323 and opposed to the ruling in 7 C.W.N. 176. This section enables a complainant at any time before a final order is passed by the Magistrate to apply for a withdrawal of a case but there is no absolute power of withdrawal under this section and before a withdrawal can be permitted, there must be sufficient grounds to the satisfaction of the Magistrate, 83 C. 631 at 635. This section is intended to apply to cases instituted upon complaint as defined in S.4 (1) (h), *supra*, while S. 249, *infra*, is intended to apply to cases instituted otherwise than on complaint. When a Magistrate took cognizance of the case upon a police-report which was no doubt based on a complaint made to them, the person who complained to the police was not entitled under this section to withdraw the charges, and the order of the Magistrate permitting the case to be withdrawn is bad in law, 23 M. 826. It is not competent for a Municipal Council to withdraw a complaint under this section when the complaint was preferred by a person in virtue of an express authorization by the Municipal Secretary to whom the powers of the Chairman were delegated under the District Municipalities Act, 27 M.L.J. 617. When a complaint is withdrawn under this section it is a withdrawal of the whole complaint even though the withdrawal is against one of the accused. It is a question of fact whether a withdrawal is in whole or in part. The offence alleged to have been committed, however numerous the offenders be, is one and the Code does not contemplate the partial withdrawal of a complaint or withdrawal against some of the offenders only, in spite of the fact that the complainant may now compound against some of the accused under S.345 (6), *infra*, and continue the case against the remaining accused, 8 Lah. 239. The effect of a withdrawal of a compoundable charge tried with another which was non-compoundable is that the Magistrate was entitled to acquit the accused under this section treating the petition of compromise as one of withdrawal of that charge, 21 Cr. L. J. 303—85 Ind. Cas. 465.

AT ANY TIME BEFORE A FINAL ORDER IS PASSED.—These words do not apply to a time before the accused has been ordered to appear inasmuch, as S. 242 *supra* applicable to the trial of summons-cases, says that "when the accused person 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 if he has any cause to show why he should not be convicted". So an order on the charge-sheet that the persons proceeded against were acquitted cannot be availed of by persons against whom no process has been issued, 2 Cr. L. Rev. 288 at 292—21 Ind. Cas. 159.

DISTINCTION BETWEEN WITHDRAWAL AND COMPOUNDING OF AN OFFENCE.

An act of compounding is different from the withdrawal of a complaint made to a Magistrate. A withdrawal must be an intimation to the Magistrate holding the trial, and is permissible only in a summons-case, and the complainant is required in such a case to satisfy the Magistrate that there are sufficient grounds for permitting to withdraw. The law does not provide for the withdrawal of a warrant-case. The compounding of an offence signifies that the person against whom the offence has been committed, has received some gratification not necessarily of a pecuniary character to act as an inducement for his desiring to abstain from a prosecution, and the law laid down in S. 345 of the Code provides that if the offence is compoundable, the composition shall have the effect of an acquittal, 21 C. 103 at 112-113. The power of withdrawal is confined to the complainant who has preferred a complaint. Where the Magistrate took cognizance of the case on a police-report, the informant to the police cannot be allowed to withdraw, 23 M. 826, and once a Magistrate has allowed a complaint to be withdrawn, a Magistrate has no jurisdiction to revive the case against the accused, 25 W.R. (Cr.) 65. There are three contingencies under which a person can be acquitted without a charge having been framed—(1) in a summons-case under S. 248; (2) under S. 345 on a valid compounding of the offence; (3) under S. 333 when the Advocate-General withdraws from the prosecution, 24 Cr. L.J. 120—71 Ind. Cas. 218. In a warrant case with regard to a non-compoundable offence it is not competent to a Magistrate on a private complainant's offering to withdraw from the prosecution to enter an order of acquittal, 37 B. 369.

249. In any case instituted otherwise than upon complaint, a Presidency Magistrate, a Magistrate of the first class, or, with the previous sanction of the District Magistrate, any other Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment, either of acquittal or conviction, and may thereupon release the accused.

Power to stop proceedings when no complainant.

SCOPE OF THE SECTION.—This section applies only to cases instituted otherwise than on a complaint, 21 Cr. L.J. 184=54 Ind. Cas. 888; 13 Cr. L.J. 860=17 Ind. Cas. 796, and S. 247, *supra* applies to such cases, instituted on complaint, 8 Patna 243.

STAY OF PROCEEDINGS AT ANY STAGE.—The order of the Magistrate stopping proceedings without pronouncing a judgment of acquittal or conviction and releasing the accused is no bar to further proceedings in accordance with law. Such an order is not an acquittal within S. 403, *infra*. A District Magistrate purporting to act under S. 436, *infra* cannot set aside such an order as his powers under that section are confined to a complaint dismissed under S. 203 or S. 204 (3), *supra*, or where there has been an order of discharge. An order under this section does not fall under any of those sections, 13 Cr. L.J. 860=17 Ind. Cas. 796.

Frivolous Accusations in Summons and Warrant-cases.

250. (1) If, in any case instituted upon complaint or upon information given to a police-officer or to a Magistrate, *one or more persons is or are* accused before a Magistrate of any offence triable by a Magistrate and the Magistrate by whom the case is heard discharges or acquits *all or any of the accused*, and is of opinion that the accusation against them or any of them was *false and* either frivolous or vexatious, the Magistrate may, by his order of discharge or acquittal, if the person upon whose complaint or information the accusation was made is *present*, call upon him *forthwith* 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, or, *if such person is not present direct the issue of a summons to him to appear and show cause as aforesaid.*

False, frivolous or vexatious accusations.

(2) The Magistrate shall record and consider any cause which such complainant or informant may show, and if he is satisfied that the accusation was *false* and either frivolous or vexatious may, for reasons to be recorded, direct that compensation to such amount *not exceeding one hundred rupees*, or, *if the Magistrate is a Magistrate of the third class, not exceeding fifty rupees*, as he may determine, be paid by such complainant or informant to the accused or to each or any of them.

(2A) *The Magistrate may, by the order directing payment of the compensation under sub-section (2), further order that, in default of payment, the person ordered to pay such compensation shall suffer simple imprisonment for a period not exceeding thirty days.*

(2B) *When any person is imprisoned under sub-section (2A), the provisions of sections 68 and 69 of the Indian Penal Code shall, so far as may be, apply.*

(2C) *No person who has been directed to pay compensation under this section shall, by reason of such order, be exempted from any Civil or Criminal liability in respect of the complaint made or information given by him :*

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) A complainant or informant who has been ordered under sub-section (2) by a Magistrate of the second or third class to pay compensation or has been so ordered by any other Magistrate to pay compensation exceeding fifty rupees may appeal from the order, in so far as the order relates to payment of the compensation, as if such complainant or informant had been convicted on a trial held by such Magistrate.

(4) Where an order for payment of compensation to an accused person is made in a case which is subject to appeal under sub-section (3), 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 and where such order is made in a case which is not so subject to appeal, the compensation shall not be paid before the expiration of one month from the date of the order.

EXTENT OF AMENDMENT.—This section has been partly redrafted. The amount awardable is raised to rupees one hundred unless the Magistrate is a third-class Magistrate who can award only rupees fifty. Imprisonment in default of payment is to be for a period not exceeding thirty days and the order awarding compensation may now specify the same, and the provisions of Ss. 69 and 70, I.P.C., are made applicable to such imprisonment. This section is made applicable to false, frivolous or vexatious accusations; (1) for the purpose of recovery and imprisonment in default of payment, the compensation will be treated in all respects as a fine; (2) the procedure in awarding compensation has been clearly laid down, by directing that a Magistrate in his order of discharge or acquittal may call upon the complainant to show cause why he should not pay compensation, and he shall then consider and record any cause shown and pass such orders as he sees fit. As the section is now worded, the order to pay compensation is part of the order of discharge or acquittal and the recording and consideration of objections is to precede such order. The procedure now proposed is more logical. An appeal is now also provided in cases where a Magistrate other than a second or third class Magistrate awards more than fifty rupees as compensation.

OBJECT OF THE SECTION.—The section applies to proceedings under this and following chapters including summary trials, 11 M. 142. The object of the section is not to punish a complainant, but, by a summary order, to award some compensation to the person against whom a frivolous or vexatious accusation is brought, leaving him to obtain further redress against the complainant, if he seeks for it, by a regular suit or criminal prosecution, 30 C. 123 (F.B.) at 129; 16 Cr. L.J. 92—26 Ind. Cas. 1061; 1881 A W N. 167. The principle of giving compensation is to recompense by way of damages the party who has been vexatiously dragged before a Criminal Court, 38 M. 1091 at 1095; under this section compensation can be awarded only against a complainant. It does not provide for the responsibility of a next

friend or guardian who cannot be ordered to pay compensation, 13 Cr. L.J. 136—13 Ind. Cas. 824. The compensation which the Court is empowered to award under this section is not a fine, but is in the nature of damages for malicious prosecution although it is made recoverable in a summary manner as if it were a fine. Proceedings under Chapter VIII for taking security are not accusations of an offence within this section enabling the Magistrate to award compensation, 20 A.L.J. 624; 35 A. 382; 15 A. 355; 7 A.L.J. 743; 25 B. 48. So also maintenance proceedings do not come within the provisions of this section, 16 M. 231; 6 M.L.T. 261. A Magistrate who makes a complaint of Court in writing under S. 476, *infra*, is not debarred from granting compensation though it may not be an exercise of proper discretion, 26 A. 542; 37 B. 376; 21 M. 237 dissenting from 22 C. 586. This is a penal section and should be construed strictly, 14 Cr. L.J. 437—20 Ind. Cas. 597; but this section does not warrant an order against a person who only instigates the giving of false information but does not himself make the complaint or give information. There is no authority for introducing into it words which would extend the liability beyond the actual complainant or person who gives the information on which the case is instituted, 20 Cr. L.J. 100—48 Ind. Cas. 980. A Magistrate cannot act under this section when the offence has been lawfully compounded by the parties. To award compensation the Magistrate himself is to discharge or acquit the accused, 16 Cr. L.J. 92—26 Ind. Cas. 1009.

ANY CASE INSTITUTED UPON COMPLAINT OR INFORMATION GIVEN TO A POLICE-OFFICER OR MAGISTRATE.—'Complaints defined in this Code' was the expression found in this section before the recent revision of the Code. Now the words "as defined in this Code" are omitted. When a certain decree-holder applied for a complaint by Court to prosecute his judgment-debtor for obstructing the Court Bailiff in executing a warrant of attachment issued by the Court, and the Court when refusing the same passed an order under S. 476 *infra* sending the judgment-debtor to the nearest first-class Magistrate for trial who in discharging the accused awarded compensation against the decree-holder, it was held that the order for compensation was bad, as the accusation was not made upon the complaint or information of the decree-holder and complaint cannot include the deposition made during the course of the trial, 14 Bom. L. R. 1166. This section is not applicable to cases under Ch. VIII of the Code relating to security proceedings. The provisions therein contained are aimed at prevention of and are not consequent upon the commission of specified offence, 17 Mad. Jur. (N.S.) 683. See also 3 Cr. L. Rev. 310—12 A. L. J. 508, where it was held that an order awarding compensation against a person laying information with a view to start proceedings under S. 107 was not proper and was set aside. A police-officer in a non-recognisable case may initiate proceedings by laying information before a Magistrate just like any other complainant, and in such a case the information which he lays will be a complaint within this section and compensation can be awarded against such police-officer if the information was found to be vexatious, 26 B. 150 (F.B.) overruling 22 B. 931. See also 6 A. 98, where it was held that a case instituted by the police on a complaint made to them is not one instituted upon complaint under this section. But see 24 A. L. J. 221—27 Cr. L. J. 702—94 Ind. Cas. 894, where it was held that a person who gave information to the police upon which proceedings were started can be dealt with under this section and he cannot be heard to say he was merely an informant and not a real complainant. A person who complains to a Village Magistrate of an offence knowing that the latter must in the ordinary course of his duty report the substance of the complaint to the police, gives information to the police just as effectively as if he went in person to the police station and if the police charge the case, it is instituted on information given to a police officer within the section. A comparison of the opening words of this section with S. 190 *supra* will show that they closely correspond and that the former are intended to cover all the three methods marked in S. 190 (a), (b) and (c) in which a Magistrate may take cognizance of a case, with the single exception "of his own knowledge or suspicion" which would be inappropriate to this section. It is difficult to understand that a person who chooses to institute a frivolous or vexatious charge in one way should be less liable to pay compensation than one instituting it in another, seeing that all are equally effective methods of inducing the Criminal Courts to take action, 39 M. 1006 dissenting from 22 M. L. J. 1.

The same view was taken in 4 Cr. L. Rev. 185, where it was held that information to the Village Magistrate was information to a police-officer within the meaning of this section, and a Magistrate was entitled to act under this section by awarding compensation to the accused. Where a Station-House-officer prepared a charge-sheet and presented it to a Magistrate on the strength of a sanction granted to prosecute a person by the Assistant Superintendent of Police for an offence under S. 311, I.P.C., and the Magistrate discharged the accused and awarded compensation against the constable under this section, it was held that the constable was not in such circumstances the person upon whose complaint or information the accusation was made, and therefore the compensation order was illegal, 21 M.L.J. 844—40 M.L.T. 191—12 Cr. L. J. 482—12 Ind. Cas. 90. See also Welr II, 318 where the order for compensation against a public servant who acted merely on the information of his official superior was held bad. 'Information to a police-officer' will include not only a case in which the police were originally put in motion but also a case where subsequent information is given leading to the accusation of others during police investigation of the case, 14 C. W. N. 328—5 Ind. Cas. 693. If a person makes a report to the police which is found by the Magistrate to be false, frivolous or vexatious the Magistrate can direct the complainant to pay compensation under this section, 23 A.L.J. 1084—27 Cr. L.J. 33—94 Ind. Cas. 67 where 1 Pat. L.J. 108 is referred to. This section has no application to a case instituted upon a police-report or on information given by a police-officer, 21 C. 879; 5 C.W.N. 370; 7 C.W.N. 208. In 39 M. 1008 the Court was inclined to take the view that the term. "Magistrate" occurring in this section included a Village Magistrate, but the point was not actually decided, although the decision in 25 M. 667 which took a different view was disapproved on the strength of the later Full Bench ruling in 32 M. 286. Under this section a guardian or next friend of a minor complainant cannot be ordered to pay compensation to accused, 13 Cr. L.J. 136—13 Ind. Cas. 824.

ANY OFFENCE TRIABLE BY A MAGISTRATE.—It must be an offence first, 44 B. 463; 15 A. 365. Offence need not necessarily be under the Indian Penal Code, 4 N. W. P. H. C. R. 94. The person must have been accused before a Magistrate of an offence, 25 B. 48. See S. 4 (1) (c) definition of an offence. Proceedings under Chapter VIII for taking security instituted on the information given by a private person is not an accusation of an offence, and therefore the provisions of this section are inapplicable to such a case, 45 A. 363; 36 A. 882; 16 A. 315; 7 A.L.J. 749; 25 B. 48; 24 Cr. L. J. 228—71 Ind. Cas. 692 or to maintenance proceedings under S. 468 *infra*, 16 M. 284; 6 M.L.T. 261—4 Ind. Cas. 1045. Nor can it be a case of mere breach of contract under S. 2 (1st part) of Act XIII of 1859 (Breach of Contract), 5 C. W. N. 253. The words "triable by a Magistrate" mean triable under S. 28 *supra*, and the provisions of this section are confined to cases specified in the eighth column of Sch. II of the Code as triable by a Magistrate. Hence, a Magistrate holding a preliminary inquiry into a case triable exclusively by the Court of Session is not competent to act under this section when he discharges the accused, Welr II, 318; 20 Cr. L. J. 151—49 Ind. Cas. 178. Where in a complaint filed, the offence disclosed was one of dacoity not triable by a Magistrate, that will not oust the jurisdiction of the Magistrate to make an order under this section if the Magistrate, after a preliminary inquiry issued process for an offence triable by him. To restrict the operation of this section to cases in which the section referred to in the complaint was an offence triable by a Magistrate would seriously diminish the usefulness of this section and enable complainants to evade its provision by intentionally referring to sections triable exclusively by a Court of Session. In filing a complaint, the Magistrate must be deemed to make an accusation which includes not only the offence specifically referred to, but also any offence which the facts disclosed in the complaint considered in the light of such inquiry as the Magistrate considers necessarily disclosed, 26 Cr. L. J. 265—84 Ind. Cas. 329. But when the complaint is for offences some of which are triable exclusively by the Magistrate and some by the Sessions Court and the accused after trial was discharged of all the offences, it was held that no order for compensation could be passed even when the accused was discharged under S. 253, *infra*, 23 A.L.J. 1086. Where a Magistrate tries an accused person for an offence within his jurisdiction when the offence disclosed was one exclusively triable by a Court of Session and discharges the accused, he is competent to award compensation to the accused under

this section, 45 M. 29; but see 20 A.L.J. 433 and 23 Cr. L. J. 289-68 Ind. Cas. 513. The provisions of this section are applicable to summons-cases tried summarily by virtue of S. 262 *infra*, and compensation may be awarded, 11 M. 142. A Magistrate who has no jurisdiction to try a charge and who inquires into the charge and discharges the accused cannot award compensation, 9 Cr.L.J. 502-2 Ind. Cas. 559.

THE MAGISTRATE BEFORE WHOM CASE WAS HEARD.—The word "heard" was substituted for the word "tried" and as a complete trial is not necessary now for awarding compensation, order can be passed after hearing a case partly, and the only restriction is that evidence must be heard, 10 W.R. (Cr.) 6. So compensation cannot be awarded in cases where the complaint is dismissed without issuing process to the accused, because in such a case there is no 'hearing' within the meaning of this section. This section is confined by its terms to the Courts of Magistrates trying cases in the first instance and does not confer the requisite powers on appellate Courts to award compensation when setting aside a conviction, 46 A. 80 followed in 27 Cr. L.J. 570-94 Ind. Cas. 138. An order making a complainant to compensate an accused for having been frivolously or vexatiously charged does not come within the words "consequential or incidental order that may be just and proper" occurring in S. 428 defining the powers of the appellate Court, as the making of an award of compensation would require express authority, and the special power under this section is given only to an original magisterial Court. Moreover, as the exercise of such a power by the appellate Court would involve such an extreme measure of contempt for the judgment of the inferior Court concerned, that it could but seldom be used with propriety, it can readily be understood why the Legislature should not have thought it worth while if, indeed, it did not think it actually inexpedient to extend it to such a Court, 39 C. 157 (F.B.). The Magistrate who *heard the case* alone is competent, and his successor cannot award compensation under this section, and this is clear from the wording of the section.

DISCHARGES OR ACQUITS THE ACCUSED.—This wording of this section is very clear. It is only the trying Magistrate who, if he discharges the accused can order compensation to be paid. The appellate court has no jurisdiction to proceed under this section, 48 A. 80 followed 28 A. 625 and 39 C. 157 (F.B.) followed in 27 Cr. L.J. 570-94 Ind. Cas. 138, 7 Lab. 132. This section is not applicable to a case in which a complaint is dismissed under S. 203 *supra* without any process being issued for the attendance of the person against whom such complaint is made. In such a case there is no discharge or acquittal within the meaning of this section entitling the Court to award compensation to the accused, 29 A. 137. See in this connection 47 A. 722 and 51 M.L.J. 605 (F.B.)=21 L.W. 603. Before compensation is awarded, the case must be heard by a Magistrate and he shall have discharged or acquitted the accused, and the principle of giving compensation is to recompense by way of damages to the party who has been vexatiously dragged before a Criminal Court, 26 M. 127 followed in 38 M. 1091. Proceedings under this section are inapplicable to a case where the accused person has himself by agreement with the prosecutor arrived at a settlement and has been a party to it. When a *Rasinama* was filed in Court stating that the offence charged which was compoundable had been compounded, the Court ought to accept the same under S. 345 *infra* and was not entitled to hold an inquiry whether the charge was frivolous or vexatious, to decide whether compensation should be awarded to the accused under this section; 10 Bom. L.R. 1058=11 Cr. L.J. 638=8 Ind. Cas. 337. The composition under S. 345 has the effect of an acquittal but there is no discharge or acquittal within the meaning of this section to entitle the Magistrate to award compensation to the accused. It was held in 24 C. 53 that the acquittal or discharge must be complete before awarding compensation; where an accused was charged with offences under Ss. 352 and 379, I.P.C., and one of the offences alone was proved; no compensation could be awarded as the complaint was at any rate partly true. Compensation may be awarded after hearing defence evidence because it is possible that the Magistrate might not be able to detect the frivolous or vexatious nature of the complaint until the accused had an opportunity to explain the real state of affairs, Weir II, 316; 10 B. 199; 5 M. 331.

ALL OR ANY OF THE ACCUSED.—The words "all or any" have been newly added now. It was not very clear whether compensation could be awarded when some accused were

convicted and some were acquitted. To make this clear, the words "all or any" were added. Conviction of some of the accused will not preclude a Magistrate awarding compensation to others who are acquitted. A complaint may be well founded as regards some of the accused, and frivolous or vexatious as regards the others so as to render the complainant liable to pay compensation to those others, 5 M. 331.

IS SATISFIED THAT ACCUSATION WAS FALSE AND FRIVOLOUS OR VEXATIOUS.—

The Magistrate must be satisfied that the accusation was false and frivolous or vexatious and it is only then, that he is entitled to award compensation, 1881 A.W.N. 167. The alteration now made, covers a case where the complaint is shown to be false and either frivolous or vexatious. This section justifies compensation being awarded when a false complaint is filed out of enmity, 24 A.L.J. 181. As qualifying an accusation the term *frivolous* indicates that the accusation is of a trivial nature, but it may or may not be false, 2 Cr. L.J. 209 (n) and the term *vexatious* implies that the accusation is one which ought not to have been made in a Criminal Court and which it is intended to harass the accused. But neither of the two words excludes the element of falsehood in the charge. Again, a charge that is false must be vexatious though it may not be frivolous as well. The word "false" has now been added and is in accordance with the decision in 30 C. 123 (F.B.) which *overruled* 28 C. 281; see 26 A. 512; 34 A. 354; 38 M. 1091 and 16 Cr. L.J. 92—26 Ind. Cas. 1004. So there is no reason why a case in which the accusation is false should be considered as being outside the scope of the section. The object of the section is not to punish the complainant but by a summary order to award some compensation to the person against whom a frivolous or vexatious accusation is brought leaving it to him to obtain further redress if he seeks for it in a Civil or Criminal Court. When a false complaint was made at the instance of another party by the complainant it is vexatious within the meaning of this section, Welr II, 313; 21 M. 237. But when the complainant finding his wife absent and the accused also missing, filed a complaint against him of enticing away his wife and the order of discharge showed that the complainant had good grounds for coming to the conclusion that they had gone together, though a good *alibi* was proved by the accused, the complaint was held to be not vexatious, 3 Cr. L. Rev. 289 at 290.

MAGISTRATE MAY IN HIS DISCRETION.—The question whether the discretion given by this section has been rightly exercised must always depend upon the facts of the particular case. If the false charge is of such a nature that a prosecution is necessary on grounds of public policy it may well be that a Magistrate would exercise his discretion wrongly, if instead of sanctioning a prosecution, he awarded compensation. If the false charge is not one which does not render it necessary on grounds of public policy that a prosecution should be sanctioned, a Magistrate who makes an order for compensation cannot be said to exercise his discretion wrongly. These are considerations to be borne in mind in making an order under this section, 27 M. 59 at 60-61. Where a Magistrate awarded compensation under this section in a case in which the complaint was found to be false and malicious and made with deliberation on account of past misunderstandings and was instituted, knowing that there was no just and lawful ground, the High Court set aside the order for compensation holding that the Magistrate did not exercise a proper discretion in granting compensation and pointed out that the case was a fit one for proceeding against the complainant under S. 211, I.P.C., 29 C. 479.

BY HIS ORDER OF DISCHARGE OR ACQUITTAL CALL UPON COMPLAINANT FORTHWITH TO SHOW CAUSE.—When a person is accused of several offences and is discharged in respect of some of them and acquitted of others, it is still open to the Magistrate to make an order under this section in respect of all the accusations when he passes the final order of acquittal. It is obviously better for the Magistrate to take action in such a case not at an intermediate stage of the trial but at the end, 27 Cr. L.J. 448—93 Ind. Cas. 240. This section requires that before a Magistrate makes it a ground for discharging an accused that the complaint was frivolous or vexatious, he shall hear the complainant on that aspect of the case and unless he does so, his order of compensation is without jurisdiction.

The order awarding compensation must be contained in the order of discharge or acquittal and not passed in a separate proceeding after the accused had been discharged and acquitted, 38 C. 302 following 25 A. 315; 34 A. 334; 15 Cr. L.J. 290—23 Ind. Cas. 498; 33 A. 132 and failure to do so cannot be cured by S. 537, *infra*, 25 Cr. L.J. 419—33 Ind. Cas. 129; 33 Ind. Cas. 615. But the decision in 38 C. 302, was distinguished in a latter case. There a Magistrate by his order of discharge declared the case to be frivolous and directed the complainant under this section to pay compensation to the accused subject to any cause being shown by him and no cause having been shown by the complainant the Magistrate, the day after, made his previous order absolute and the High Court held that the order was not only reasonable and proper but it strictly complied with the requirements of the section. The Court further remarked that it was sufficient that the Magistrate fixed the compensation in his order of discharge but if the complainant was absent at the time of discharge the Magistrate certainly would not be justified in keeping the accused in custody with the charge hanging over their head while the complainant is fetched to show cause. The direction shall be conditional or in the nature of a rule and that the rule shall not be made absolute until complainant had shown cause, 18 C.W.N. 702. A complainant cannot insist on an adjournment to show cause why he should not be ordered to pay compensation under this section, 28 Bom. L.R. 98. A complainant who was called upon to show cause, stated "my pleader will give a written reply. I am not in a position to give my reply now" and the Magistrate passed an order directing him to pay compensation, it was held that he had not a right to an adjournment to enable him to consult his pleader and give a written reply if he chose the procedure prescribed under this section being similar to the one prescribed in the case of an accused person in a summons case to show cause under S. 242, *supra*, 27 Cr. L.J. 430—93 Ind. Cas. 158. It is only the trying Magistrate who can order payment of compensation when discharging or acquitting the accused. The appellate Court has no jurisdiction to proceed under this section and award compensation, 7 Lah. 152 where 28 A. 625; 39 C. 137 (F.B.); 46 A. 80; 7 Bom. L.R. 998 are followed. Where the Magistrate ordered compensation to be paid by an absentee complainant believing that the complainant deliberately absented himself on the day the judgment was pronounced, it was held that the order was illegal as the section provided for what is to be done in case the complainant was not present when judgment was delivered, *i.e.*, to summon him and give him an opportunity to show cause before passing the order. The order was therefore set aside as illegal, 25 A.L.J. 170—27 Cr. L.J. 128—91 Ind. Cas. 704.

The word "forthwith" has been newly added. By this section as amended and enacted in the precise words which are now to be found in it, it was intended that its provisions should be observed and carried out by the subordinate Court irrespective of any prejudice to the complainant occasioning a failure of justice. It is desirable and it should be made clear that the provisions of the Code should be observed by the Magistrates in the subordinate Courts, 29 C.W.N. 127—26 Cr. L.J. 419—35 Ind. Cas. 129. The law as it now stands is that only the order calling upon the complainant to show cause why he should not pay compensation is to be contained in the order of discharge and the order for payment of compensation is necessarily a subsequent order, 7 Lah. 121. The order is to be passed always in the presence of the complainant in Court. If the complainant is absent when the Magistrate discharged the accused, before he awards compensation, he must adjourn the case to secure the attendance of the complainant and give him an opportunity to show cause and then pass his final order. See 3 Cr. L.J. 123. Where a Magistrate signed and dated his order of discharge, then recorded an order calling upon the complainant to show cause why he should not pay compensation, and recorded and considered the objections and at once proceeded to pass an order to pay compensation, it was held that the entire proceedings followed one another on one and the same date and there was substantial compliance with the provisions of the section or at most an irregularity cured by S. 537, *infra*, 8 Bom. L.R. 847. The same view was taken in 35 A. 132. There, after calling upon the complainant to show cause, the Magistrate four days later after hearing complainant passed an order awarding compensation. It was held that the proceedings though not strictly in accordance with law was merely irregular and not without jurisdiction. Where a Magistrate directed the acquittal of the accused and asked the complainant if he had any cause to show, and immediately thereafter passed the order, it is only a continuation of the same order, and if instead of signing the order at two places, he had

signed the order at the very end no objection can be taken to the procedure adopted, 27 Cr. L. J. 35-31 Ind. Cas. 67 where 25 A. 315 and 34 A. 354 are distinguished. Where a Magistrate after acquitting the accused passed an order directing complainant to pay compensation to each of the accused and then called upon complainant to show cause why he should not pay the same, complainant being absent, his brother verbally showed cause which was held by the Magistrate to be insufficient; held that the complainant was in fact given no opportunity to show cause, 18 C.W.N. 1277-15 Cr. L.J. 707-26 Ind. Cas. 155; 25 Cr. L.J. 1312-62 Ind. C. 480.

DIRECT THE PERSON UPON WHOSE COMPLAINT ACCUSATION IS MADE.—

Where a charge sheet under S. 211 I.P.C. was presented to a Magistrate by a constable having been prepared by an S.H.O. under the orders of an Assistant Superintendent of Police it was held that the constable was not a person upon whose complaint or information the accusation was made so that the Magistrate may make an order under this section, 21 M. L.J. 841-10 M.L.T. 191-12 Cr. L.J. 482-12 Ind. Cas. 90. A guardian and next friend of a minor complainant cannot be asked to show cause and against him an order to pay compensation cannot be made, 13 Cr. L.J. 126-13 Ind. Cas. 824.

SHALL RECORD AND CONSIDER ANY CAUSE COMPLAINANT MAY SHOW.—

These words are imperative and the omission to record and consider the objections cannot be treated as a mere irregularity, 23 Cr. L.J. 281. An order for compensation made in the absence of the complainant is not a compliance with law, as this sub-section says that the Magistrate shall record and consider any cause which such complainant may show and the order was set aside by the High Court, 9 A.L.J. 170-13 Cr. L.J. 288-14 Ind. Cas. 652. It cannot be said that an order for compensation made in spite of the request of the complainant to examine all his remaining witnesses to prove that his case was a true one is not illegal but is not one that should be made except in exceptional cases. He should be allowed to call witnesses, for until the Magistrate has heard them he cannot say that their evidences will not help him to decide the propriety of such order and the extent of the culpability of complainant to assess the amount, 44 M. 51; 25 Cr. L.J. 1280-81 Ind. Cas. 288. The direction to pay compensation should be part and parcel of the order of discharge or acquittal and this clearly shows that no separate inquiry is contemplated, (1928) A.W.N. 198. An opportunity to show cause must be given before an order is passed, 24 Bom. L.R. 365; 5 Cr. L. Rev. 400.

FOR REASONS TO BE RECORDED DIRECTING COMPENSATION.—The Magistrate should state his reasons why he holds the complaint to be frivolous or vexatious. A bare statement that the prosecution evidence is in his opinion highly unsatisfactory and upon the evidence and the written statements and documents there is no doubt that the complaint is vexatious was held not to be sufficient, 10 C.W.N. 544. On a proper reading of this section it is clear that recording of reasons for ordering compensation to be paid, is almost a condition precedent to the proper exercise of the power. The recording of reasons is in addition to the finding of the Magistrate that the accusation was either frivolous or vexatious. No doubt there are no words in the section calculated to indicate what the reasons recorded should be but obviously the reasons must go to show, why it is that the Magistrate considers the accusation against the accused to be frivolous or vexatious and why in his opinion it was a fit case in which an order for compensation should be made. The reasons for the Magistrate finding the accusation to be frivolous or vexatious must be set out.....The policy of the Legislature in requiring that in such a case the reasons should be recorded in writing is obviously to afford an opportunity to the appellate or revising tribunal to consider the sufficiency of the reasons so recorded, 21 L.W. 646 at 647-25 Cr. L.J. 1501-90 Ind. Cas. 157.

SUB-SECTION (2).—Under this sub-section all that is prohibited is that the compensation to the accused or each of them where there are more than one accused should not exceed rupees one hundred in amount. This sub-section does not mean, if there are a number of accused persons, the total amount awarded to all of them must not exceed the maximum. 24 A.L.J. 221.

SUB-SECTION (2A).—Where under the provisions of sub-section (2) the Court orders a complainant to pay compensation separately to each of several accused and in default to suffer imprisonment, imprisonment may be awarded for default of each separate payment as ordered, even though this sub-section is not very explicit, 3 Rang. 93. For the purpose of recovery and imprisonment in default of payment, the compensation is to be treated in all respects as a fine. It is now enacted that the Magistrate by his order directing payment may further order that, in default of payment, the complainant shall suffer simple imprisonment for a period not exceeding thirty days. So the decisions in *Weir II, 320; 18 C.W.N. 702; 5 C.W.N. 213 & 214; 28 C. 251 and 164; 22 C. 586 and 139; 18 A. 95; 19 A. 73*, and similar decisions, which held that the order should not specify imprisonment in default and a prior attempt to recover the amount was absolutely necessary before imprisonment is awarded, are no longer law. The provisions of S. 397, *infra* cannot apply when the detention of the person against whom an order of imprisonment for default of payment of compensation under this sub-section is made under the order of a Civil Court as such detention is not a sentence of imprisonment, penal servitude or transportation and so a Magistrate has no power to order that the sentence of imprisonment in default, shall take effect after a term of detention by order of a Civil Court, 3 Rang. 93.

SUB-SECTION (2B) is new. Ss. 68 and 69, I.P.C., provide for termination of imprisonment on payment of fine or proportionate portion of fine.

SUB-SECTION (2C) is also new and makes it clear that the award of compensation under this section will not exonerate the complainant from any civil or criminal liability with regard to such complaint and the proviso which was sub-section (5) before makes it clear that such amount already awarded may be taken into consideration in any subsequent civil proceedings.

SUB-SECTION (3) provides for an appeal against an order for payment of compensation passed by a Magistrate of the second or third class and also an appeal is now provided from a similar order of any other Magistrate to pay more than rupees fifty as compensation. This sub-section means that whenever a complainant is ordered under sub-section (2) to pay compensation exceeding rupees fifty the right of appeal is given, whether the compensation is awarded only to one accused or is to be distributed among a number of accused in sums not exceeding rupees fifty. In a case where the total compensation awarded is over rupees fifty to all the accused, the complainant is entitled to appeal, 49 B. 440 at 442; 26 Cr. L.J. 1504—89 Ind. Cas. 160. The words of this sub-section are general and do not repeat the provisions of sub-sections (1) and (2) stating the limit of compensation to each individual accused. When the total amount ordered to be paid as compensation in one particular case exceeds rupees fifty there is a right of appeal even though the amount awarded to each individual accused may not exceed rupees fifty, 24 A.L.J. 167—27 Cr. L.J. 146—91 Ind. Cas. 882. The remedy to have the order revised by the High Court after the appellate Court has declined to interfere is still open under Ss. 435, and 439, *infra*. A Sessions Judge has no power to set aside an order for compensation made by a first class Magistrate unless the amount exceeds rupees fifty although he has power to set aside the order of discharge made by a first class Magistrate. A Bench of the Madras High Court has held that when a Sessions Judge or District Magistrate is moved under S. 436 *infra* to set aside an order of discharge by a first-class Magistrate and to direct a further inquiry, if there is a further order awarding compensation also, the Sessions Judge or District Magistrate should report the matter to the High Court which alone would be competent to deal effectively with both the orders of discharge and compensation, 10 Cr. L.J. 569—4 Ind. Cas. 399. This will also prevent conflict of decisions by the superior and inferior Courts; but see 18 L.W. 651 following 43 A. 497 and 36 C. 643 which took a different view. There it was held that it is a right course to adopt to insist on a party exhausting all his remedies in an inferior Court before he comes up to the High Court, and the fact that the order of compensation is revisable by the High Court only does not alter the procedure. This section does not declare what the powers of an appellate Court are in disposing of appeals under this sub-section and it is necessary to invoke the aid of S. 438 *infra* for this purpose. S. 439 *infra* illustrates the difference in this respect between

this section and S. 195 *supra* which has been held to be a self-contained section . . . It seems to be an anomaly which might be cured when the Code is amended that no provision should be made for notice to the person most interested in the order being upheld in the case of an appeal being preferred against an order of compensation passed by a second class or third class Magistrate, but if the matter is taken to the High Court for revision of his order. S. 439 (2), *infra*, strictly construed, will make it imperative that notice should go to the accused. In appeals under this section notice should ordinarily be given to the accused and an order made without such notice even though not illegal will be set aside by the High Court under S. 439 as improper, 38 M. 1091 *following* 29 M. 137 and 33 M. 89 and *distinguishing* 27 M. L.J. 629—16 M.L.T. 426—1 L.W. 808—16 Cr. L.J. 648—25 Ind. Cas. 848; 25 Cr. L.J. 203—75 Ind. Cas. 841. No provision is made by the new amendment to give notice in appeals to the accused in whose favour an award was made to support the order. See 27 Cr. L.J. 248—92 Ind. Cas. 424 where it was held that though want of notice is not illegal it is desirable generally that before an order is made the accused should have notice of any intended interference with an order of compensation made in his favour. See also 27 Cr. L.J. 1086—97 Ind. Cas. 82.

SUB-SECTION (4).—In cases where no appeal is provided for, it is enacted that the compensation is not to be paid to the accused before the expiration of one month from the date of order within which a complainant may apply to the High Court in revision and get an order for stay.

CHAPTER XXI.

OF THE TRIAL OF WARRANT-CASES BY MAGISTRATES.

Procedure in 251. The following procedure shall be observed
warrant-cases. by Magistrates in the trial of warrant-cases.

WARRANT-CASE.—For definition of a "warrant-case" see S. 4 (1) (w). For mode of recording evidence in warrant cases see Ss. 856 and 862, *infra*. The distinction between a summons-case and a warrant-case is that in a warrant-case sufficient evidence to support the charge must be recorded before a charge can be framed and the accused called upon to plead, 27 C.W.N. 923 at 924. The powers of a Magistrate who has taken a warrant case on his file for trial are as follows:—(1) He may try it himself if he has jurisdiction. He may, if he thinks he cannot inflict a proper sentence or act under S. 346 or S. 349, send it to a higher Magistrate. (2) He may, if he thinks that it is a proper case for Sessions, commit the accused under S. 347. (3) If he has no power to commit, send the case to another Magistrate to commit under S. 346, 42 M. 83 at 89. The procedure prescribed by this Chapter is to be observed when there are two charges arising out of the same facts, one triable as a summons-case and the other as a warrant-case, 11 C. 91 *followed* in 39 M. 403. When a warrant-case is tried as a summons-case and the conviction was passed on an admission made by the accused under S. 243 *supra* which applied only to summons-cases it was held that this was something more than an irregularity and the conviction was set aside and a retrial ordered, as the procedure adopted by the Magistrate may have prejudiced the accused, 29 M. 372. See 27 C.W.N. 923. It is settled law that proceedings before a Magistrate in a warrant-case under this chapter is only an "inquiry" until a charge is framed and on a charge being framed it becomes a "trial," 38 M. 555; 32 M. 216 and 220.

252. (1) When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution:

Evidence for
prosecution.

Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.

(2) The Magistrate shall ascertain, from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such of them as he thinks necessary.

SCOPE OF THE SECTION.—This section lays down that not only shall the Magistrate take down all the evidence which may be produced in support of the prosecution but shall himself ascertain the names of other persons able to give evidence for the prosecution and summon such of the latter as he thinks necessary. When a new list of witnesses is filed by complainant some time after the complaint was filed and after the trial had begun, what then is the proper attitude of the Court to take up regarding such a list? The section does not appear to be very clear on the point but it means that the complainant should himself produce what evidence he can in support of the prosecution and the Magistrate shall then proceed to hear it. The Court is apparently not bound to issue process for such witnesses or grant time for their production but if produced he must record their evidence. Unlike the corresponding provisions in 308 (3) *supra* and 244 (2) *supra* there is a remarkable omission here. S. 257 *infra* gives the accused power to issue compulsory process to his witnesses while this section gives the Magistrate power to summon persons whom he has himself ascertained to be acquainted with the facts of the case. When the complainant has done all he can without the assistance of the Court it is then for the Magistrate to ascertain from the complainant or otherwise the names of other persons likely to give evidence and he is to summon such of them as he thinks necessary. He cannot arbitrarily refuse to summon such witnesses. It is his duty to assist and not to hamper the prosecution and for that purpose he must issue summonses to persons named by the complainant when he thinks that they are likely to give useful evidence. The Magistrate is not bound to, or expected to exercise this duty of ascertaining more than once and the proper time when evidence is produced, by the prosecution, has been taken. 51 M. L. J. 328—25 L.W. 305 at 307—[1926] M.W.N. 730—27 Cr.L.J. 1123.

AMENDMENT.—The proviso to sub-section (1) is new and dispenses with the hearing of complainant when a complaint is made by a Court in writing under Ss. 195 and 475 *infra*.

APPEARS OR IS BROUGHT BEFORE A MAGISTRATE.—S. 204 *supra* deals with issue of process for causing the accused to be brought or to make him appear at a certain time before a Magistrate. S. 205 *supra* deals with the power of Magistrate when he issues a summons to an accused before him, to dispense with his personal attendance and to permit him to appear by pleader. When an accused is brought before the Court it is duty of the Court to try the accused for the offence charged. There is no provision of law which requires or entitles the Magistrate to go into the question as to the legality of the arrest or as to how the accused came into the hands of the police. See 35 B. 225; 31 C. 557; 25 C. 123.

HEAR THE COMPLAINANT.—Hearing of a complainant within the meaning of this section does not involve his examination on oath and the trial in a warrant-case is not irregular merely because it did not begin with an examination of the complainant by the Court, 43 M.L.J. 108—(1922) M.W.N. 71—15 L.W. 311.

TAKE ALL SUCH EVIDENCE AS MAY BE PRODUCED.—A Magistrate under this section is bound to take the evidence of the witness produced before him in support of the prosecution. But he is not bound by law to hear one witnesses beyond those mentioned in the original list. The law clearly lays down that after the witnesses produced in support of the case have been heard, the Magistrate is then to ascertain the names of persons likely to be acquainted with the facts of the case and shall summon to give evidence before himself only such of them as he, the Magistrate, thinks necessary. He is not bound by law to accept a list thrown to his head from time to time by the police or by any one else and it

would be well if the Magistrate bore this more clearly in mind. The length to which cases are spun out threatens to be a danger to the administration of justice. 12 A.L.J. 262 at 283-265-15 Cr. L.J. 333-23 Ind. Cas. 731; 51 M.L.J. 328-24 L.W. 303, S. 540 *infra* is to be read along with this section. By the former section it was not intended that a Magistrate should exercise his powers at the bidding of any person, but that the powers are given to prevent any danger of miscarriage of justice just because some particular witness has not been called and are to be exercised with great discretion. Under this section the prosecution is given full opportunity of substantiating their whole case. But it is expected and the expectation is right and proper one, that the prosecution should come to Court with their case fully prepared and thought out. After the witnesses produced in support of the prosecution are heard, it is the duty of the Magistrate to see that prosecutors are not allowed to set the Court on to a roving inquiry summoning persons in the hope that something may be elicited which would help their case, and cases which ought to be heard within a fortnight are spun out to a period of six weeks and more to the inconvenience of all concerned. Now a witness is not an inanimate thing and is not to be moved about as if he were a stick or a stone. He is a living person who has his work to do and whose convenience has to be considered. For a Magistrate to send for every person whom the complainant names in a supplementary list is a thoughtless act and in some cases cause very serious inconvenience to persons who ought not to be subjected to such inconveniences, 12 A.L.J. 15 at 16 17-14 Cr. L.J. 682-21 Ind. Cas. 1002. But once the Magistrate has issued summons to the witnesses named, he must enforce their attendance. This section applies to the course which may be taken before the issue of summons and not after, 4 M. 329; 33 C. 1093; 6 C.W.N. 648. For form of summons, see Sch. V, Form No. XXX.

IN SUPPORT OF THE PROSECUTION.—In a warrant case, the Magistrate without recording the evidence produced in support of the prosecution and without framing a formal charge, cannot call upon the accused to plead to the charge and convict him on his own admission and if he does so, his procedure is more than an irregularity, 29 M. 372.

ANY PERSONS LIKELY TO BE ACQUAINTED WITH THE FACTS.—The persons need not be necessarily witnesses named by the complainant and summoned by the Magistrate before framing a charge. The word used is "any" and so any person who according to the prosecution is likely to be acquainted with the facts may be summoned, 11 Bom. L.R. 1132-10 Cr. L.J. 630-4 Ind. Cas. 268; 51 M.L.J. 328-24 L.W. 303-27 Cr. L.J. 1123-97 Ind. Cas. 643.

SHALL SUMMON SUCH OF THEM AS HE THINKS NECESSARY.—It is not obligatory on a Magistrate to summon every person named by the complainant. It is within his discretion to summon witnesses, but he is bound to summon if he thinks it necessary. So when a list is given by the complainant it is the duty of the Magistrate to see which of the witnesses he thinks necessary, 51 M.L.J. 328-(1928) M.W.N. 730-24 L.W. 303. The Magistrate should look to the exact wording of this section. In a warrant case the duty of seeing that all the evidence essential for the prosecution is before the Court, is thrown by the Code upon the Magistrate himself. It is not open to a Magistrate to acquit the accused on the ground that the prosecution has failed to produce a necessary witness, 26 Cr. L.J. 1266-88 Ind. Cas. 1032 or on the ground that a civil suit is pending between the parties, 23 A.L.J. 20. In all warrant cases after the production of the accused the Magistrate shall ascertain from the complainant or otherwise the names of any persons likely to be acquainted with the facts of the case and shall summon to give evidence before himself such of them as he thinks necessary. The wording of the section clearly indicates that the issue of the summons in such cases is on the initiative of the Magistrate himself and consequently, if fees are to be levied the expenses must fall on the Magistrate's budget and not on the complainant, 27 Cr. L.J. 415-93 Ind. Cas. 79 where Weir II, 323 is followed. But in 4 Rang. 143 (F.B.) the above decision was overruled and it was held that in non-cognizable cases the Court is not bound to summon witnesses for prosecution and defence under the provisions of this and S. 257 *infra* if the party does not pay the process fee for the same as required by the rules.

253. (1) If, upon taking all the evidence referred to in section 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

This section deals with discharge of accused in a warrant-case. See S. 20, *supra*.

SUB-SECTION (1)—An order of discharge cannot *ordinarily* be passed until the evidence of all the witnesses for the prosecution has been taken, 4 M. 329; 20 W.R. (Cr.) 67; 22 W.R. (Cr.) 25, but sub-section (2) permits the discharge of the accused at any previous stage of the case, if the Magistrate, for reasons to be recorded by him, considers the charge to be groundless, (1911) 1 M.W.N. 149=9 M.L.T. 302=12 Cr.L.J. 105=9 Ind. Cas. 808. A Magistrate should not refuse to examine witnesses for the sole reason that their evidence will be to the same effect as that already recorded by him, 8 C. 389; 2 A. 417.

SUCH EXAMINATION OF ACCUSED AS HE THINKS NECESSARY.—This section does not place any restriction on the power of the Magistrate to examine the accused. But it should be conducted according to the provisions of S. 345, *infra* and recorded in the manner laid down in S. 364, *infra*. A Magistrate should not examine the accused if the evidence adduced by the prosecution discloses no proper subject of a criminal charge against him, 1 B.L.R. Appx. 16. The object of an examination of the accused is to enable the Judge to ascertain from the accused from time to time, particularly if he is undefended, what explanation he may desire to offer regarding any facts stated by the witnesses or after close of the case how he can meet what the Judge may consider damnatory evidence against him, 9 C. 56 at 102 and not to fill up gaps in the prosecution evidence, 28 C. 49; 27 M. 238; 39 M. 770. S. 342 says the examination of the accused by the Court is for the purpose of enabling the accused to explain any circumstance appearing in evidence against him. The Magistrate may examine the accused if he thinks it necessary, 48 M. 459 at 461. It is not absolutely compulsory for the Magistrate in a warrant case to examine the accused before framing a charge. Provided he does so after all the prosecution witnesses have been examined and before the accused is called on to enter on his defence and such non-examination before charge where the accused has been duly examined at the close of the prosecution case, would amount to a mere irregularity, 27 Cr. L.J. 830=95 Ind. Cas. 606.

WHEN NO CASE IS MADE OUT, MAGISTRATE SHALL DISCHARGE.—A Magistrate who finds that he had no jurisdiction to try the case cannot discharge the accused under this section which authorizes only a discharge on the ground that no offence has been proved by the evidence for the prosecution, but the proper procedure for him is to send the accused before a Magistrate having jurisdiction under S. 346, *infra*, Weir II, 323. The Legislature does not render the writing of reasons by the Magistrate necessary when an accused person is discharged after he has heard all the prosecution evidence. It is, however, desirable that the Magistrate should record his reasons as his order is not final and to satisfy a Court of Revision that a proper judicial discretion was exercised. The provisions of S. 367 apply only to a judgment which is a final decision of the case so far as the Court trying the case is concerned, 9 Bom. L.R. 250; 29 C. 726. An order of discharge under sub-section (1) is not a judgment which indicates the final order in a trial terminating in either conviction or acquittal of the accused. It is clear that the Legislature never intended that a Magistrate discharging an accused should furnish him with a certificate of immunity from further molestation and the section does not require the Magistrate to give reasons for his order in-

ordinary circumstances, 31 M. 543. A Magistrate has power to re-entertain a complaint or of his own accord to revive a proceeding after a discharge of the accused without such order being set aside by a superior Court. The principle enunciated in 29 M. 126 (F.B.) was extended to cases coming under this section by 31 M. 543. No distinction in principle could be drawn between a discharge under this section or under S. 503, *supra* or S. 259, *infra*. A discharge not operating as an acquittal leaves the matter at large for all purposes of magisterial inquiry, 31 M. 543 at 545. It is competent to a Magistrate who had tried and discharged an accused person on a particular charge to again inquire into the same charge on a second complaint, 38 A. 53. See also the decisions in 28 C. 682; 29 C. 726 (F.B.); 38 C. 828; 29 M. 126; 28 M. 310; 31 M. 543; 40 C. 71; 29 A. 7, which take the same view, but unless there is manifest error or manifest miscarriage of justice no process is to issue, 29 M. 126 (F.B.). See also 9 Bom. L.R. 250; 12 Cr. L.J. 384=11 Ind. Cas. 132. But the appropriate remedy for a complainant whose complaint is wrongly dismissed is to move the superior Court to set aside the dismissal, 11 Cr. L.J. 582=8 Ind. Cas. 202; 11 Cr. L.J. 203=52 Ind. Cas. 696. A very heavy burden lies on those who seek to disturb in revision the order of discharge, 10 Cr. L.J. 160=2 Ind. Cas. 825; 10 Cr. L.J. 314=3 Ind. Cas. 580. The mere absence of a complainant is not a valid ground for discharging the accused in a warrant case regarding a non-compoundable offence, 10 C. 87; 20 C.W.N. 698, nor can a Magistrate discharge an accused on the ground that the accused was illegally arrested by the police without a warrant issued on complaint of a non-cognizable offence, 21 A. 265.

SUB-SECTION (2).—This sub-section was introduced in the 1998 Code, under which it is competent to a Magistrate to discharge the accused *after examining some only of the prosecution witnesses*, 9 M.L.T. 802=(1911) 1 M.W.N. 149=12 Cr. L.J. 105=9 Ind. Cas. 606. If he does so, he is bound under this sub-section to record his reasons for the same. The reasons are to the effect that the Magistrate considers the charge to be groundless and no case is made out against the accused. When in a warrant case the Magistrate discharged the accused under this section on account of the absence of the complainant it was held, setting aside the discharge, that this section only provided for discharge when the Magistrate found that no case had been made out or he considered the charge to be groundless, and when the complainant was absent, the discharge must be under S. 259, *infra* provided the offence is compoundable under S. 315, *infra*, 20 C.W.N. 698. Under this sub-section the Magistrate may discharge an accused person even when no witnesses are examined, in accordance with the provisions of S. 252 *supra*, 27 Cr. L.J. 511=93 Ind. Cas. 1017; but solid and substantial reasons are required to justify such a course, 15 C. 608 at 621; 11 A.L.J. 481; 4 C.W.N. 550; 25 Cr. L.J. 696=81 Ind. Cas. 184.

FURTHER INQUIRY.—A District Magistrate or a Sessions Judge can direct a further inquiry under S. 486 *infra*, 32 M. 220; 18 Cr. L.J. 703=10 Ind. Cas. 706. So also the High Court, but further inquiry is to be made sparingly and in exceptional cases and notice to accused should as a rule be given before an order to his prejudice is made, 17 L.W. 247. But it is open to a Magistrate who has discharged the accused under this section to entertain a fresh complaint on the same charge, 2 Cr. L. Rev. 448 where 1895 A.W.N. 86 is followed; 26 A. 53; 29 C. 726; 38 C. 828; 29 M. 126; 31 M. 543.

254. If, when such evidence and examination have been taken and made, or at any previous stage of the case, the charge to be framed when offence appears proved, Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this chapter, which such Magistrate is competent to try, and which, in his opinion, could be adequately punished by him he shall frame in writing a charge against the accused.

SCOPE OF THE SECTION.—This section merely lays down what a Magistrate must do when proceeding with the trial of warrant-cases. It would be an undue extension of its scope to hold that it was meant to fetter the discretion of the Magistrate in all circumstances,

S. 347, *infra* is a general section which applies to all inquiries and trials and gives the Magistrate power to deal with the case under Chapter XVII at any stage before signing judgment and if this power is exercised, then, the provisions of this section are no longer applicable, 3 Rang. 42 where 42 M. 83 is followed.

The words "or at any stage of the case" were added in the Code of 1898. Before this amendment, the Magistrate was bound to take all the evidence for the prosecution before framing charges. The amendment was made for the purpose of protecting witnesses from the inconvenience of being required to attend a second time by enabling the Magistrate at any stage of the case to frame a charge in writing and if a cross-examination then takes place, it would be in the terms of S. 256, *infra* and then, unless there has been some amendment of the charge, a second cross-examination might be refused, 27 C. 370 at 372. No Magistrate or Court can refuse to allow an accused person to cross-examine prosecution witnesses before charge is framed and the Magistrate's procedure in refusing to allow such cross-examination was most irregular and in contravention of law. The proper course in revision, where such a procedure is adopted is for the High Court to cancel the charge and direct that the cross-examination of the witnesses be permitted, 25 Cr. L.J. 556-81 Ind. Cas. 44; 21 C. 632. The discretion was given to the Magistrate to draw up a charge at any previous stage of the case in order to enable the cross-examination of the witnesses for the prosecution to take place on their first attendance. Before the amendment the procedure in inquiries held in cases triable exclusively by the Court of Session under Chapter XVIII of the Code and in trials under this Chapter as to warrants cases up to the time of drawing up a charge was the same, and there was no difficulty when the accusation was of offences, some of which were triable exclusively by the Court of Session, while others were triable by the Magistrate, but when some of the offences were triable exclusively by the Court of Session, the Magistrate cannot proceed under this section. S. 208, *supra*, requires that an opportunity should be given to the accused to cross-examine the witnesses for the prosecution before the stage of proceedings is reached at which it might be found necessary to draw up a charge, and the Magistrate has power under S. 213 (2), *supra*, to cancel a charge if on taking further evidence after the charge he finds that no case is made out for commitment, 5 C.W.N. 110 at 111, 112, S. 259, *infra* also makes provisions for the examination of the remaining witnesses for the prosecution after a charge was framed at an early stage without examining them all.

OFFENCE TRIABLE UNDER THIS CHAPTER.—The procedure prescribed by this section is applicable only to the trial of warrant-cases, but where one of the offences with which the accused is charged is triable exclusively by the Court of Session, then proceedings will be in the nature of an inquiry under Chapter XVIII and S. 208, *supra*, and this section is not applicable. 5 C.W.N. 110. Where the accused was tried at one trial of defamation a warrant-case and using criminal force, a summons-case, and was convicted of the latter offence and it was objected that the conviction was bad as the provisions of this section only allowed the Court in the course of a warrant-case to charge an offence triable under this Chapter, it was held by the High Court that the procedure of the Magistrate was legal, inasmuch as the allegations made by the complainant in her evidence constituted a fresh complaint and the accused understood this new charge and cross-examined the witnesses with reference to this new charge, 3 Bom. L.R. 675. Where in the course of a trial under this Chapter the warrant-case fails the Magistrate can then and there, under the provisions of S. 238, *supra* try the accused for a minor offence, a summons-case, adopting the procedure to be followed in trying summons-cases, 7 M. 453.

OFFENCE WHICH THE MAGISTRATE WAS COMPETENT TO TRY AND ADEQUATELY PUNISH.—A charge is not to be framed when the Magistrate (1) cannot himself punish adequately; (2) is of opinion that he should submit the case to a superior Magistrate under S. 349; (3) thinks the case ought to be committed, but a Magistrate is not bound to commit merely because the evidence disclosed another offence triable exclusively by a Court of Session, 4 Lah. 69; 37 C.L.J. 34. Failure by a Magistrate to exercise his own power where the offence is within his jurisdiction is a failure to comply with the provisions of this section and an unnecessary committal can be quashed, 25 Cr. L.J. 148-83 Ind. Cas. 708. A Magistrate who is competent to try a case should not commit it.

to the Sessions unless he considers that he cannot pass an adequate sentence. The mere fact that the Magistrate was a witness to the identification parade is no ground for committing the accused, 21 A.L.J. 420—25 Cr. L.J. 665—81 Ind. Cas. 153. The complaint given to the Magistrate gave him jurisdiction to try the offence complained of, and, if it was established, to proceed with the trial and to convict, 27 A. 69 at 70. It is not irregular to frame a charge even in cases where the Magistrate knows that he may have to send up the case to a superior Magistrate for adequate punishment, 2 Cr. L.J. 464. In framing a charge the Magistrate is to consider the sole question, what is the offence disclosed by the evidence on record? When the Magistrate is of opinion that the offence is one which he is competent to try but could not be adequately punished by him, he can commit the accused to the Court of Session, 24 C. 429; 41 A. 484; 42 M. 83, followed in 3 Rang. 42 or he may act under S. 349, *infra*, see 2 Cr. L.J. 464. A Magistrate's discretion to commit to the Court of Session is not limited by this section which directs the Magistrate only to frame a charge, 42 M. 83. Under this section a Magistrate has to exercise a discretion in each particular case and his proceedings in the exercise of this discretion are clearly subject to examination and review by a superior Court either on appeal or by way of revision, 15 B 580. The terms of this section are mandatory. It is imperative on a Magistrate to draw up a formal charge against the accused in the manner indicated in this section and also to strictly comply with the provisions of S. 342, *infra*, 43 C.L.J. 100; 50 B. 250. The Magistrate is given a discretion to commit to the Court of Session only such of the cases as are within his competence to try but which cases he is of opinion cannot be adequately punished by him and so they should be tried by the Court of Session, 15 Cr. L.J. 664—25 Ind. Cas. 992.

HE SHALL FRAME IN WRITING A CHARGE.—It is important to bear in mind the distinction obviously recognized in the Code between the preliminary proceedings in warrant-cases that precede the drawing of a charge, which may be terminated by an order of discharge, that does not amount to an acquittal nor bar a second prosecution at the instance of the complainant and those that ensue after charge framed and pleaded, which can only be concluded by an acquittal or conviction where of the accused can afterwards avail himself under S. 403 of the Code. So long as the case continues in the stage of inquiry, the duty of the Magistrate is confined to ascertaining whether there is anything that the person accused ought to be called upon to answer. When once the charge has been framed and a plea has been taken, the inquiry is turned into a trial and the evidence in support of the charge already recorded becomes evidence on that trial, subject to the right of the accused as declared by Ss. 256 and 257 *infra*, 9 A. 52 (F.B.) at 56, "Trial begins when the accused is charged and called upon to answer and then the question before the Court is whether the accused is to be acquitted or convicted and not whether the complaint is to be dismissed or the accused discharged. The observations in 15 C. 608 at 620 are questions which arise at the stage of inquiry." 32 M. 220 at 234, where during the trial of a warrant-case, the complainant when examined, further charged the accused of an offence triable as a summons case and the accused cross examined the complainant and her witnesses upon the new charge a conviction upon the new charge is legal and is not prohibited by this section, 3 Bom. L.R. 675; Omission to frame a charge in writing will not invalidate the trial and acquittal of the accused, 3 A. 129. When a Magistrate frames a charge he indicates thereby that *prima facie* case exists against the accused, 7 C.W.N. 521. When a Court has framed a charge against an accused for an offence which is compoundable without the permission of the Court, and the charge has been read and explained to the accused who has pleaded to the same, the Court should when an application is made to it intimating that a composition by the person authorized to compound has been effected at once accept the composition and acquit the accused and has no power to alter the charge already drawn up, 15 Cr. L.J. 81—26 Ind. Cas. 993.

255. (1) The charge shall then be read and explained to the
 Plea, accused, and he shall be asked whether he is guilty
 or has any defence to make.

(2) If the accused pleads guilty, the Magistrate shall record the plea, and may in his discretion convict him thereon.

SCOPE OF THE SECTION.—An accused person does not plead to a section of a criminal statute. He pleads guilty or not guilty to the facts alleged to disclose an offence under that section. Accordingly the Court has to consider whether the facts set out in the charge establish an offence within a particular section, 7 Lah. 359 at 362.

CHARGE SHALL BE READ AND EXPLAINED TO ACCUSED.—The provisions of this section are imperative and it is an illegality to ignore them. Mere reading of the charge to the accused is not sufficient. Where a Judge after reading the charge did not explain the charge to the accused as he is required to do by law, the conviction was set aside, 7 C. 98 ; 9 M. 61. When arraigning an accused, and before receiving his plea, the Court should be careful to ensure the explanation of the charge in a manner sufficiently explicit to enable the accused to understand thoroughly the nature of the charge which he is called upon to plead, 5 C. 826. S. 340, *supra* provides for copy of the charge to be given to the accused free of cost.

HE SHALL BE ASKED WHETHER HE IS GUILTY.—An accused person is not bound to answer any question put to him at all and can, if he likes decline to plead and mere refusal to plead on the part of an accused person to a charge read and explained to him by the Court is not an offence under S. 179, I.P.C., 47 M. 398. No pleader can be called upon to plead on behalf of his client "guilty" or "not guilty" even in the presence of the accused. It is improper for a Magistrate to act on such a plea. The Magistrate ought to call upon the accused to say with his own lips whether he denied the truth of the complaint, 6 Bom. L.R. 861, *referred to and distinguished* 80 B. 250. on the ground that the remarks applied only to a case under S. 305, *supra*.

SUB-SECTION (2).—The plea of the accused is to be recorded in the actual words used by him and not merely a narrative of what occurred and of the statement of the prisoner, 7 C. 96. The plea must be clear and unambiguous. Where the accused instead of pleading guilty to the charge makes a rambling statement more or less admitting guilt, it would be much safer for the Judge to record a formal plea of not guilty, 5 A.L.J. 127, but it is improper in a warrant-case to convict the accused on his mere admission, 29 M. 372. When an accused does not formally plead "guilty" but throws himself at the mercy of the Court, that fact ought not to be held to prejudice him, 17 C.W.N. 140.

MAY IN HIS DISCRETION CONVICT.—In summons-cases also, now a discretion is given by amending *shall* into *may* in S. 243 *supra*. A Court is not bound to convict on the plea of the accused.

255A. *In a case where a previous conviction is charged under the provisions of section 221, sub-section (7), and the accused does not admit that he has been previously convicted as alleged in the charge, the Magistrate may, after he has convicted the said accused under section 255, sub-section (2), or section 258, take evidence in respect of the alleged previous conviction and shall record a finding thereon.*

This section is new and prescribes the procedure when a previous conviction is charged and the accused does not admit a previous conviction, the Magistrate is not bound to take evidence of previous conviction, but it is discretionary with him to record evidence and to give a finding. A mere admission by an accused that he had been to jail once is no admission of a previous conviction, Weir II, 285 and 286 ; 4 Bom. L.R. 177; see under S. 221, *supra*.

256. (1) If the accused refuses to plead, or does not plead, or claims to be tried, he shall be required to state, *at* Defence, *the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith*, whether he wishes to cross-examine any, and, if so, which of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be re-called, and, after cross-examination and re-examination (if any), they shall be discharged. The evidence of any remaining witnesses for the prosecution shall next be taken, and, after cross-examination and re-examination (if any), they also shall be discharged. The accused shall then be called upon to enter upon his defence, and produce his evidence.

(2) If the accused puts in any written statement, the Magistrate shall file it with the record.

AMENDMENT.—The words “at the commencement of the next hearing” were added to give time to the accused; but the Magistrate for reasons to be recorded by him in writing may, if he thinks fit, require him *forthwith* to state whether he wishes to cross examine which of the prosecution witnesses.

SCOPE OF THE SECTION.—This section is concerned only with cases in which a charge is framed before all the witnesses for the prosecution have been examined-in-chief and S. 257, *infra*, refers to a stage when the prosecution closes its case after examining all its witnesses, 25 Cr. L.J. 1182—81 Ind. Cas. 976. This section does not prohibit a cross-examination before charge is framed, 25 Cr. L.J. 856—81 Ind. Cas. 44 ; 21 C. 642. It merely permits a further cross-examination expressly directed to the case embodied in the charge. Once the requirements of the section are complied with then there is no obligation on the part of the Magistrate to offer the accused another opportunity to have the witnesses again re-summoned, (1912) M. W. N. 1121—13 Cr. L.J. 826—17 Ind. Cas. 572. The privilege of the accused under this section is a substantive one and can be exercised by the accused when tried both for a summons and a warrant case, especially when he reserves cross-examination. When the right allowed by law is denied to the accused it is for the prosecution to show that there has been no prejudice, 39 M. 308. In the trial of a warrant case, an accused person has three different opportunities for cross-examination: (1) At the end of the examination-in-chief of each prosecution witness under S. 252, *supra*, before a charge is framed. S. 252, *supra* does not contain any specific provision for or against such cross-examination and there is nothing in that section prohibiting such a right which is in accordance with the elementary principles of judicial procedure, 21 C. 642. See also 19 L. W. 391, where it was held that a refusal by the Court to allow such cross-examination is contrary to law. (2) Under this section after a charge has been framed and before the accused is called upon to enter upon his defence and produce his evidence. The privilege conferred by this section is a substantial one and cannot be refused. The Magistrate has no discretion under this section. (3) Under S. 257 after the accused has entered upon his defence he may apply to the Magistrate for process to witnesses. Here the law gives the Magistrate a discretion. He is not bound to compel the attendance of the witnesses for cross-examination unless the Magistrate is satisfied that is necessary for the purposes of justice, but if the Magistrate refuses to comply with his application, the accused is entitled to call them as his own witnesses and cross-examine them, 28 C. 894 ; 29 C. 387 ; 43 M. 411 at 415 ; 5 Pat. L.J. 94 at 95. The reason why the Legislature has enacted this section is that it is not until a specific charge has been drawn up and explained to that accused that he is in a position fully to cross examine the witnesses for the prosecution, 16 Cr. L.J. 136—27 Ind. Cas. 210. “The object of this section is clearly to secure to the accused an opportunity of cross-examining the witnesses for

the prosecution after he has been informed as to the nature of the specific charge which he is required to answer. Until he knows this, he is not in a position to decide on what points the evidence for the prosecution is material. If this opportunity be secured, I do not apprehend that he has any further right of re-calling witnesses. If the witnesses for the defence are in attendance they are to be examined, and after that the accused shall be allowed to re-call and cross-examine the witnesses for the prosecution. If he refuses to exercise this right after he has entered on his defence he cannot demand as of right to recall the witnesses for the prosecution if the case is adjourned because he has not produced his witnesses. He has had the opportunity intended by the section." 2 A. 253 at 258. The right conferred by this section is absolute and unqualified, 43 M. 411. The privilege conferred by this section on the accused is a substantial one and when denied it was for the prosecution to show that there was no prejudice, 39 M. 803. But omission to follow it in a summary trial does not vitiate the proceedings. The section gives the accused a right of recalling witnesses after a charge is framed. In summary trials where no charge is framed the accused has no such right, 28 Bom. L. R. 95—27 Cr. L. J. 431—93 Ind. Cas. 159, but see 51 M.L.J. 687—24 L. W. 649. When an accused seeks to exercise his right of cross-examining the prosecution witnesses under this section he cannot be required to deposit the expenses, likely to be incurred by the witnesses, the right under this section being absolute, 23 Cr. L. J. 912—81 Ind. Cas. 448.

SUB-SECTION (1).—This sub-section was redrafted in 1898. From this sub-section it is clear that in a warrant-case "the trial" does not begin till a charge has been framed and the accused claims to be tried. Till a charge is framed it is only an inquiry. Trial begins when the accused is charged and called on to answer and then the question is whether the accused is to be convicted or acquitted, and not whether the complaint is to be dismissed or accused discharged, 52 M. 220 at 234 and 248 followed in 38 M. 555. An accused person is not bound to answer any question put to him at all, and can, if he likes, decline to plead and if he declines to plead, the case goes on just the same. S. 179, I.P.C., has nothing whatever to do with the conduct of the accused persons in Court and no conviction for refusing to plead to a charge against an accused under S. 179, I.P.C. can stand, 47 M. 398.

SHALL BE REQUIRED TO STATE AT THE COMMENCEMENT OF THE NEXT HEARING WHETHER HE WISHES TO CROSS-EXAMINE.—Under this section as amended, the accused is to be called upon to state whether he wishes to cross-examine any of the prosecution witnesses, only at the commencement of the next hearing. But if the Magistrate requires the accused to state so forthwith, the law requires the Magistrate to state his reasons for doing so. Where the accused is represented by a vakil from the very beginning he may be asked forthwith to state whether he wishes to cross-examine for the simple reason that the accused will not be prejudiced and it is convenient to arrange a date for the attendance of such of the prosecution witnesses whom the accused wishes to further cross-examine before the witnesses leave the court. But if the accused is not represented reasons must be recorded for not postponing the question to the next hearing by which time he can consult a vakil. The provisions of the section are undoubtedly mandatory. Before the amendment it was held that omission on the part of the Magistrate to ask the accused if he wished to cross-examine the prosecution witnesses vitiated the trial. The Legislature has now amplified the mandatory section and an omission on the part of the Magistrate to comply with the mandatory provisions cannot be cured by S. 537, *infra*. The safest guide is the well-known ruling of the Judicial Committee in 25 M. 61 (P.C.), that a disobedience to an express provision of law as to a mode of trial is not a mere irregularity but an illegality, 51 M.L.J. 687—24 L.W. 649 dissenting from 6 Lah. 554 and 27 Cr. L. J. 431—93 Ind. Cas. 159. The intention of the Legislature is that sufficient time should be given to an accused person to consider whether he wishes to cross-examine any of the prosecution witnesses after the framing of the charge and it is only in special cases the Magistrate can require him to state forthwith if he so wishes. This does not come into operation until the charge is framed and where a pleader for the defence, before charge, had cross-examined the witnesses and stated that he no longer required their attendance it will not deprive the accused of his right to cross-examine prosecution witnesses after charge and any irregularity committed by the Magistrate in not asking the accused to state if he wished to further cross-examine the witnesses can be condoned if the defence pleader

expresses a desire that the witnesses should be recalled for further cross-examination. The Magistrate has no power when passing an order under this section to impose a condition on the accused that he should deposit in Court the expenses of recalling the prosecution witnesses before they are actually recalled, 8 Pat. 110; 13 Cr. L.J. 554-15 Ind. Cas. 970. The Legislature intended to give accused persons, against whom charges are framed an interval of time to think out the line of their defence before they are called upon to inform the Court how they intended to proceed. Where a Magistrate infringed the imperative provisions of this section he commits an illegality which vitiates the whole proceedings. The Legislature has conferred upon an accused person the privilege that ordinarily after being charged with an offence, he shall have a period of not less than twenty-four hours to consider the method in which he will meet the charge, and it is difficult to say that he has not been prejudiced if the Magistrate without assigning any reason departs from the normal procedure probably overlooking or being unaware of the recent changes in the law and has not allowed the accused that privilege, 26 Cr. L.J. 1188-88 Ind. Cas. 518. Provided no failure of justice has been occasioned the Magistrate's omitting to record reasons in writing forthwith questioning the accused under this section is only an irregularity as the provisions of this section as to the recording of reasons is not mandatory and the trial held cannot be said to be illegal by this omission, 6 Lah. 554; but cured under S. 537, *infra*. But see 24 L.W. 649 which *dissents* from this view. Where the prosecution witnesses came from distant Native State and it would have taken a long time to have again secured their attendance, it was held that the Magistrate was justified in asking the accused forthwith whether they wished to cross-examine any of the prosecution witnesses, 27 Cr. L.J. 720-94 Ind. Cas. 912. The obligation imposed by this section on a Magistrate to ask the accused whether he wishes to further cross-examine the prosecution witnesses is quite distinct from the obligation imposed by S. 342, *infra*, to question the accused generally for the purposes mentioned therein. 27 Bom. L.R. 108-26 Cr. L.J. 690-86 Ind. Cas. 66. The accused is not required to state *immediately*. Time till the next hearing is to be given to him generally, but if the Magistrate thinks fit he may for reasons to be recorded by him in writing forthwith ask the accused to state *immediately* after a refusal or omission to plead or claim to be tried whether he wishes to cross-examine the witnesses. The object of the amendment is to require the accused to exercise his right *at once* only in exceptional cases. The provisions contained herein are *imperative* and it is an illegality to ignore them. The law allows no option in the matter and the accused must be asked at the appropriate time if he wishes to recall witnesses for cross-examination, 16 Cr. L.J. 146-27 Ind. Cas. 210; 24 L.W. 649. This section gives the Magistrate no discretion and the accused is entitled to have the witnesses recalled for the purpose of cross-examination. Indeed, after a charge has been drawn up, it is his duty to require the accused to state whether he wishes to cross-examine and, if so, which of the witnesses for the prosecution whose evidence has been taken. The fact that there has already been some cross-examination before the charge has been drawn up does not affect the privilege. It is only after the accused has entered upon his defence that the Magistrate is given a discretion to refuse, 27 Cr. L.J. 370 at 371-372; 14 Cr. L.J. 388-20 Ind. Cas. 212. To the same effect are the rulings in 7 Cr. L.J. 240; 4 C.W.N. 361 and 6 C.W.N. 424, but it was held in a case in 4 Cr.L.Rev. 393, that the omission on the part of the Magistrate to ask the accused whether he wishes to cross-examine the prosecution witnesses again after the charge was framed is an irregularity, and a conviction ought not to be interfered in revision by the High Court, as the records in that case showed that the accused was not prejudiced in any way. Failure on the part of the Magistrate to record his reasons in writing for calling upon the accused to answer forthwith whether he wished to cross-examine, prosecution witnesses as required by this section does not render the trial illegal. The provision is only directory and not mandatory and it is a mere irregularity which can be cured under S. 537, *infra* unless there has been a failure of justice, 6 Lah. 554; see also 28 Bom. L.R. 95-27 Cr. L.J. 431-93 Ind. Cas. 189. But see 24 L.W. 649. The privilege conferred by this section is a substantial one and, when denied, it is for the prosecution to show that there was no prejudice, 39 M. 803 at 804; see also 48 M. 439 (F.B.). When there are several accused and some of them have cross-examined, that fact will not in any way affect the right under this section of each accused to cross-examine, 11 C.W. N. ori.

WITNESSES NAMED BY HIM SHALL BE RECALLED.—The word "recall" is very significant and does not mean *resummon*. If the pleader for the defence who had heard the evidence-in-chief is not prepared to cross-examine the witnesses then and there after the charge has been framed, he hardly deserves the name and rank of a pleader. Cross-examination is intended for testing the accuracy and credibility of witnesses, not for building up a case for the defence and the witnesses should then and there after cross and re-examination have been discharged and they would have been discharged with a minimum inconvenience. Then should follow the evidence of the remaining witnesses for the prosecution who should then and there be cross-examined and re-examined and discharged. After this the accused should be called upon to enter upon his defence and produce his evidence. The moment the stage has been reached when there is ground for presuming that an accused has committed an offence triable under Chapter XXI, is the critical moment at which the examination of the accused should be taken and the charge drawn up, 8 A.L.J. 707 at 708, 709—12 Cr. L.J. 471—11 Ind. Cas. 1007. But when the case is a complicated one, a pleader ought not to be asked to cross-examine immediately, and time ought to be given to prepare for such cross-examination, 1895 A.W.N. 40. Where the accused is undefended it is not giving him a reasonable opportunity to ask him immediately after charge was framed to cross-examine the witnesses, more especially when he had no means of knowing that a charge would be framed on that date and that the prosecution witnesses would be present then for cross-examination, and a refusal of the Magistrate to give a reasonable adjournment, and to summon the prosecution witnesses for cross-examination was regarded by the High Court not merely as an irregularity but an illegality vitiating the conviction, and the conviction was set aside, [1911] 2 M.W.N. 192—12 Cr. L.J. 518—12 Ind. Cas. 524. Similarly where the accused who were ignorant persons wanted time to cross-examine after a charge has been framed against them to obtain legal advice and assistance and the Magistrate refused the request of the accused, it was held that no reasonable opportunity was given to the accused to cross-examine the witnesses and asking them who were undefended to cross-examine immediately after the charge was framed was not giving them a reasonable opportunity, 16 Cr. L.J. 786—31 Ind. Cas. 642. Where the accused applied for an adjournment to have the prosecution witnesses cross-examined by Counsel who could not appear on the date fixed and the Magistrate refused the adjournment and when they were summoned as defence witnesses the Court refused Counsel to cross-examine them, the High Court while setting aside the conviction holding that the Magistrate was wrong in refusing cross-examination of the witnesses, made the following general observation: "We may observe at the very outset that in our opinion the work of this Court would be appreciably lightened, if the subordinate Magistrates in dealing with the law relating to the rights of accused persons, would construe it in a less technical spirit than they are sometimes accustomed to do. In the inferior Courts the right principle is occasionally reversed and a person is presumed to be guilty the moment he is accused, and every attempt on his part to prove his innocence is regarded as vexatious. When the law vests in a Court a certain discretion, that discretion in our opinion should be exercised so as not to give rise to any reasonable complaint of prejudice or bias, 23 C. 594 at 595. Where a Magistrate refused to resummon a medical witness for cross-examination unless the accused paid beforehand the fees for his attendance, and convicted the accused, the High Court set aside the conviction and sentence and directed the Magistrate to issue process for the attendance of the witnesses, 4 C.W.N. 351. Where before charge was framed the accused was allowed to cross-examine the prosecution witnesses on the distinct understanding that the witnesses will not be asked to be recalled after charge and the accused, after charge wanted to recall for further cross-examination of the witnesses and the Magistrate refused to recall them, it was held that the Magistrate acted contrary to the provisions of this section, but as the accused offered to pay the expenses incidental to the recall of the witnesses they were directed to pay the same, 6 C.W.N. 423. Where an inquiry commenced as a warrant-case and the accused curtailed their cross-examination of the prosecution witnesses under the impression that they will have a further opportunity to cross-examine after the framing of a charge but no offence triable as a warrant-case having been disclosed, the Magistrate closed the case and convicted the accused, it was held that the refusal of the Magistrate to recall the prosecution witnesses for cross-examination was inequitable and that

It was his duty to allow the accused an opportunity of completing the cross examination before proceeding with the charge, 16 Cr. L. J. 250—28, Ind. Cas. 106. Similarly where a summons and a warrant-case are tried together the procedure to be followed being that prescribed for a warrant-case, the accused would be entitled under this section to recall for cross-examination the prosecution witnesses even if the charge triable as a warrant-case had been dropped. The accused could not have anticipated such an event and the refusal of the Magistrate to recall the witnesses for cross-examination was held illegal, 39 M 503. When the records showed that the requirements of this section as to requiring the accused to state whether he wished to cross-examine any witness had been complied with, then there is no provision requiring a Magistrate to offer an opportunity to the accused to have his witnesses summoned. It is his right to apply and when he did not exercise it he has nothing to complain, [1912] M.W.N. 1121—13 Cr. L. J. 828—17 Ind. Cas. 572.

EVIDENCE OF REMAINING WITNESSES FOR PROSECUTION SHALL BE TAKEN.—The expression "*remaining witnesses*" occurring in this sub-section is not necessarily limited to the witnesses named by the complainant and summoned by the Magistrate before the framing of the charge. The expression is wide enough to include any witness who, according to the prosecution, is able to support its case, though he has not been named, provided, of course, that he is not sprung upon the defence all of a sudden, and sufficient opportunity is given to the latter to prepare for the cross-examination of the witnesses, 11 Bom. L.R. 1153—10 Cr. L.J. 530—4 Ind. Cas. 288. The witnesses whom the complainant may wish to examine after the cross-examination and the re-examination of the prosecution witnesses already examined are "*remaining witnesses*" within this sub-section and if they are not in attendance he has a right to insist, on an adjournment for the hearing of their examination. 25 Cr. L.J. 958—87 Ind. Cas. 110.

ACCUSED TO BE CALLED UPON TO ENTER UPON HIS DEFENCE.—An accused cannot be called upon to enter upon his defence until the prosecution closes its case. After the accused has entered upon his defence, no further evidence can be adduced against the accused except under S. 540, *infra* for which there must be valid reasons which must be recorded by the Magistrate, 10 A.L.J. 383 at 381.

SUB-SECTION (2).—This is the only provision in the Code for putting in a written statement by an accused which the Magistrate should file with the record. When the accused says he will file a written statement as an answer to questions put to him it means he prefers to put in a written statement and does not wish to answer by word of mouth. 46 M. 449 at 470. The sub-section provides that if the accused puts in any written statement the Magistrate shall file it with the record. An examination of this and the next section of the Code leaves no room for doubt that the time of taking a written statement filed by the accused synchronises with the recording of his plea. After that is done witnesses already examined by the prosecution are recalled if the accused so desires and they are cross-examined and re-examined and the evidence of the remaining witnesses for the prosecution is next taken and they are cross-examined and re-examined. At this stage the accused is called on to enter upon his defence and produce his evidence. It is exactly at this stage that the Court is bound under S. 342, *infra* to question the accused generally on the case for the purpose of enabling him to explain any circumstances appearing in evidence against him. It is difficult to imagine how the filing of a written statement can relieve the Court from performing its duty which under the law it is to do at an altogether different stage of the trial, namely, after the trial has proceeded much further and the court is in possession of the complete evidence for the prosecution. 29 C.W.N. cxviii. See also 20 C.W.N. 128—17 Cr. L.J. 9—32 Ind. Cas. 137; Weir II, 238.

257. (1) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the

Process for compelling production of evidence at instance of the accused.

Magistrate shall issue such process unless he considers 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. Such ground shall be recorded by him in writing.

Provided that, when the accused has cross-examined, or had the opportunity of cross-examining any witness after the charge is framed, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the purposes of justice.

(2) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court.

SCOPE OF THE SECTION.—This section is neither imperative nor exhaustive and the grounds on which the decisions in 31 M. 131 and 26 B. 418 proceeded are based on incomplete premises, 25 Cr. L.J. 401 at 408—77 Ind. Cas. 481. It is a sufficient compliance with this section if a Magistrate in rejecting an application for summoning defence witnesses states the fact which led him to the conclusion that an application was for the purpose detailed in this section, although the Magistrate has not expressly recorded his reasons for such a refusal and the failure to record reasons will be cured under S. 537, *infra*. whether an application is vexatious or not is for the Judge to decide and if he is satisfied that the evidence of the witnesses is not material he is justified in dismissing the application, 25 Cr. L.J. 401—77 Ind. Cas. 481. It is only after the accused has entered upon his defence that the Magistrate can exercise his discretion under this section for refusing the application of the accused to summon witnesses. 27 C. 370. The provisions of this section ought not to be used for defeating the ends of justice. 39 C. 781. The Magistrate has no discretion to refuse to issue process to compel the attendance of any witnesses unless he considers that the application should be refused on the ground that it was made for the purpose of vexation or delay or defeating the ends of justice and such ground shall be recorded by him in writing. The Magistrate, therefore, must issue the summons for each witness named in the list, unless he takes the responsibility of recording his ground for believing that any particular name is entered for the purpose of vexation or delay or defeating the ends of justice, 8 Pat. L.J. 84; 26 Cr. L.J. 384—84 Ind. Cas. 844. The case of each witness must be dealt with separately and the limitation of the number of witnesses on a particular point was purely arbitrary and cannot be upheld, 26 B. 418 at 421 followed in 27 Cr. L.J. 543—93 Ind. Cas. 1039. Every case in which a petition is rejected under this section must be judged on its merits, 21 M.L.J. 283 at 298—10 M.L.T. 84—(1911) (1) M.W.N. 327—12 Cr. L.J. 180—9 Ind. Cas. 887. The Magistrate cannot decline to examine the witnesses for the accused on the ground that in his opinion they are unnecessary, 14 Bom. L.R. 380—13 Cr. L.J. 823—15 Ind. Cas. 795.

AFTER THE ACCUSED HAS ENTERED ON HIS DEFENCE.—After a charge was framed the accused pleaded not guilty and stated he had witnesses to examine, in such a case the accused had entered on his defence and an application for further cross-examination of witnesses discharged from attendance must be deemed to have been made under this section, 13 M. 411. It is not clear whether the application for summons should be made immediately after the accused had entered upon his defence or whether it could be made within a reasonable time and how long the right of the accused will remain open. Where there was a delay of one day in making an application under this section the Magistrate, it was held, was not justified in refusing to summon the witnesses, 4 C.W.N. 211. It is open to a Magistrate after a case has been closed, and at any time before judgment is pronounced to give an opportunity to the accused to cross-examine the witnesses for the prosecution and to examine the witnesses for the defence, even if the accused had to avail himself of such opportunity at an earlier stage of the proceedings. And it always depends upon the

circumstances of each case whether a belated application should be granted or not. Where the attitude of the accused is deliberately designed to harass the Court, the Magistrate will not be acting improperly by refusing his application, 21 M.L.J. 233-10 M.L.T. 85.

PROCESS FOR COMPELLING ATTENDANCE OF ANY WITNESS FOR EXAMINATION OR CROSS-EXAMINATION.—As the law stands, an accused person, by paying expenses can enforce the appearance of any witness including the trying Magistrate under this section, unless the Magistrate considers the application should be refused on the ground that it is made for the purpose of vexation or delay or defeating the ends of justice and it would be for the Magistrate to decide whether the application shall be granted or refused. The Magistrate may however require that reasonable expenses for summoning witnesses be deposited in Court. There is a clear distinction here, between the expenses incurred by the witnesses and the other expenses mentioned in S. 215, *supra*. Sub-section (2) of this section does not provide that the expenses of issuing processes shall be deposited in Court and as issue of process is mandatory the rules issued under the Process Fees Act must be read subject to the provisions of the Code, 27 Cr. L.J. 415-93 Ind. Cas. 79, but this was overruled by 4 Rang. 145 (F.B.) where it was held that the rules as to process-fees should be complied with and the party must pay the process fee. When an application is made for the transfer of a case from the file of a Magistrate on the ground that he is a material witness in the case, it is inexpedient to place the Magistrate in such a position as to decide whether process should be issued to him or not under this section, 26 A. 535. An accused is entitled to cross-examine prosecution witnesses subsequently called as his witnesses as they do not change their character as prosecution witnesses, 16 L.W. 195- (1922) M.W.N. 120; 23 C. 894; 27 Cr. L.J. 353-92 Ind. Cas. 865; 1 C.W.N. 19, and also any witness for a co-accused, 21 C. 301. He is also entitled to cross examine any Court witness, 23 C. 337; 1 C.W.N. 19, and also call witnesses to adduce evidence to rebut the evidence of a Court witness after conclusion of his defence, 6 C. 714.

REFUSAL ON THE GROUND OF VEXATION, DELAY OR DEFEATING ENDS OF JUSTICE.—It is only on these grounds that the Magistrate could refuse an application under this section, 25 B. 418; 31 M. 131; 15 Cr. L.J. 245-28 Ind. Cas. 101; 18 L.W. 899; 5 Pat. L.J. 95; 25 Cr. L.J. 401-77 Ind. Cas. 481; 3 Patna 891; 25; Cr. L.J. 310-76 Ind. Cas. 1030-24 Cr. L.J. 686-74 Ind. Cas. 782 and 25 Cr. L.J. 831-74 Ind. Cas. 863. An intention to delay can be inferred from the accused filing a list of two hundred witnesses for the defence, 25 A. 233. The mere fact that the witnesses had already been cross-examined is not by itself a sufficient ground, 4 C.W.N. 241, nor can a refusal to summon witnesses on the ground that they were implicated in the charge be a valid ground, 6 B.L.R. Appx. 55. Ground for refusal with regard to each witness to be recorded, 4 Bom. L.R. 88. When once process was issued the Magistrate is bound to procure their attendance and cannot refuse to re-summon them, 10 C. 931; 8 C.W.N. 348, and he cannot dispose of the case before having the summons enforced, 32 C. 1093. If owing to some mistake the process once issued is not carried out and the accused is convicted without his evidence being recorded, the conviction is unsustainable as the accused had not been afforded an opportunity to produce his witnesses before the Court, 27 Cr. L.J. 851-93 Ind. Cas. 761. It is not competent to a Magistrate to decline to examine witnesses cited for the defence on the ground that their evidence is unnecessary, 14 Bom. L.R. 360-13 Cr. L.J. 823-15 Ind. Cas. 795, nor is it open to him to refuse to examine a witness for the accused when the witness was actually present in Court, 4 Bom. L.R. 451.

The section is imperative as to the recording of reasons for refusing the application of the accused for further cross-examination, and if the Magistrate fails to record in writing his reasons, the trial is bad, 25 Cr. L.J. 334-84 Ind. Cas. 854.

SUCH GROUND SHALL BE RECORDED.—Failure to record reasons is an illegality and cannot be cured by S. 637, *infra*, 31 M. 131; 25 B. 418. It was held in 3 A. 392 that a failure to record reasons is to omit to satisfy the plain direction of the law. The proviso was newly added in the Code of 1898. When the accused had cross-examined or had an opportunity to cross-examine but did not exercise it, the Magistrate is to be satisfied that to allow a further cross-examination is necessary for the purposes of justice.

PROVISO.—A Magistrate is bound under this section to issue process on the accused's application after he has entered on his defence for compelling the attendance of his witnesses unless for stated circumstances which he must find, and record in writing his reasons for the refusal. The provision the other hand definitely prohibits the Magistrate from issuing such process, if the accused has cross-examined or had an opportunity to do so after charge, unless the Magistrate is satisfied that such attendance is necessary for the purposes of justice, *i.e.*, unless he is convinced of the existence of the strongest possible grounds for disregarding the prohibition. The exception to the prohibition must not be read as swallowing up the prohibition or the whole proviso as enjoining that the Magistrate shall issue process if he is not satisfied that the attendance of witness is unnecessary for the ends of justice, or if he is not satisfied that (as in the case of witnesses not covered by the proviso) the application is made for the purpose vexation or delay or for defeating the ends of justice. On the contrary the prohibition may not be disregarded unless the Magistrate is of opinion that the ends of justice not only warrant but demand such disregard. It is also clear that it is not incumbent to record in writing reasons for not being satisfied. The natural consequence would be a record of reasons for disregarding (not for not disregarding) a statutory prohibition. There may be exceptional cases where the Court can see at once that the attendance of witnesses referred to in the proviso should be compelled. But it is ordinarily for the applicant to satisfy the Magistrate that it is necessary for the purposes of justice that his application for compelling the attendance of such witnesses should be granted, 27 Cr. L.J. 353—92 Ind. Cas. 855.

SUB-SECTION (2) makes provision for calling upon the accused to deposit in Court reasonable expenses for summoning witnesses on his behalf. See B. 544, *infra*; 13 Cr. L.J. 554.

258. (1) If in any case under this Chapter in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal.

Acquittal.

(2) Where in any case under this Chapter the Magistrate does not proceed in accordance with the provisions of section 349 or section 562, he shall, if he finds the accused guilty, pass sentence upon him according to law.

Conviction.

SCOPE OF THE SECTION.—When the trial of a case was one falling under Chapter XXI of the Code, the only means by which an order of acquittal could legally be arrived at are the means described in this section and the preceding sections, that is to say, an order of acquittal could be pronounced only where, after the framing of a charge, the Magistrate is of opinion that the evidence is insufficient to justify a conviction. In a warrant-case in respect of a non-compoundable offence the Magistrate without framing a charge and instead of exercising his own mind upon the evidence in the case, allowed the decision to be taken out of his hands by a private arrangement between the persons interested and acquitted the accused, it was held that upon the provisions of the Code the order was unwarranted and a rehearing of the case was ordered, 37 B. 369 at 372. No order acquitting the accused under this section can be made without the Court recording a finding that the accused is not guilty. Where the charge had been framed against the accused and they pleaded not guilty to the charge and entered on their defence they cannot be acquitted on account of the complainant's absence on an adjourned hearing and such acquittal is illegal, 26 Cr. L.J. 264—84 Ind. Cas. 328. An order of acquittal made under this section cannot be set aside by the District Magistrate or Sessions Judge and further inquiry ordered under S. 436, *infra*. The only remedy open is to move the Local Government to prefer an appeal against the acquittal under S. 417 *infra* to the High Court. An acquittal of some of the accused under this section bars the trial even of those accused who could have been charged and tried along with the acquitted accused but were not tried. So long as the acquittal on the same facts remained in force, the acquittal could be pleaded as a bar even by those accused who were not so tried, 7 C.W.N. 493 and 711.

SHALL PASS SENTENCE ACCORDING TO LAW, ETC.—"Unless he proceeds in accordance with the provisions of S. 349 or S. 562" has been newly added. Every case of conviction need not necessarily be followed by a sentence. The Magistrate, if empowered, may pass an order under S. 562, *infra*, releasing the accused upon probation of good conduct or release on admonition instead of sentencing him at once to undergo punishment or he may send up the case under S. 349 to a superior Magistrate for a more severe punishment.

259. When the proceedings have been instituted upon complaint, and upon any day fixed for the hearing of the case the complainant is absent, and the offence may be lawfully compounded, or is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

Absence of complainant.

AMENDMENT.—The words "or is not a cognizable offence" have been newly added now for conferring a discretion on the Magistrate to discharge the accused if the complainant is absent and the offence is not cognizable.

SCOPE OF THE SECTION.—An order under this section has not the effect of an acquittal under S. 403, *infra*, 28 M. 310; 28 Cr. L.J. 1040—87 Ind. Cas. 928; under this section, which deals with warrant cases the Magistrate can pass an order of discharge where the offence is compoundable. This section cannot apply to the case of withdrawal by a complainant, 10 C. 551 and 67. In a warrant case a Magistrate is bound to proceed with the trial of a non-compoundable offence after the framing of the charge and to conclude it regardless of the fact whether the complainant does or does not attend. After the framing of a charge in such a case, the position of the complainant is reduced to that of a witness and he cannot be ordered to pay the costs of the adjournment occasioned by his failure to attend at the date of the particular hearing, 25 Cr. L. J. 87—78 Ind. Cas. 28. This section gives no power to dismiss a warrant case for default after a charge has been framed, 20 Cr. L.J. 763—53 Ind. Cas. 491 and the Magistrate ought to enforce the attendance of the complainant in such a case, Ratanlal 834, 847; 4 C.W.N. 26. A discharge under this section can be made on the ground of the absence of the complainant. The offence may be lawfully compoundable and is not cognizable. The Magistrate has a wide discretion under this section and before discharging the accused he is bound to see whether a *prima facie* case has been made out by the evidence on record, 1881 A.W.N. 116; 12 Cr. L.J. 184—9 Ind. Cas. 1007. He is not bound to wait till the Court is about to close for the day in order to give an opportunity for the absentee complainant to appear before discharging the accused, 7 M. 356 and 213, followed in 49 M. 838. When, in a warrant case, the Magistrate discharged the accused under S. 253, *supra*, on account of the absence of the complainant, it was held that the only provision which enabled a Magistrate to discharge the accused for absence of complainant was this section, 20 C.W.N. 598. A Magistrate discharging the accused under this section is competent to rehear the case without an order for further inquiry. The order of discharge has not the effect of an acquittal, 31 M. 533; 29 M. 126 (F.B.); 28 C. 552; 29 C. 736; 18 M.L.J. 561; 41 M. 727; 22 B. 711.

COMPLAINANT IS ABSENT.—The absence of the complainant raises a presumption that he does not wish to proceed with the prosecution, 12 Cr. L.J. 184—9 Ind. Cas. 1007.

FURTHER INQUIRY.—A District Magistrate and the Sessions Judge can direct under S. 436, *infra*, a further inquiry into the case of discharge under this section. An accused person should be given an opportunity to show cause before an order of discharge under this section is set aside and further inquiry ordered, 28 Cr. L.J. 523—77 Ind. Cas. 987. A District Magistrate was held to have acted very properly under S. 436, *infra*, when the absence of the complainant was due to no hour being fixed for hearing of the case by the Magistrate, Ratanlal 938, 145 and 76. Where a Magistrate discharges an accused person on the ground that the complainant was absent and it transpired subsequently that his absence was due to

heavy floods the order of discharge was set aside. The power under S. 436 is very wide and not limited as the powers of a court of appeal, 12 Cr. L.J. 184—9 Ind. Cas. 1007. The High Court has also under Ss. 436 and 439 *infra* power to direct further inquiry,

CHAPTER XXII.

OF SUMMARY TRIALS.

SCOPE OF THE CHAPTER.—In summary trials the procedure to be adopted is the same as that prescribed for summons and warrant cases respectively but the full record of evidence and judgment required ordinarily are dispensed with and the right of appeal is also curtailed. The trial is not summary in respect of proceedings themselves which should be as complete and as carefully conducted as if they were recorded at length. Summary trial is summary only in respect of records of its proceedings. No tribunal can properly clutch at jurisdiction by intentionally ignoring facts of aggravation which make the offence really cognizable only by a higher tribunal and where the accused himself has objected to the jurisdiction of the lower court the High Court will interfere in revision and set aside the conviction, 25 Cr. L.J. 1193 following Weir II, 21, Splitting up of offences for purposes of summary trial is not permitted by law but highly objectionable, 4 C. 18; 1 C.L.R. 431; 11 C. 236; 23 W.R. (Cr.) 19; 22 W.R. (Cr.) 28; 25 W.R. (Cr.) 19; 1 Bom. L.R. 683; 16 C. 715, where the facts disclosed in a complaint amount to an offence of an aggravated nature the case cannot be tried summarily, 27 C.W.N. 148—25 Cr. L.J. 528—77 Ind. Cas. 992. There is no law forbidding a public servant being tried summarily and it would be unwise to make any general pronouncement as to classes of public servants who should never be tried summarily and such summary trials cannot constitute an irregularity, 26 Cr. L.J. 1452—89 Ind. Cas. 972; In 35 A. 173 it was held that Magistrates should ordinarily restrict summary trials to simple cases and a retrial was ordered in a case under the Indian Companies Act involving inspection of accounts. The mere fact that the case involves a question of title, say to certain trees cut, will not be a sufficient ground for holding the case to be too complicated for a summary trial, 28 Cr. L.J. 1452—89 Ind. Cas. 972. Cattle lifting is a serious offence and should not be tried summarily, 13 Cr. L.J. 780—17 Ind. Cas. 412; 23 Cr. L.J. 21—64 Ind. Cas. 501. So also a case involving question of title depending on documentary evidence supporting the same, 13 Cr. L.J. 771—17 Ind. Cas. 403, Cases to be tried summarily should be of simple character not calling for severe punishment, 38 A. 173. This Chapter is not applicable to Presidency Magistrates, Ratanlal 539, but Ss. 362 and 370 *infra* provide something like a summary trial so far as they are concerned. First-class Magistrates must be specially empowered to try summarily. In Madras every Sub-divisional first-class Magistrate who had exercised first-class powers for two years has been invested with the powers under this Chapter.—*Fort St. George Gazette*, 1874, p 1136; G. O. No. 169 Jud., dated 24-1-1896. Second and third class Magistrates cannot exercise powers under this Chapter and they cannot even be empowered to try under this Chapter. But under S. 261 Bench of Magistrates invested with the powers of a Magistrate of the second or third class can try certain specified offences mentioned in that section summarily. The District Magistrate of Bangalore has no power to try a European British subject summarily and a trial held is void under S. 530, *infra*. The Code does not apply primarily to Bangalore which is no part of British India and is only in force there by virtue of declarations of the Governor-General in Council in the exercise of powers conferred by the Indian Foreign Jurisdiction Order in Council, 1902. The notification confers on Justices of the Peace certain specified powers among which the powers of trying offenders summarily under this section is not included, 39 M. 942. This Chapter of the Code does not appear to intend that proceedings in summary trials shall commence ordinarily, otherwise than in other criminal trials, either by summons or warrant, indeed. S. 262 implies the contrary. S. 263 requires a record of the proceedings to be made by the presiding officer, and it is intended that the record shall be made at the time of trial.

Power to try summarily.

260. (1) Notwithstanding anything contained in this Code,—

- (a) the District Magistrate,
- (b) any Magistrate of the first class specially empowered in this behalf by the Local Government, and
- (c) any Bench of Magistrates invested with the powers of a Magistrate of the first class and especially empowered in this behalf by the Local Government,

may, if he or they think fit, try in a summary way all or any of the following offences :—

- (a) offences not punishable with death, transportation or imprisonment for a term exceeding six months ;
- (b) offences relating to weights and measures under sections 264, 265 and 266 of the Indian Penal Code ;
- (c) hurt, under section 323 of the same Code ;
- (d) theft, under section 379, 380 or 381 of the same Code, where the value of the property stolen does not exceed fifty rupees ;
- (e) dishonest misappropriation of property under section 403 of the same Code, where the value of the property misappropriated does not exceed fifty rupees ;
- (f) receiving or retaining stolen property under section 411 of the same Code, where the value of such property does not exceed fifty rupees ;
- (g) assisting in the concealment or disposal of stolen property, under section 414 of the same Code, where the value of such property does not exceed fifty rupees ;
- (h) mischief, under section 427 of the same Code ;
- (i) house-trespass, under section 448 and offences under sections 451, 453, 454, 456 and 457 of the same Code ;
- (j) insult with intent to provoke a breach of the peace under section 504, and criminal intimidation, under section 506, of the same Code ;
- (k) abetment of any of the foregoing offences ;
- (l) an attempt to commit any of the foregoing offences, when such attempt is an offence ;
- (m) offences under section 20 of the Cattle-trespass Act, 1871 :

Provided that no case in which a Magistrate exercises the special powers conferred by section 34 shall be tried in a summary way.

(2) When in the course of a summary trial it appears to the Magistrate or Bench that the case is one which is of a character which renders

it undesirable that it should be tried summarily, the Magistrate or Bench shall recall any witnesses who may have been examined and proceed to re-hear the case in manner provided by this Code.

TRY IN A SUMMARY WAY.—The jurisdiction to try summarily does not depend on the complaint alone but on the complaint and examination of the complainant taken together, 36 C. 67. Where a Deputy Magistrate being also the Chairman of the Municipality while seated on his pony convicted an accused on his own admission of having raised the level of a road, of the offence of causing obstruction to a highway without dismounting from his pony, without issuing process and without making a record of proceedings under this section, the conviction was set aside. The record prepared after the close of the trial from memory or possibly from rough note is not the procedure contemplated by the Code even in summary trials, 15 M. 83 at 87. The question whether a complaint affords sufficient grounds for a summary trial or requires a trial in the ordinary way must be left in a great measure to the discretion of the Magistrate to be exercised with due care according to judicial methods with reference to the circumstances of each case, 10 A. 55 at 56, but when an accused person is charged with two offences, one of which is triable summarily and the other is not so triable, it is not open to the Magistrate to ignore the latter charge and to proceed to try the case summarily, 11 C. 236. No tribunal can properly clutch at jurisdiction by intentionally ignoring facts of aggravation which make the offence really cognizable only by a higher tribunal and where the accused himself has objected to the jurisdiction of the lower Courts the High Court will interfere in Revision and set aside the conviction, 25 Cr. L.J. 1193—82 Ind. Cas. 87 following Weir II. 21. Where the facts disclosed in the complaint amounted to an offence of an aggravated nature, the case cannot be tried summarily, 37 C.W.N. 148—25 Cr. L.J. 528—77 Ind. Cas. 992. Similarly a Magistrate cannot split up a charge so as to give himself summary jurisdiction unless he disbelieves some of the essential elements of the offence charged, 16 C. 715; 5 C. W.N. 282; 4 C. 16; 27 C. 883; 6 N.W.P.H.C.R. 254; 23 W.R. (Cr.) 19; 22 W.R. (Cr.) 28; 25 W.R. (Cr.) 19; 1 Bom. L.R. 683. A Magistrate after hearing evidence finds that the offence disclosed is one triable summarily, he may adopt summary procedure, 22 M. 459; but once the Magistrate had followed recording evidence in the regular manner he could not afterwards change his procedure to that followed in this Chapter, 37 C.L.J. 105—26 C.W.N. 331. "The responsibility thrown on the Magistrate entrusted with summary powers is very great and the responsibility of those who have to entrust them with such powers is equally great. Magistrates who are sufficiently alive to the responsibility entrusted to them will take care that the procedure and the record is not made more summary than the law has laid down," 21 A. 189 at 192. In summary trials there must be clear findings on questions of facts because it is only by means of those findings the High Court will be in a position to exercise its revisional jurisdiction effectually, 24 Cr. L.J. 916—75 Ind. Cas. 292.

MAY IF HE OR THEY THINK FIT.—The words "if he or they think fit" have been added in the Code of 1898. A very wide discretion is given to the Magistrate or Bench of Magistrates to try under this Chapter or to proceed in the ordinary way. A District Magistrate has a free discretion as to whether he should proceed under this Chapter or not, 3 Cr. L. Rev. 378. Sub-section (1) (e), (m) and sub-section (2) were introduced in the Code of 1898. Under S. 4 (1) (c) the word "offence" was made to include any act for which a complaint may be made under S. 20 of the Cattle-trespass Act. The rehearing under sub-section (2) must be *de novo* as the proceedings held till then was without jurisdiction and therefore void under S. 539 (g) *infra*, 23 W.R. (Cr.) 3.

ALL OR ANY OF THE OFFENCES:—Joinder of charges is permitted. The offences of mischief and theft may be tried together, 25 W.R. (Cr.) 5.

CLAUSE (f) :—Before a Magistrate can assume jurisdiction to try offences of theft or receiving stolen property in a summary way, he has to satisfy himself that the property in respect of which the offence has been committed is less than rupees fifty in value and must record this fact in the form prescribed in this section. Where there is no such reference in the records of the case, the conviction cannot stand. 22 W.R. (Cr.) 68; 20 W.R. (Cr.) 17; 1891 A.W.N. 183; 1892 A.W.N. 30; 25 Cr. L.J. 545—81 Ind. Cas. 33

The following offences are not to be tried summarily :—(1) Theft when combined with a charge of previous conviction, Weir II, 324; (2) breach of contract of service under Act XIII of 1859; 4 M. 234; 20 M. 233; 27 C. 131; 16 B. 368; (3) petition under S. 488, *infra*, for maintenance of wives and children, 20 C. 381; (4) preferring a false charge under S. 211, I.P.C., 28 C. 251; (5) where the offence charged is one under S. 60 of the Excoise Act 1910 as modified by Act II of 1923 punishable with imprisonment for one year, 26 Cr. L.J. 800—66 Ind. Cas. 432. A Magistrate cannot to the prejudice of an accused change his procedure in the middle of a regular trial to one under this section, 23 Cr. L.J. 137—71 Ind. Cas. 509.

261. The Local Government may confer on any Bench of Magistrates invested with the powers of a Magistrate of the second or third class power to try summarily all or any of the following offences :—

Power to invest Bench of Magistrates with less power.

(a) offence against the Indian Penal Code, sections 277, 278, 279, 285, 286, 289, 290, 292, 293, 294, 323, 334, 336, 341, 352, 426, 447 and 504;

(b) offences against Municipal Acts, and the conservancy clauses of Police Acts which are punishable only with fine or with imprisonment for a term not exceeding one month *with or without fine*;

(c) abetment of any of the foregoing offences;

(d) an attempt to commit any of the foregoing offences, when such attempt is an offence.

AMENDMENT.—S. 504, I.P.C., has been newly added to cl. (a) and to cl. (b) the words "with or without fine" have been added. In Madras every Bench with first class or second class powers is empowered to try summarily.—*Fort St. George Gazette*, 1891, Part I, p. 279. This section unlike S. 260 *supra* applies only to certain sections of the I.P.C. and against Municipal and Police Acts but does not apply to Special and Local Laws. Under S. 407 *infra* an appeal lies from the conviction by a Bench of Magistrates exercising second or third class powers, 9 M. 36. A Bench of Magistrates cannot try any offence except those mentioned in this and S. 260, *supra*; 9 C. 96. They are not entitled to take proceedings under the security chapter.

OFFENCES AGAINST MUNICIPAL ACTS.—In prosecutions under Municipal Acts the Magistrate is bound to conduct the proceedings according to the rules applicable to summary trials. The expression summary proceedings occurring in Municipal Acts must be proceedings for which provision is made in Chapter XXII of the Code. There is no other provision in the Code which appears applicable to the case. 17 B. 781 at 732, 733.

OFFENCES AGAINST CONSERVANCY CLAUSES OF POLICE ACTS.—S. 48 of the General Police Act XXIV of 1859 which relates to obstructions and nuisances in roads within the limits of towns is a general conservancy clause and that offences committed thereunder are within the cognizance of a Bench of Magistrates; 13 M. 142 at 143.

262. (1) In trials under this Chapter, the procedure prescribed for summons-cases shall be followed in summons-cases, and the procedure prescribed for warrant-cases shall be followed in warrant-cases, except as hereinafter mentioned.

Procedure for summons and warrant cases applicable.

(2) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter.

Limit of imprisonment.

SUB-SECTION (1).—The procedure prescribed for summons and warrant-cases shall be followed in summary trials according as the offences tried are summons or warrant-cases. It was held by the Bombay High Court in 27 Cr. L.J. 431—93 Ind. Cas. 159 that the mere fact that a Magistrate in a summary trial did not ask the accused before he is called upon to enter on his defence whether he wishes to recall any of the prosecution witnesses for further cross-examination is not an illegality but only an irregularity cured by S. 537, *infra*, but the Madras High Court in 24 L.W. 649 at 682 *dissented* from the above view and held that the mandatory provisions of S. 256, *supra* apply equally to warrant-cases tried summarily under Chapter XXII of the Code and it cannot be said that when the accused who is unrepresented is called upon to state forthwith whether he wishes to cross-examine and the Magistrate recorded no reasons for such a course as required by S. 256, *supra*, that no failure of justice had been occasioned in such a case. In a warrant case tried summarily the memorandum of the substance of the evidence of witnesses must in conformity with S. 350 (3), *infra*, be signed by the Magistrate, 23 Cr. L.J. 114—68 Ind. Cas. 556. Under this section it is necessary that in a summary trial the procedure prescribed in warrant-cases shall be followed in warrant-cases with certain exceptions; one of the distinguishing points between a summons-case and a warrant-case is that in a warrant-case sufficient evidence to support the charge must be recorded before a charge can be framed and the accused called upon to plead. Where a Magistrate convicted the accused in a warrant-case without recording evidence on the plea of the accused and passed an appealable sentence, the conviction was held bad, 27 C.W.N. 923. The procedure prescribed by this Chapter does not appear to intend that proceedings in summary trials shall commence ordinarily otherwise than in criminal trials either by summons or warrant; indeed, this section implies the contrary, 15 M. 83 at 87. In summary trials whether appealable or not a formal charge in writing need not be framed, 27 Cr. L.J. 689—93 Ind. Cas. 418 following 27 C.W.N. 923—25 Cr. L.J. 1270—82 Ind. Cas. 278; Ratanlal 768.

SUB-SECTION (2) lays down the limit of punishment in summary trials. The term shall not exceed three months. See 9 Cr. L.J. 23. But where an accused is convicted for more than one offence in the same trial, there is nothing in law to prevent the Magistrate passing a sentence of three months for each of the offences, the sentences unless otherwise directed running consecutively under S. 35 *supra*. The limit of three months is applicable only to substantive sentence passed, and will not apply to imprisonment awarded in default of payment of fine which is only a process for enforcement of fine, 6 A. 61. There is nothing to limit the amount of fines in a summary trial. There is also nothing in this sub-section making it illegal to impose solitary confinement as part of the sentence under S. 73, I.P.O., 6 A. 83.

263. In cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses or frame a formal charge; but he or they shall enter in such form as the Local Government may direct, the following particulars:—

Record in cases where there is no appeal.

(a) the serial number;

- (b) the date of the commission of the offence ;
- (c) the date of the report or 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 (d), clause (e), clause (f), or clause (g) of sub-section (1) of section 260, the value of the property in respect of which the offence has been committed ;
- (g) the plea of the accused and his examination (if any) ;
- (h) the finding, and, in the case of a conviction, a brief statement of the reasons therefor ;
- (i) the sentence or other final order ; and
- (j) the date on which the proceedings terminated.

SCOPE OF THE SECTION.—This section does not excuse the Magistrate from hearing the evidence of all the witnesses but only excuses him from recording the evidence of witnesses which is a different thing from hearing the evidence, 39 C. 931. The provisions of this section should be strictly complied with in cases of summary trials in which so little is recorded and therefore there is very little protection from without to the person accused, against the risk of error, haste or inaccuracy, the scanty provisions of the section must be fully and strictly complied with and the record must be sufficiently exact and full to enable a Revision Court to say whether the law has been complied with or not on the points to be recorded. Three particular things are to be recorded, (1) the offence complained of, (2) offence, if any, proved, (3) in case of conviction a brief statement of the reasons. These must be recorded in such a way as to enable the Court of Revision to say "aye" or "no" from within the four corners of the record itself, whether the offence charged is an offence in point of law, whether the offence proved is an offence in point of law and whether the reasons for the conviction are good and sufficient, 2 C.L.J. 565 at 567—10 C.W.N. 79—3 Cr.L.J. 178 ; 21 A. 189 ; 10 A.L.J. 251 ; 12 Cr. L.J. 280—10 Ind. Cas. 921 ; 16 Cr. L.J. 713—30 Ind. Cas. 1001 ; 21 Cr. L.J. 656—37 Ind. Cas. 672 ; 20 Cr. L.J. 431—51 Ind. Cas. 207. This section is not abrogated by S. 441, *infra*, 46 M. 253 ; 20 L.W. 330 and provides for the preparation of record in cases where there is no appeal from a conviction under this Chapter. With regard to appeals from summary convictions, see Ss. 407, 409, 412, 413, 414 and 415 *infra*. The next section provides for preparation of record in appealable cases. The section cannot apply to a case tried summarily in which the Magistrate passes an appealable sentence, 27 C.W.N. 923 at 924—25 Cr. L.J. 1270—31 Ind. Cas. 278. This section must be read along with S. 355, *infra* and this section only lays down by way of exception that in cases where no appeal lies the Magistrate need not record any evidence. The primary rule is that the Magistrate shall make a memorandum of the substance of the evidence, but he can do away with it only when he makes up his mind at the initial stage that in any event the sentence to be passed will be non-appealable, 43 C. 280. The Magistrate's notes should form part of the record and where they have not been kept the conviction is liable to be set aside as the High Court will not be in a position to form an opinion as to the propriety of the conviction without the notes of evidence, 26 Cr. L.J. 1484—39 Ind. Cas. 974. In summary trials it is very important that there should be clear findings on questions of facts because it is only then, the High Court will be in a position to exercise its revisional jurisdiction effectively, 35 Cr. L.J. 916—75 Ind. Cas. 292.

NEED NOT RECORD THE EVIDENCE.—This section does not excuse the Magistrate from hearing the evidence of all the witnesses. It excuses him only from recording the evidence of any of the witnesses. It is an elementary point that recording evidence is not the

same as hearing evidence. In all criminal cases if the accused denies the charge, the complainant and such witnesses as he may produce must be examined and the case must be decided upon the effect of their evidence, 39 C. 931 at 932.

NEED NOT FRAME A FORMAL CHARGE.—This section expressly says that no charge need be framed in non-appealable cases and from the omission of such a provision in S. 264, *infra* dealing with appealable cases it cannot be contended that a formal charge should be framed in appealable cases. In a summary trial whether appealable or non-appealable no formal charge in writing need be framed. Charge cannot be held to be part of the record or what is usually called the record of evidence and sub-section (2) of S. 264 cannot therefore apply to a charge, 7 Lah. 303, see also 53 C. 739 at 745. Although no formal charge need be drawn up, the accused must be called upon to answer to the particulars of the offence charged, whether the proceedings be summary or otherwise, and the Magistrate must specify the offence complained of to give the accused sufficient notice of what is charged against him. The same rules of law as to misjoinder of charges in warrant-cases must apply to the particulars required to be set out by this section in a summary record, 16 C.W.N. 698 at 697 = 13 Cr. L.J. 224 = 14 Ind. Cas. 820. The record should state the offence clearly and distinctly, 1882 A.W.N. 59.

SHALL ENTER IN SUCH A FORM THE PARTICULARS.—The Magistrate should himself prepare the record in non-appealable cases subject to the exception contained in sub-section (2) of S. 265, *infra*, where a Bench may be authorized to employ a clerk. A Magistrate is not authorised in either case to employ a clerk to prepare the record or to affix his signature to the record by a stamp, 6 M. 396; 8 A. 293; 10 C.W.N. 79 = 2 C.L.J. 565 = 3 Cr. L.J. 178; 12 Cr. L.J. 280 = 10 Ind. Cas. 921; 16 Cr. L.J. 713 = 30 Ind. Cas. 1001. The facts found by the Magistrate must show what offence has been committed, 3 C.W.N. 281. But where no reasons are given the defect cannot be subsequently cured by the explanation submitted to the High Court by the Magistrate, 9 C.W.N. 79.

CLAUSE (f).—The value of the property alleged to be stolen should be stated and the value should be found to be less than the amount mentioned in S. 260 (d) to (g); otherwise the conviction will be bad, 20 W.R. (Cr.) 17; 22 W.R. (Cr.) 66; 1891 A.W.N. 183; 1892 A.W.N. 30; 25 Cr. L.J. 545 = 81 Ind. Cas. 33.

CLAUSE (g).—It seems unthinkable that the Legislature should have intended by this section to give Magistrates a discretion in cases ending in a conviction to dispense with the examinations of the accused. The principle '*audi alteram partem*' is the first and most important principle governing the mode of administering Justice and essential of a fair trial. The meaning of the words 'if any' in this and S. 370, *infra*, are clear; if one considers Ss. 243, 245, 253 and 289 of the Code. It is not in every trial the examination of the accused is required, e.g., in a summons-case if the accused admits his having committed the offence the Magistrate may convict him under S. 243 and again if the prosecution evidence does not support the charge under S. 245 the Magistrate may acquit and under S. 253, the Magistrate may discharge in a warrant case. This is only reasonable and in harmony with S. 342, for in such a case there is nothing in the evidence requiring the accused to explain. Similarly under S. 289 the Court may without examination direct the jury to return a verdict of not guilty. The words 'if any' do not limit the obligation under S. 342 or render it inapplicable to summary trials. They really have reference to those cases in which owing to the admission and plea of the accused or owing to the weakness of the prosecution evidence the accused can be convicted or acquitted without his examination. That the mandatory provisions of this section apply to summons-cases have been recognized by all the High Courts, 23 Cr. L.J. 1594 = 90 Ind. Cas. 431. This clause does not give a Magistrate discretion whether he will examine the accused or not. This is governed by S. 342, *infra* which gives the accused the right to refuse to say anything if he chooses. But there must be an examination in all warrant-cases and the words "if any" occurring in this clause do not apply when the case tried by the Magistrate is a warrant-case, 41 C. 743 at 745; see also 46 M. 449 (F.B.).

CLAUSE (b).—Under this clause a brief statement of reasons for conviction must be given showing that there is evidence to prove the existence of the ingredients necessary to complete the offence, 10 A.L.J. 281—13 Cr. L.J. 708—16 Ind. Cas. 516; 21 A. 189 at 191; 30 Ind. Cas. 1001; 23 Cr. L.J. 161—65 Ind. Cas. 625; 13 Cr. L.J. 593—21 Ind. Cas. 466; 23 Cr. L.J. 94—65 Ind. Cas. 446. The Magistrate under this section need not write a judgment as in the case contemplated by S. 264 *infra*. He is bound to state briefly his reasons for conviction. The Legislature has provided a minimum protection for the person affected by the order and it is absolutely necessary that officers who act under the Chapter should most strictly observe the scanty formalities which the law provides. If they do not do so, it would be absolutely impossible for the High Court as a Court of Revision or any other authority to exercise the smallest control over proceedings which may form the subject of complaint, 22 W.R. (Cr.) 23; 10 C.W.N. 79—2 C.L.J. 568—3 Cr. L.J. 178; 21 A. 189; 46 M. 253. A Magistrate may be well satisfied in his mind of the guilt of the person accused but what he should do and what he must take care he does, is to leave upon record some brief but intelligible reasons for the conclusions at which he has arrived so that the High Courts' superintendence of his proceedings may not be defeated, 1888 A.W.N. 115; 1885 A.W.N. 213; 1886 A.W.N. 181; 1899 A.W.N. 81, but where there is clear evidence to justify a conviction the omission to comply strictly with the provisions of this sub-section may be treated as an irregularity cured under S. 537 and there is no contravention of some express provision of law as to the mode of trial, 26 Cr. L.J. 466—65 Ind. Cas. 146. The record must be sufficiently elaborate to satisfy a Court of Revision that the finding is correct, legal or proper under this Chapter, 2 Cr. L.J. 378; 6 C. 579; 18 B. 97; 46 M. 253; 20 L.W. 330; 3 C.W.N. 281; 8 C. 195.

264. (1) In every case tried summarily by a Magistrate or Bench in which an appeal lies, such Magistrate or Bench shall, before passing sentence, record a judgment embodying the substance of the evidence and also the particulars mentioned in section 263.

Record in appealable cases.

(2) Such judgment shall be the only record in cases coming within this section.

This section deals with the preparation of the record in appealable cases tried under this Chapter.

IN WHICH AN APPEAL LIES.—An appeal lies from a conviction by a Bench of Magistrates exercising second or third class powers, 9 M. 36, and the Bench should record a judgment under this section. This section may not apply to the case of an acquittal although an appeal is provided for by S. 417 *infra* at the instance of the Local Government.

BEFORE PASSING SENTENCE.—The record should be made at the time of trial and not after concluding it, from memory or from rough notes, 15 M. 83.

JUDGMENT EMBODYING SUBSTANCE OF EVIDENCE, ETC.—Sufficient evidence must be recorded to justify the judgment. No doubt the object of the procedure laid down in this Chapter is to shorten the course of the trial, but this will not absolve the Magistrate from recording sufficient evidence to support his order, 27 C. 450. The judgment under this section must contain in addition to the particulars required to be mentioned in non-appealable cases under S. 263 *supra*, the substance of the evidence on which a conviction is based and such judgment shall be the only record in appealable cases tried summarily. See 27 C.W.N. 923. Under this section the judgment is the only record available to the appellate Court. Rough and incomplete notes of evidence made by the Magistrate is no evidence, 26 Cr. L.J. 1026—87 Ind. Cas. 914. The judgment alone embodying as it does the substance of the evidence, is the only record of the case. There is no other record, 7 Lah. 803, following 27 C.W.N. 923. See 53 C. 736, which also takes the same view that the judgment is the only record in the case.

265. (1) Records made under section 263 and judgments recorded under section 264 shall be written by the presiding officer, either in English or in the language of the Court, or, if the Court to which such presiding officer is immediately subordinate so directs, in such officer's mother-tongue.

Language of record and judgment.

(2) The Local Government may authorise any Bench of Magistrates empowered to try offences summarily to prepare the aforesaid record or judgment by means of an officer appointed in this behalf by the Court to which such Bench is immediately subordinate, and the record or judgment so prepared shall be signed by each member of such Bench present taking part in the proceedings.

Bench may be authorised to employ clerk.

(3) If no such authorisation be given, the record prepared by a member of the Bench and signed as aforesaid shall be the proper record.

(4) If the Bench differ in opinion, any dissentient member may write a separate judgment.

Sub-sections (3) and (4) were added in the Code of 1898. See S. 355 *infra* which contains similar provisions as to mode of taking and recording evidence in inquiries and trials. It is doubtful whether S. 355 *infra* was intended to apply to cases coming under this Chapter.

DEFECTIVE JUDGMENT.—It is no doubt important that the substance of evidence, on which the conviction is based should be set forth in the judgment to enable the appellate Court to perform its functions in appeal. The prisoner's right of appeal must not be defeated in consequence of an imperfect statement of the substance of the evidence. On the other hand it does not appear necessary to cancel a conviction and sentence not otherwise apparently exceptionable by reason of such a defect. The Session Judge may have found authority in precedents for the course adopted by him in this case. But if he found it impossible to dispose of the prisoner's appeal because the substance of the evidence for the prosecution has not been sufficiently embodied in the judgment of the Magistrate, it would have been better to have required that officer to repair the defect in this judgment by recording a judgment in which the substance of the evidence should be fully embodied and if necessary re-examining the witnesses for that purpose, or, to have ordered a retrial with that view. The Session Judge's order was therefore cancelled and he was directed to dispose of the appeal afresh, 1 A. 680 at 682.

CHAPTER XXIII.

OF TRIALS BEFORE HIGH COURTS AND COURTS OF SESSION.

A.—Preliminary.

266. In this Chapter, except in sections 276 and 307, and in Chapter XVIII, the expression "High Court" means a High Court of Judicature established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and includes the Courts of the Judicial Commissioners of the Central Provinces, Oudh and Sind and such other Courts as the

"High Court" defined.

Governor-General in Council may, by notification in the Gazette of India, declare to be High Courts for the purposes of this Chapter *and of Chapter XVIII.*

The words "and includes the Courts of the Judicial Commissioners of Central Provinces, Oudh and Sind" and the other italicised words have been added by Act XII of 1923. For definition of "High Court" see S. 4 (1) (f), *supra*.

267. All trials under this Chapter before a Court to be by jury. High Court shall be by jury ;

and, notwithstanding anything herein contained, in all criminal cases transferred to a High Court under this Code or under the Letters Patent of any High Court established under the Indian High Courts Act, 1861, or the *Government of India Act, 1915*, the trial may, if the High Court so directs, be by jury,

SCOPE OF THE SECTION ;—Trial by Jury does not owe its existence to any positive law it is not the creature of an Act of Parliament establishing the form and defining the functions of the new tribunal. It arose silently and gradually out of the usages of a state of society which has for ever passed away but of which it is necessary to have a clear idea in order to understand how this mode of trial first came into existence, *Forsyth His. of Tr. by Jury*, p. 1. This section must be read subject to the provisions of S. 269 (1). Trial should ordinarily be with the aid of assessors except when by the notification issued under S. 269 (1) the offence is to be tried by a jury. An European British subject has no absolute right to be tried by a jury, and his trial can be held now with the aid of assessors. See S. 284A. For an exception to the rule laid down in this section that all trials before the High Court shall be by a jury, see S. 526 (2). See S. 536 as to the effect of trial by assessors of offences which ought to be tried with the aid of a Jury, and *vice-versa*. Where a Sessions Judge tries a case with the aid of assessors, it is the Judge together with the assessors who constitute the Court and not the Judge alone and in a case tried by the Judge with a less number of assessors than that fixed by the law, there is no legal trial at all and S. 537, *infra*, cannot cure such a defect, 25 Cr. L.J. 459—77 Ind. Cas. 511 ; 24 M. 523.

Trials before Court of Session to be by jury or with assessors.

268. All trials before a Court of Session shall be either by jury, or with the aid of assessors.

269. (1) The Local Government may, by order in the official Gazette, direct that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by jury in any district, and may, with the like sanction, revoke or alter such order.

Local Government may order trials before Court of Session to be by jury.

(2) The Local Government, by like order, may also declare that, in the case of any district in which the trial of any offence is to be by Jury, the trial of such offences shall, if the Judge, on application made to him or of his own motion so directs, be by jurors summoned from a special jury list, and may revoke or alter such order.

(3) When the accused is charged at the same trial with several offences of which some are and some are not triable by jury, he shall be tried by jury for such of those offences as are triable by jury, and by the

Court of Session, with the aid of the jurors as assessors, for such of them as are not triable by jury.

SUB-SECTION (1).—When a notification under this section says that a particular offence, say, arson, must be tried by Jury and not by assessors it means that assessors are incompetent to determine whether a certain set of facts constitute an offence. The disability centres where the inquiry is whether upon the additional set of facts widening the field of liability prescribed by S. 149 the accused has rendered himself punishable for the same. The trial remains a trial for the offence originally charged and the Court must always first determine whether that offence has been committed, by an individual and next whether S. 149 makes the participant responsible. So it is with S. 34, I.P.C., & Patna 238.

Various Local Governments have issued notifications under this sub-section specifying what offences are triable by jury.

Madras: Ss. 379, 380, 382, 391 to 395, 397 to 401, 411, 412, 414, 451 to 459 and 461, I.P.C.

Bombay: All offences for which under Chapters VIII, XI, XII, XXI, XXIII or under any of the Chapters taken with S. 75, I.P.C., the punishment awardable is death, transportation for life or imprisonment for ten years or upwards.

Bengal: All offences under Chapters VIII, XI, XVI, XVII, XVIII and XX, I.P.C.

United Provinces and Outh: Ss. 363 to 369, 372, 373, 376, 379, 380, 381, 382, 393 to 395, 397 to 399, 401, 403, 404, 411 to 414, 426 to 432, 434 to 436 440, 448, 450 to 461, 493 to 498 and offences under Chapters V and XXIII, I.P.C.

ANY PARTICULAR CLASS OF OFFENCES.—The classification need not be the same classification recognised by the Legislature such as offences against the state, against the person, or bailable or cognizable offences, etc. The classification may be according to the persons who commit them, i.e., the offences, the offenders or according to the person or property against whom or which the offences are committed, or in regard to the particular occasion in connection with which they are committed. Thus the fact of offences having been committed by old offenders or members of criminal tribes or having been committed against women or against public property would afford reasonable grounds for a classification. Offences connected with an outbreak of riots and disturbances directed against a section of the population, i.e., riots and disturbances known as the "Anti Shanar" riots may properly be dealt with by notification as a particular class of offences, 23 M. 632 at 635.

SUB-SECTION (2).—Trial by Jury is a comparatively recent innovation in India and even now few offences are so tried and the classes of cases to be so tried may be varied from time to time by Government, 26 M. 1 at 16. Powers given to the Local Government to revoke its general order as regards certain particular class of offences; offences connected with an outbreak of riots and disturbances can be dealt with by a notification under this section as a particular class of offences. When the Madras Government soon after the Sivakasi Shanar riots in Tinnevely District issued a notification under this section revoking the previous jury notification as to trial of offences by jury and directing that the rioters who were committed for trial or who may hereafter be committed for trial to the Sessions Court of Tinnevely shall be tried with the aid of assessors and not by jury, it was held that the trial held by the Sessions Judge with the aid of assessors in pursuance of such a notification was valid as the offences connected with the outbreak were treated as a class of offences, and it was competent to the Government to revoke the previous notification as far as it related to that class, 23 M. 632.

SUB-SECTION (3).—The words 'same trial' in this sub-section cannot be read as taking away the right of appeal given by S. 410, *infra*. This section uses the words in a distributive sense. 'Trial has two meanings.' In a case of trial by jury and there is another charge tried by the judge, right of appeal from the judgment of the judge is retained in spite of the words 'same trial' used in this sub-section, 9 Cr. L. Rev. 187=18 Cr.L.J. 248=38 Ind. Cas. 730. When an accused is charged at the same trial with respect to offences some

of which are triable by jury and some with the aid of assessors, the Judge was bound to constitute all the members of the jury as assessors for trying the non-jury offences and not two of them as assessors, it was held that the Judge acted illegally and the conviction was set aside, 21 M.L.J. 510—10 M.L.T. 22—12 Cr. L.J. 239—10 Ind. Cas. 281 following 26 M. 398. Similarly where the Judge convicted the accused without recording the opinion of the jury as assessors as required by this section, the conviction was held bad, *Wels II*, 334. But where the Judge charged the jury as a whole directing them to give a verdict on each of the charges and not taking their opinion individually as assessors on the minor charges not triable by jury it was held the trial of all the offences was by jury, 33 B. 423. Where a preliminary register showed that the accused were either guilty of murder in dacoity under S. 396, I.P.O., an assessor case, or that they were not guilty of dacoity at all, and the Sessions Judge tried the case with a jury, and on their returning a verdict of not guilty, referred the case to the High Court, it was held that the Sessions Judge ought to have tried the accused with the aid of assessors for an offence under S. 396, I.P.O. The High Court further pointed out that the Judge might have empanelled a jury and at the conclusion of the trial he might have under this section recorded their opinion as assessors as to the guilt of the accused under S. 396 and the Judge should then have found the accused guilty or not guilty under that section. If, he found them guilty he should have proceeded to conclude the case by passing sentence. If, however, he found them not guilty, he should have then charged the jury with respect of the dacoity under S. 395, I.P.O., and should have taken their verdict, 22 M. 15, at 18. The High Court without ordering a retrial dealt with the case on the merits under S. 307, *infra*. Where an accused was tried by a Judge with a jury who found them guilty of a non-jury offence and the Judge made a reference under S. 307, *infra*, to the High Court, it was held that the reference was not proper as the Judge ought to have treated the verdict as the opinion of assessors under this section and he was competent to deal with the case finally as if the trial was with the aid of assessors, 9 Bom. L.R. 1037. See 27 Cr. L.J. 1100—97 Ind. Cas. 864 as to the effect of a retrial by the appellate Court on appeal from a conviction of the assessor offences as re-opening the whole case including the jury offences of which the accused had been acquitted.

ASSESSORS :—In the early days of British administration Judges who administered justice were not fully equipped with the knowledge of the customs and habits of parties and their witnesses. It was therefore thought necessary to appoint two or more respectable Indians possessing special knowledge to assist the Judge. See Bengal Regulation VI of 1892. Subsequently Act VII of 1843 extended the system to the Presidency of Madras and is now applicable to the whole of British India. The opinion has lost much of its weight since the passing of the Code of 1872 and is now in the same footing as the opinion evidence of persons specially skilled. The law makes no distinction as to the procedure at the trial between a trial by jury and one with the aid of assessors except as to summing up in the case of the former and the manner in which the verdict in the former and the opinion of the assessors in the latter are respectively taken. It is at this latter point there is a departure of the ways and if the accused who is tried, does not object at that stage he cannot be heard to complain afterwards, 33 B. 423.

Trial before Court of Session to be conducted by Public Prosecutor.

270. In every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor.

PUBLIC PROSECUTOR :—For definition of Public Prosecutor see S. 4 (1) (f) and see Chapter XXXVIII, *infra* as to appointment of duties and powers of Public Prosecutor.

SHALL BE CONDUCTED BY A PUBLIC PROSECUTOR.—The word "shall" here is merely directory. An accused person will not be entitled to an acquittal merely on the ground that a public prosecutor did not conduct the prosecution. Counsel instructed by a private party cannot conduct the prosecution. A Public Prosecutor may avail himself of his services and once the assistance had been accepted that cannot be excluded at any stage of the trial, 11 B.H.C.R 102.

B.—Commencement of proceedings.

271. (1) When the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried.

Commencement
of trial.

(2) If the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon.

Plea of guilty.

WHEN THE COURT IS READY TO COMMENCE THE TRIAL.—When a Judge is of opinion that there is an absence of evidence to warrant a commitment of the accused to the Court of Session he has no power to withdraw the case, a power specially conferred on the High Court only, of withdrawing a case from the jury. The proper procedure for the Sessions Judge in such a case is to make a reference to the High Court to have the commitment quashed under S. 215, *supra*, 5 C.W.N. 411. The hearing or trial must be taken to include all proceedings taken to determine a case and the first step in the hearing at a Sessions trial is the reading and explaining of the charge to the accused, 35 M. 701 at 703, but it was held in 15 B. 514 that the actual trial does not begin until the charge has been read and explained to the accused and he claims to be tried. The trial begins only after the assessors or jurors have been chosen, 6 Lah. 262.

Trial with the aid of assessors does not commence with the reading of the charge, for it is only when the accused has refused or does not plead to the charge and claims to be tried that the Sessions Court is to proceed to choose assessors under S. 272, *infra*, 15 B. 514.

CHARGE SHALL BE READ OUT IN COURT AND EXPLAINED TO ACCUSED.—The ultimate responsibility of settling the charge vests on the Sessions Judge who can modify or change the same, 15 Bom. L.R. 80 = 15 Cr. L.J. 292 = 23 Ind. Cas. 500. Mere reading out the charge is not sufficient but it must be explained to him, and where a charge is not explained to the accused the conviction is liable to be set aside, 9 M. 51 see also 19 A. 119 and 30 B 511. When arraigning an accused person and before receiving his plea the Court should be careful to insure the explanation of the charge in a manner sufficiently explicit to enable the accused to understand thoroughly the nature of the charge he is called upon to plead, 5 C. 826 ; 7 C. 96 ; Weir II, 336 ; 337 and 339. See S. 255, *supra*, and the notes thereunder at p. 376.

HE SHALL BE ASKED WHETHER HE IS GUILTY OR CLAIMS TO BE TRIED.—This and S. 272 *infra* contain all that is necessary as to pleading, and there is no need to supplement their contents by a reference to any other system of judicature. The accused can plead "guilty" under this section, he can claim to be tried, or he can refuse to plead which is taken to be the same as claiming to be tried. The plea of "not guilty" is thus one not recognized by the Code and this has been the law since 1872 at least, and this is intentional and is designed to get rid of a great mass of English law relating to criminal pleading which for more than half a century has been discredited and is in fact falling into oblivion. It is not open to the accused to make any answer to an indictment except "guilty" or "claim to be tried". If an accused claims to be tried, subject to special provisions, he can take any objection to his trial or conviction at any time before verdict, at any rate and in any form that the Court sees fit to allow. S. 403 has nothing to do with pleading, but is in terms a limitation on the jurisdiction of the Court, 41 C. 1072 at 1084. A plea of guilty must be a distinct admission of each and every fact necessary to constitute the offence charged and unless the Judge himself finds on the admission made that the offence charged is legally established, he should record evidence and come to a decision thereon, Weir II, 336. Where the accused instead of pleading guilty makes a rambling statement more or less admitting guilt, it would

be much safer if the Judge recorded a formal plea of "not guilty" and proceeded with the trial in the ordinary way recording evidence, 1908 A.W.N. 54. Before a Judge makes up his mind to convict on a plea of guilty, it is the duty of the Judge to consider whether the plea is really one of "guilty"; in other words, whether accused fully understands the nature of the charge and the consequences which will ensue if his plea of guilty is accepted, and it is not advisable to accept a plea of guilty in murder cases, 20 A.L.J. 325—23 Cr. L.J. 283—66 Ind. Cas. 327 followed in 26 Cr. L.J. 1316—89 Ind. Cas. 260. The section lays down that the accused may be convicted on a plea of guilty and thereby leave it open to the Court to refuse to accept the plea of guilty and have the question of the guilt of the accused tried by the Court. 13 C.W.N. 552—9 C.L.J. 291—10 Cr. L.J. 484—4 Ind. Cas. 57, where 19 B. 195; 23 A. 53 and 30 A. 540 are referred to; 19 A. 119. It is not in accordance with the usual practice to accept a plea of guilty in a case where the natural consequence would be a sentence of death, 19 Bom. L.R. 356—18 Cr. L.J. 699—40 Ind. Cas. 699. A man may plead that he hit some one who thereby died and that he did it for the purpose of taking away the ornaments of the person injured without necessarily admitting he committed murder, 8 Bom. L.R. 240; 8 C. 326; 9 M. 61. As a matter of practice in Sessions trials, especially in murder cases many Judges very properly prefer not to accept the plea of guilty but proceed to take evidence just as if the plea had been one of not guilty and decide the case upon the whole evidence including the accused's plea, 23 M. 151 at 153; 19 B. 195; 23 M. 491. Where there is a doubt the Court will do well to proceed with the trial, 5 A.L.J. 157.

SUB-SECTION (2).—Under this sub-section all that is incumbent on the Court is to record the plea of guilty. It is not obligatory on the Court to convict him thereon. The conviction on a plea of guilty is discretionary, 24 A.L.J. 318—27 Cr. L.J. 439—93 Ind. Cas. 341. The plea is to be recorded in the language in which it is conveyed to the Court by the interpreter, 5 C. 326, and the accused should be asked to plead by his own mouth and not through his counsel or pleader, 8 Bom. L.R. 861, referred to and distinguished in 50 B. 280 at 287; 15 W.R. (Cr.) 42. The Judge is not bound to convict on the plea of guilty. The term used is "may" convict and a wide discretion is allowed to the Judge. Where the plea is not equivocal but a complete plea of "guilty" the Judge is entitled to act upon such a plea and convict the accused. If the Judge does not accept the plea of "guilty" and convicts the accused he should proceed with the trial and take all the evidence in order to determine whether he committed the offence charged, 4 B.L.R. Appx. 101. A trial does not end till the accused is convicted or acquitted, 23 M. 151. If the Court considers it is unsafe to accept the plea of guilty and to convict the accused on such plea no special procedure is laid down in the Code. As a matter of practice the trial proceeds as if the plea was one of not guilty and when the Judge decides to try the case he should direct the accused to enter a plea of not guilty as is the practice in England. The recording of a plea of guilty after the Judge had decided to try the case would be meaningless unless he accepts it. If on the other hand he accepted it, there was nothing in issue between the Crown and the prisoner at the bar whom he has to try. 9 C.L.J. 55 at 72.

MAY BE CONVICTED.—Under the Code the Court is not bound to convict an accused person on his plea of guilty; 23 M. 151 at 153; 13 C.W.N. 552. In 24 A.L.J. 318 it was held that the Magistrate has a discretion to accept the plea of guilty and convict the accused on such plea.

272. If the accused refuses to, or does not, plead, or if he claims to be tried, the Court shall proceed to choose jurors or assessors as hereinafter directed and to try the case :

Refusal to plead or claim to be tried.

Trial by same jury or assessors of several offenders in succession.

Provided that, subject to the right of objection hereinafter mentioned, the same jury may try, or the same assessors may aid in the trial of, as many accused persons successively as the Court thinks fit.

REFUSES TO PLEAD.—An accused is not bound to answer any question put to him and can if he likes decline to plead and if he does so the case goes on just the same. S. 179. I.P.O. has nothing whatever to do with the conduct of accused persons in Court, 47 M. 396. When the accused person refuses to plead, that is to be taken as equivalent to his claiming to be tried and the trial should proceed, 41 C. 1072 at 1085. The actual trial does not begin until the charge has been read and explained to the accused and his plea is recorded, 15 B. 514. If the accused refuses to plead or claims to be tried, then the Judge shall proceed to choose jurors or assessors to try the case.

CLAIMS TO BE TRIED.—If an accused person pleads not guilty, it is after so pleading that he claims to be tried. In such cases if he confesses, a Judge is not entitled to convict him on the confession without taking the verdict of the jury after laying before them all the evidence including the confession.

PROVISO TO THE SECTION.—On the conclusion of one trial, the same jury or assessors may proceed to try the accused in the next case committed for trial, 6 C. 93, but the hearing of the two cases should not be simultaneous, 23 Cr. L.J. 49=65 Ind. Cas. 833.

273. (1) In trials before the High Court, when it appears to the High Court, at any time before the commencement of the trial of the person charged, that any charge or any portion thereof is clearly unsustainable, the Judge may make on the charge an entry to that effect.

Entry on unsustainable charges.

(2) Such entry shall have the effect of staying proceedings upon the charge or portion of the charge, as the case may be.

Effect of entry.

EFFECT OF ENTRY ;—An entry made under this section has not the effect of an acquittal which could be pleaded in bar to a subsequent trial under S. 403, *infra*. In 21 C. 97 a charge under S. 372 I.P.O. when not made out, the learned Judge thought it was his duty to act under this section to stay the proceedings by making an entry as contemplated by this section and the accused was discharged from custody. The power under this section is to be invoked in the exercise of the ordinary original criminal jurisdiction of the High Court. S. C. 397. Such an entry has the effect of postponing proceedings finally. For other instances of stay of proceedings see Ss. 145 (5) 240, 464 (2), 465 (1).

C.—Choosing a Jury.

Trial by jury is an ancient institution of almost all European races inhabiting Europe and European Colonies in America and elsewhere where every criminal is tried by jury. The origin of the trial by jury is not traceable to any single Legislature or to any particular period. It seems to have had its beginnings in certain primitive customs of the Northern European races and received special developments from different nations. By the Anglo-Saxons, a person who was accused of crime, was permitted to summon twelve of his neighbours called *compurgators* who swore to his innocence. This was the origin of an institution which took settled and vigorous form after the Norman conquest gradually developing into its present form . . . In the United States, in Canada, and other British Colonies, jury trials are essentially the same as in England. In France they are only applicable to criminal cases. Trial by jury is in force in Italy and in the German Empire, 27 Cr. L.J. 421 at 423=93 Ind. Cas. 149. The origin of the English Jury is attributed to a national recognition of the principle that no man ought to be condemned except by the voice of his fellow citizens, *Forsyth, His. of Tr. by Jury*, p. 5.

274. (1) In trials before the High Court the jury shall consist of nine persons.

Number of jury.

(2) In trials by jury before the Court of Session the jury shall consist of such uneven number, not being less than *five*, or more than

nine, as the Local Government, by order applicable to any particular district or to any particular class of offences in that district, may direct :

Provided that, where any accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons, and, if practicable, of nine persons.

AMENDMENT.—The word "three" has been changed into "five" and the proviso has been newly added by Act XII of 1929.

JURY.—The term "*jury*" generally signifies a body of men sworn to inquire into a matter of fact and to declare the truth upon such evidence as shall be delivered to them. Jury form a tribunal or body with a foreman and the verdict is the verdict of the body and when there is no unanimity among the members of the body, the opinion of the majority prevails as the verdict of the body. The jurors are sworn after the foreman is appointed, and after the judge has finished his charge, the jury may retire to consider their verdict and if they are not unanimous, he may require them to retire for further consideration. If in the course of a trial any juror unavoidably absents himself, or if it appears that any juror is unable to understand the language in which the evidence is given or the language in which it is interpreted, any new jurors shall be added or the jury discharged and a new jury chosen. But in either case the trials shall commence anew, 24 M. 523 at 536-537.

SUB-SECTION (2).—When the Local Government by a notification under this sub-section has fixed the number of jury at five, a trial held before a jury of seven persons in accordance with a cancelled notification was held to be wholly invalid, 28 A. 211.

275. (1) *In a trial by jury before the High Court or Court of Session of a person who has been found under the provisions of this Code to be an European or Indian British subject, a majority of the jury shall, if such person before the first juror is called and accepted so requires, consist, in the case of an European British subject, of persons who are Europeans or Americans and, in the case of an Indian British subject, of Indians.*

Jury for trial of European and Indian British subjects and others.

(2) *In any such trial by jury of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American, a majority of the jury shall, if practicable, and if such European or American before the first juror is called and accepted so requires, consist of persons who are Europeans or Americans.*

This section was amended by Act XII of 1929, The Racial Distinctions Act, and provides for mixed jury for the trial of European and Indian British subjects and Europeans and Americans. See S. 284A *infra* as to trial with the aid of assessors of such persons. The right conferred by this section is a substantive right to be obtained not by a luck of the ballot but by the process of challenging as of right, 40 G.L.J. 288 at 289. A claim to be tried as an Indian British subject is a different and distinct one from the claim to be tried by a majority of Indian jury as mentioned in this section though it can only be put forward by a person who has in the language of the section been found under the provisions of the Code to be an Indian British subject and the section further requires that such a claim has to be expressly put forward before the first juror is called and accepted before it can be listened to, 51 G. 980 where certain Mahomedan accused were charged with abduction of a Hindu girl applied to

the Sessions Court for a mixed jury of Hindus and Mahomedans alleging that Hindus bear a sort of instinctive hatred or prejudice against them in a case of this nature and would not get a fair trial before a jury composed entirely of Hindus, the application was rightly rejected as there is no provision of law for a mixed jury of this character on communal basis and the accused were not entitled to get what they asked for, 28 Cr. L.J. 1009-87 Ind. Cas. 833.

276. The jurors shall be chosen by lot from the persons summoned to act as such in such manner as the High Court may from time to time by rule direct :

Jurors to be chosen by lot.

Provided that—

first, pending the issue under this section of rules for any Court, the practice now prevailing in such Court in respect to the choosing of jurors shall be followed ;

existing practice maintained ;

secondly, in case of a deficiency of persons summoned, the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present ;

persons not summoned when eligible ;

thirdly, in a trial before any High Court in the town which is the usual place of sitting of such High Court—

trials before special jurors.

(a) if the accused person is charged with having committed an offence punishable with death, or

(b) if in any other case a Judge of the High Court so directs, the jurors shall be chosen from the special jury list hereinafter prescribed ; and

fourthly, in any district for which the Local Government has declared that the trial of certain offences may be by special jury, the jurors shall, in any case in which the Judge so directs, be chosen from the special jury list prescribed in section 325.

AMENDMENT.—The opening words of the third proviso are new.

OBJECT OF THE SECTION. The object of this section coupled with Ss. 279 and 326, *infra*, is to secure an impartial trial by rendering impossible any intentional selection of jurors to try a particular case, and an accused person has a right to claim to be tried by a jury chosen with strict regard to the safeguards provided by law to secure perfect impartiality. When the required number of jurors not being present, the deficiency was made up from other persons who were present in Court, though they were not in the jury list and were not chosen by lot, being called to serve as jurors, the trial is not vitiated on that ground, 29 C.W.N. 582-28 Cr. L.J. 819-88 Ind. Cas. 467.

SHALL BE CHOSEN BY LOT.—When instead of choosing jurors by lot and then hearing and deciding objections as provided by law the Judge proceeded at once to exempt some of the persons present merely on their own representation and tried the accused with the rest and no selection was made as required by S. 326, *infra*, it was held that such a grave irregularity in the selection of the jurors affects the constitution of the Court and is not cured by S. 537, *infra*, 7 C.W.N. 188, where 8 C. 739 was distinguished, on the ground that in that case no objection was taken to the Judge himself selecting the jurors and no

prejudice was shown by the accused. Jurors are judges of facts and the absence of a properly constituted jury as required by the imperative provisions of this section is an illegality which cannot be cured by S. 537, *infra*, 33 A. 333 but there is nothing to show that any objection was taken in that case.

SPECIAL JURY.—As to the preparation of the list of Special Jurors, see S. 325, *infra*.

277. (1) As each juror is chosen, his name shall be called aloud, and, upon his appearance, the accused shall be asked if he objects to be tried by such juror.

Names of jurors to be called.

(2) Objection may then be taken to such juror by the accused or by the prosecutor, and the grounds of objection shall be stated :

Objection to jurors.

Provided that, in the High Court, objections without grounds stated shall be allowed to the number of eight on behalf of the Crown and eight on behalf of the person or all the persons charged.

Objection without grounds stated.

UPON HIS APPEARANCE.—This may mean, either simultaneously with or after the act of the juror appearing in the witness-box. It cannot possibly refer to any act done before the juror puts in his appearance. In England the challenge of a juror either by the Crown or by the prisoner must be before he is sworn. As a matter of practice, here in India counsel challenges the juror immediately he hears the juror's name called aloud and sees him emerging from the crowd collected in the Court room ready to get into the jury box.

OBJECTION TO JURORS.—The right of challenge is almost essential for the purpose of securing perfect fairness and impartiality in a trial. *Forsyth Hist. of Trial by Jury*, p. 175. In the case of a prisoner challenging, he must do so as each juror comes to the box and before he is sworn. But the King need not assign His cause of challenge until the whole pannel is gone through and unless there cannot be a full jury without the persons so challenged, and it is then that the counsel for the Crown must show cause, otherwise the juror shall be sworn. The practical effect of this rule is that the Crown has the benefit of peremptory challenge provided it takes care that a sufficient number are left on the pannel unchallenged so as to make up a full jury. *Forsyth Hist. of Trial by Jury*, p. 232.

ACCUSED SHALL BE ASKED IF HE OBJECTS.—The omission to ask the accused whether he has any objection to each juror whose name is called aloud and upon his appearance, is a very serious one, though it may not necessarily vitiate a conviction unless the accused has been actually prejudiced, 13 C.W.N. cxi.

PROVISO.—This proviso enables the accused as well as the Crown in the High Court Sessions only, to peremptorily challenge without grounds stated to the extent of eight persons, but this principle of peremptory challenge is not allowed in trials before Court of Session. "In charges of treason and felony a prisoner is entitled to a peremptory challenge, because he may challenge peremptorily upon his own dislikes without showing any cause," *Forsyth Hist. of Trial by Jury*, p. 231.

278. Any objection taken to a juror on any of the following grounds, if made out to the satisfaction of the Court, shall be allowed :—

Grounds of objection.

- (a) some presumed or actual partiality in the juror ;
- (b) some personal grounds, such as alienage, deficiency in the qualification required by any law or rule having the force of law for the

time being in force, or being under the age of twenty-one or above the age of sixty years ;

(c) his having by habit of religious vows relinquished all care of worldly affairs ;

(d) his holding any office in or under the Court ;

(e) his executing any duties of police or being entrusted with police-duties ;

(f) his having been convicted of any offence which, in the opinion of the Court, renders him unfit to serve on the jury ;

(g) his inability to understand the language in which the evidence is given, or when such evidence is interpreted the language in which it is interpreted ;

(h) any other circumstance which, in the opinion of the Court, renders him improper as a juror.

HOLDING ANY OFFICE IN OR UNDER THE COURT.—This refers to the Court trying the case. The words "in or under the Court" is significant. The fact that a person is a clerk in the District Magistrate's office is no ground for objection for his sitting on the Jury in the Sessions Court, 7 C. 42.

279. (1) Every objection taken to a juror shall be decided by the Court, and such decision shall be recorded and be final.

Decision of objection.

(2) If the objection is allowed, the place of such juror shall be supplied by any other juror attending in obedience to a summons and chosen in manner provided by section 276, or if there is no such other juror present, then by any other person present in the Court whose name is on the list of jurors, or whom the Court considers a proper person to serve on the jury :

Supply of place of juror against whom objection allowed.

Provided that no objection to such juror or other person is taken under section 278 and allowed :

SHALL BE DECIDED BY THE COURT.—In India every objection taken to a juror shall be decided by the Court. But in England, it is otherwise. If the challenge is to the first juror called, the Court may select any two indifferent persons as triers. If they find against the challenge, the juror will be sworn in and be jointed with the triers in determining the next challenge. But as soon as two jurors have been found indifferent and have been sworn every subsequent challenge will be referred to their decision. The burden of proof of a challenge for cause is on the person who makes it and he is not entitled to question a juror before challenging him. When the challenge has been made the trial proceeds by witnesses called to support or defeat the challenge ; the juror objected to may also be examined on the *voir dire* as to his qualification or the leaning of his affection, but he cannot be interrogated as to matters which tend to his own discredit, as whether he had been convicted of felony, etc., nor whether he has expressed a hostile opinion as to the guilt of the defendant. *Arch. Pl. and Pr.* p. 190. (25th Ed.).

§80. (1) When the jurors have been chosen, they shall appoint one of their number to be foreman.

(2) The foreman shall preside in the debates of the jury, deliver the verdict of the jury and ask any information from the Court that is required by the jury or any of the jurors.

(3) If a majority of the jury do not, within such time as the Judge thinks reasonable, agree in the appointment of a foreman, he shall be appointed by the Court.

§81. When the foreman has been appointed, the juror shall be sworn under the Indian Oaths Act, 1873.

The oath to be administered is in the following form:—You shall well and truly try and true deliverance make between our Sovereign Lord the King-Empereor of India and the prisoner at the bar and true verdict give according to the evidence. So help you God," Section 6 of the Indian Oaths Act enacts that where a juror is a Hindu or a Mahomedan or a person who has objection to taking an oath, shall, instead of making an oath, make an affirmation and the form prescribed is as follows: "I solemnly affirm in the presence of Almighty God that I will Judge truly between the King-Empereor of India and the prisoner at the bar and will give a true verdict according to the evidence."

282. (1) If, in the course of a trial by jury at any time before the return of the verdict, any juror, from any sufficient cause, is prevented from attending throughout the trial, or if any juror absents himself and it is not practicable to enforce his attendance, or if it appears that any juror is unable to understand the language in which the evidence is given or, when such evidence is interpreted, the language in which it is interpreted, a new juror shall be added, or the jury shall be discharged and a new jury chosen.

Procedure when juror ceases to attend, etc.

(2) In each of such case the trial shall commence anew.

SCOPE OF THE SECTION:—This section does not permit the discharge of the jury in the middle of a trial and commencing the trial anew with a fresh jury when an adjournment is asked for on account of the absence of a defence witness who was summoned to appear, 4 Bom. L.R. 939. This and the next section do not provide for the discharge of the jury for improper conduct during the trial. Where the question of misconduct on the part of the jury or other sufficient cause arises, a Sessions Judge has inherent power to discharge the jury and empanel another. The Code does not provide for such circumstances, the presumption that jurors will discharge their duties without impropriety may explain the omission. Such a power is not to be exercised lightly unless the Judge on inquiry finds reasonable grounds for exercising such a right. Unless the judge had the power to discharge the jury in cases of misconduct, great difficulties must arise and in many cases a serious miscarriage of justice will happen. 80 C. 872. If a juryman is taken ill so as to be in the opinion of a competent witness incapable of attending through the trial, the jury may be discharged and the prisoner tried *de novo*; another juryman may be added to the rest but in that case the prisoner should be offered his challenge over again as to the eleven and the eleven should be sworn and the trial begun *de novo*, *Ros. Cr. Ev. & Pr.*, p.188 (13th Ed.). This section refers only to absence of a juror and not to witness, 4 Bom. L.R. 939. This section applies to the case where the Judge in the course of the trial found out that a juror was deaf and partly blind and the Judge was entitled to try the case afresh with another jury, 19 M. 375. On a trial by a jury after two witnesses have been examined one of the jurors was discovered to be deaf and was

discharged by the Judge and another juror sworn in his place, the trial was not commenced afresh but the evidence given by the two witnesses were read over and admitted by them to be correct, *held* that the procedure adopted by the Judge contravened the provisions of this section and therefore the trial was invalid, 36 A. 481.

SUB-SECTION (2).—This sub-section enacts an important direction that when a new juror is added or when the jury is discharged and a new jury is chosen, the trial commences anew. If during the trial the prisoner be taken so ill that he is incapable of remaining at the bar the jury may be discharged without verdict and a different jury is to be empannelled on his recovery. *Ros. Cr. Ev. & Pr.*, p. 180 (13th Ed.)

283. The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar.

Discharge of jury in case of sickness of prisoner.

Where a prisoner was by sudden illness rendered incapable of remaining at the bar the Jury were discharged and the prisoner on recovering was tried before another Jury. *Arch. Cr. Pl. & Pr.* pp. 201-02 (25th Ed.).

D—Choosing Assessors.

284. When the trial is to be held with the aid of assessors, not less than three and, if practicable, four shall be chosen from the persons summoned to act as such.

Assessors chosen, how chosen.

ASSESSORS—THEIR DUTIES AND FUNCTIONS.—The principle underlying the institution of assessors which is the same as that in England, is this: Europeans administering justice in a foreign land, and being deficient in their knowledge of the customs and habits of the parties and witnesses appearing before them and also deficient in judging of their demeanour in the witness box should have the benefit of the opinion of two or more respectable natives of the land as assessors possessing such knowledge and judgment. Their opinion stands on the same footing as opinion evidence of a person specially skilled in foreign law, science or not, 24 M. 523 at 543-544. A Court constituting a Judge and two or more assessors by which every person must be tried before a Court of Session when he is not tried by jury, appears to be a compromise between a trial by judge and jury and by a single judge. It is a constitutional privilege, the benefit of which is not confined to the subject, for in an appeal by a person convicted in an assessor's case, the Crown can as well rely on the opinion of the assessors if it is in favour of a conviction as the prisoner can when their opinion is the other way. *Ibid* at 531. Assessors do not form members of the Sessions Court and that therefore the Sessions Court was not illegally constituted if an assessor who had absented himself for some days when the trial went on was allowed to resume his seat as an assessor subsequently. *Ibid* at 538. In trials with the aid of assessors, it is imperative that the judge should commence his trial with the aid of at least two assessors and that at least one of them should continue to attend the trial throughout, this being mandatory, the jurisdiction of the Sessions Judge to commence the trial, and his jurisdiction to continue the trial are dependent upon his choosing at least two assessors to aid him and on the continuation of at least one of them throughout the trial. The above two requisites are conditions precedent to the exercise of his jurisdiction and therefore any finding or sentence passed in contravention of either of those requisites will not be one passed by a Court of competent jurisdiction and the defect is not one which can be cured by S. 537 *infra* or by S. 167 Indian Evidence Act. *Ibid* at 538. The object and purpose of the provisions of the Code with regard to the summoning and selection of assessors is that there must be no room for suspicion that any one of the assessors sitting on a particular trial has been "planted" on the Court by any one interested in the success or failure of the prosecution. 7 Cr. L. Rev. 267=17 Cr. L.J. 17=32 Ind. Cas. 145. Assessors do not form a body and each acts and expresses his opinion individually and the judge is to invite the opinion of each separately and record it. The judge is the sole judge of law and fact, the responsibility of the decision rests only with him, though in the decision of the case he is expected to take into consideration the individual opinion of

each assessor and during the trial he may also consult them on any point in connection with examination of the witnesses, or otherwise. Assessors are not to retire for consultation and forming their opinion. The judge should have before him the individual and independent opinion of each assessor. 24 M. 523 at 527.

Assessors, like jurors, are not members of the Court. They are appointed to assist the Court and the discussion and statement of points by a Judge sitting with assessors cannot be said to be otherwise than in furtherance of the object of getting at the best assistance for the proper adjudication of the case, 7 B.L.R. 83 at 88. When a trial commences with only one assessor, there is no legal trial as required by this section and the error vitiates the whole proceedings. S. 537 *infra*, does not apply as there was no properly constituted Court to hold a trial, 25 B. 593 at 696. A trial properly commenced with two assessors does not become invalid if one assessor absents himself during the trial, the absent assessor ceases to occupy the position of one aiding the Court and his opinion ought not to be taken, 6 C.W.N. 715, but if he was permitted to be present subsequently and to give his opinion and the Judge took his opinion into consideration, it was held that it was merely an irregularity cured by S. 537 *infra*, 24 M. 523. See S. 921 as to the preparation of the list of assessors. Where after commencing trial it was discovered that one of the assessors chosen is interested and unfit to sit as an assessor the proper procedure for the judge is to refer the matter to the High Court for orders, to have his order in choosing the assessor set aside and then proceed a *de novo* trial after receiving the order of the High Court. [1912] M.W.N. 378—13 Cr. L.J. 473—15 Ind. Cas. 313. Where in a trial only one assessor was summoned to act as such at the Sessions, the trial is illegal as there is no lawful trial before a lawful tribunal and the conviction cannot stand. 35 A. 670 where 1894 A.W.N. 207 is followed.

NOT LESS THAN THREE, ETC.—The section as amended requires that there shall at least be three assessors. It has always been held that a trial commenced and held throughout with less than the minimum number of assessors prescribed by law is not a court properly constituted and S. 537 *infra* cannot apply to such a case. 26 Cr. L.J. 369—81 Ind. Cas. 711. It is even necessary if practicable four assessors should be chosen to aid the Court and where four assessors are not chosen, it is proper the judge gives his reasons in the order sheet explaining the omission. A trial held without four but with three assessors without reading reasons is still in accordance with law and does not offend against provisions of this section. 26 Cr. L.J. 713—86 Ind. Cas. 183.

284A. (1) *In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European or Indian British subject, if the European or Indian British subject accused, or, where there are several European British subjects accused or several Indian British subjects accused, all of them jointly, before the first assessor is chosen so require, all the assessors shall, in the case of European British subjects, be persons who are Europeans or Americans or, in the case of Indian British subjects, be Indians.*

(2) *In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American, all the assessors shall, if practicable and if such European or American before the first assessor is chosen so requires, be persons who are Europeans or Americans.*

This section is new and was added by Act XII of 1923—The Racial Distinctions Act.

This section is analogous to the provisions contained in S. 275, *supra*, which relate to trial by jury before the High Court or Court of Session of an European or Indian British

subject with this distinction that in the case of trial with the aid of assessors the accused whether European or Indian British subject may claim that all, not one half before the amendment, the assessors shall be European British subjects or Indians as the case may be. Similar right is conferred on Europeans and Americans also whenever such a course is practicable.

285. (1) If in the course of a trial with the aid of assessors, at any time before the finding, any assessors is, from any sufficient cause, prevented from attending, throughout the trial, or absents himself, and it is not practicable to enforce his attendance, the trial shall proceed with the aid of the other assessor or assessors.

Procedure when assessors is unable to attend.

(2) If all the assessors are prevented from attending, or absent themselves, the proceeding shall be stayed, and a new trial shall be held with the aid of fresh assessors.

SUB-SECTION (1).—A trial to be valid should commence with not less than two assessors. When one assessor is from sufficient cause, prevented from attending throughout the trial, or it is not possible to enforce his attendance, the trial held with the aid of the other assessor alone is valid in law. The trial cannot begin and end with one assessor, for, in that case, there is no properly constituted Court to hold the trial, 25 B. 693; 21 A. 106. If an assessor who was absent during the course of the trial was allowed to resume his seat as an assessor and to give his opinion which the Judge took into consideration it was held that the procedure adopted was only an irregularity and did not affect the jurisdiction of the Court, 24 M. 323.

SUB-SECTION (2).—A trial held when both the assessors who were absent during the course of the trial was held bad as the law contemplated the continuous attendance of at least one assessor throughout the trial, 13 A. 337; 6 C.W.N. 715. A conviction based on evidence recorded after the discharge of the assessors was held bad on the ground that the evidence was recorded by a Court not properly constituted to record the same, 15 A. 138.

THE PROCEEDING SHALL BE STAYED.—The stay contemplated here is only till a new trial is held. In S. 393, *infra* the stay may result in the discharge of accused and such discharge may amount to an acquittal if the presiding Judge so declares. But that section is a special provision applicable to the High Court only.

DD.—Joint trials.

285A. *In any case in which an European or American is accused jointly with a person not being an European or American, or an Indian British subject is accused jointly with a person not being an Indian, and such European, Indian British subject or American is committed for trial before a Court of Session, he and such other person may be tried together, but if he requires to be tried in accordance with the provisions of section 275 or section 284A and is so tried, and the other person accused requires to be tried separately, such other person shall be tried separately in accordance with the provisions of this chapter.*

This section is new and was added by Act XII of 1923—The Racial Distinctions Act, and allows separate trials to European or American or Indian British subjects when accused jointly, at their option, in accordance with the provisions of, Ss. 275 or 284A.

E.—Trial to Close of Cases for Prosecution and Defence.

286. (1) When the jurors or assessors have been chosen, the prosecutor shall open his case by reading from the Indian Penal Code or other law the description of the offence charged, and stating shortly by what evidence he expects to prove the guilty of the accused.

Opening case for prosecution.

Examination of witnesses.

(2) The prosecutor shall then examine his witnesses.

WHEN JURORS OR ASSESSORS HAVE BEEN CHOSEN.—The trial of an accused person in the Court of Session begins after the assessors or jurors have been chosen, § Lah. 262 following 15 B. 514. After the jurors or assessors have been chosen and sworn, the trial cannot be postponed to enable the prosecution to examine a witness on commission. The case must be proceeded with, 19 C. 113.

SUB-SECTION (2).—The examination of the witnesses contemplated by this section is the oral examination of the witnesses present in Court. The demeanour of the witnesses may be important for the assessor or juror or the judge for forming an opinion as to their credibility. It is unnecessary to go into the many reasons why the rules should be followed. It is sufficient to say "it is the rule, and is founded on reason and justice", 9 M. 83 at 85. Reading the depositions taken before the committing Magistrate as examination in chief of the prosecution witnesses and allowing the accused's Attorney to cross-examine the witnesses in the Sessions Court without examining the witnesses is not permitted by law although the accused's attorney requested the Court to adopt such a procedure, and the Public Prosecutor also consented to the same, 9 M. 83; 45 M. 766; when the accused is on his trial on a capital charge it is inexpedient that he should be convicted on a plea of guilty recorded before the trial of the Court itself. As a matter of practice the Court should read and consider evidence putting aside the plea of the accused not only as to the guilt of the accused but as to the precise nature of the offence committed and the appropriate sentence to be passed, 20 A.L.J. 869 and 326. There is no provision of law in the Code authorising a Judge to allow all the prosecution witnesses to be examined one day and permitting the cross-examination of those witnesses to be reserved to a subsequent date and such a practice is irregular and inconvenient. Weir II, 381. But in 41 C. 299, a slightly different view was taken. There in a charge of murder the defence counsel applied after the examination in chief of the first prosecution witness for a postponement of the cross-examination of the witness till the next day on the ground of his unpreparedness but did not ask for an adjournment of the trial itself. It was held that the application was a reasonable one which the Judge should, under the circumstances have allowed, though the accused is not entitled to such postponement as of right the court may in a proper case grant the indulgence when the result of such a refusal has been that the first six witnesses for the prosecution were not cross-examined at all and of these at least four were important witnesses and the remaining witnesses had not been efficiently cross-examined owing to the circumstances under which counsel who defended the accused undertook their defence, the accused were prejudiced inasmuch as they lost the opportunity of a cross-examination and a trial was ordered by another Judge.

STATING SHORTLY BY WHAT EVIDENCE HE EXPECTS TO PROVE GUILT OF ACCUSED.—The object is to prevent new evidence being sprung on the accused. The prosecutor should state in his opening of the case for the prosecution the names of the witnesses he proposes to call and the purpose for which each witness is to be produced. S. 308, *supra* refers to the taking of evidence of the prosecution witnesses before the Committing Magistrate and S. 319, *supra* empowers the Magistrate to examine supplementary witnesses after commitment.

SUB-SECTION (2).—A conviction of an accused person by a Sessions Judge on the evidence recorded by an Assistant Sessions Judge is illegal, 85 A. 63.

Examination of accused before magistrate to be evidence.

287. The examination of the accused duly recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence.

EXAMINATION OF ACCUSED DULY RECORDED SHALL BE TENDERED.—The examination of the accused before the Committing Magistrate must be given in evidence at the Sessions trial whether it tells for or against the accused, and it is not optional with the prosecution to put in such statements. If it is not tendered the Judge is bound to call for the same, 18 M. 382. This section refers only to the examination of the accused duly recorded and it should not be confounded with the deposition of an approver. This section permits the examination of the accused before the Committing Magistrate to be read as part of the prosecution case. This refers only to the statement relating to the subsequent offence and not to a previous conviction, 5 Pat. L.J. 708 at 708. It is advisable that Sessions Judges themselves should examine carefully the accused persons even in cases where he is satisfied that the Committing Magistrate has examined them with great care. It makes a considerable difference to listeners like the jury whether a statement made in the lower Court is read over by the court interpreter or whether the accused is carefully examined in the presence of the jury and his answer and demeanour noted by them so that the defence of the accused and its hollowness where it is untenable, may be fully impressed on the mind of the jury, 26 Cr. L.J. 1376-90 Ind. Can. 538. A written statement filed by the accused with the Superintendent of Jail with a request that it might be placed on record and with regard to which he was examined by the Magistrate can be read in evidence under this section, 32 M. 8 at 15. The statement must be taken in its entirety, 8 W.R. (Cr.) 38; 5 M.H.C.R. Appx. iv. Though it is not imperative on a Magistrate to examine the accused, yet this section and S. 342, *intra* contemplate such an examination for the purpose of enabling the accused to explain any circumstances appearing in evidence against him, and such examination should be filed before the accused is called upon to enter on his defence, Welr II, 361; 45 M. 349 (F.B.).

BEFORE THE COMMITTING MAGISTRATE.—The phrase "Committing Magistrate" in this section is merely a compendious way of referring to the Magistrates or Magistrate who held the preliminary inquiry on which the committal is made. Where a Sub-Magistrate who enquired into a case discharged the accused, but the District Magistrate under S. 437 committed the accused for trial, the examination of the accused and the statements of the witnesses before the Sub-Magistrate were held to be recorded by or before the Committing Magistrate within the meaning of this and S. 288, *intra*, 31 M. 50.

AND READ AS EVIDENCE.—The whole of the examination taken before the Magistrate must be read as evidence, 5 M.H.C.R. (Appx) iv; 15 M. 352. But it is not necessary for the Judge to read out to the accused confessions made by them before the Magistrate and ask them if they have any objection to their reception as evidence. The attestation of the Magistrate is sufficient proof of the circumstances under which they were made, 14 W.R. (Cr.) 9.

288. The evidence of a witness *duly recorded* in the presence of the accused *under Chapter XVIII* may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act, 1872.

AMENDMENT.—The additions newly made define more clearly the use which may be made at the Sessions trial of the evidence of a witness duly recorded in the presence of the accused before the Committing Magistrate.

SCOPE OF THE SECTION.—The object and effect of this section is to place the deposition in the committal inquiry on exactly the same footing as the deposition in the Sessions-

Court, 45 M. 766 at 768. This section makes the previous evidence of a witness taken before the Committing Magistrate admissible at the subsequent trial and the limitation imposed on such admission by the introduction of the words "Subject to the provisions of the Indian Evidence Act" merely means as laid down in 3 Pat. 761, that such evidence can be used for all purposes so long as the evidence is evidence within the meaning of the Indian Evidence Act. In other words the deposition recorded by the Committing Magistrate can be utilised at the trial if the matter contained therein is in accordance with the rules laid down by the Indian Evidence Act as to evidential value. To limit the admissibility of such evidence at the trial only to cases where the evidence is admissible under the Indian Evidence Act is to frustrate the object of this section. The law has been correctly laid down in, 47 M. 232, as to the weight to be attached to such evidence, 27 Cr. L.J. 894—91 Ind. Cas. 258. This section is intended to provide for the contingency that may arise where a witness produced before the Sessions Court holds back information and evidence and tells a different story to that which he gave in the preliminary inquiry, 2 A. 643. This section is not an exception to the rule in S. 286, for it contemplates that the evidence taken in the presence of the accused by the Magistrate may, in the discretion of the Judge, if the witness is produced and examined, be treated as evidence and there is abundant authority for holding that this evidence once admitted at the discretion of the Judge stands on exactly the same footing as any other evidence in the case, 45 M. 766 at 771 and 46 B. 97 following 28 A. 683; 24 M. 414; and 11 B.H.C.R. 281; 18 L.W. 703—26 Cr. L.J. 1063—83 Ind. Cas. 7; 6 Lah. 199. This section does not dispense with the examination of the witnesses as directed by S. 286. The examination contemplated by this section is examination of a witness in the ordinary way, *vis.*, orally in reference to the case. The provision is not that the evidence before the Magistrate may be put in as the evidence of the witness if he is tendered for cross examination but it is that such evidence before the Magistrate may be treated as evidence in the case, if the witness is examined; that is examined as a witness and not if he was cross-examined or tendered for cross-examination. The rule appears to contemplate that the witness shall first have been examined and that after that his evidence before the Magistrate may be treated as evidence, 9 M. 83 at 85. This section does not extend to Magistrates other than the Committing Magistrate, and the deposition must be taken in the presence of the accused, 31 M. 127.

EVIDENCE DULY RECORDED IN THE PRESENCE OF ACCUSED UNDER CHAPTER XVIII.—The words "duly recorded in the presence of the accused under Chapter XVIII" have been newly substituted by the amending Act of 1923 for the words "duly taken in the presence of the accused before the Committing Magistrate." The amendment is intended to cover cases where evidence may be recorded by the Committing Magistrate but not for the purpose of commitment as under S. 219, *supra*. There is no special procedure laid down in Chapter XVIII for recording evidence and any evidence recorded by a Magistrate before commitment whether recorded with a view to commitment or in the ordinary course of trial is evidence recorded in the presence of accused under Chapter XVIII, 53 C. 181. Evidence of the witnesses must be duly recorded in the presence of the accused, 35 A. 260 at 263. Any statement recorded in the absence of the accused is inadmissible in evidence, 27 Ind. Cas. 198. If no opportunity is allowed to the accused to cross-examine witnesses for the prosecution the evidence of such witnesses cannot be said to have been *duly recorded* in the presence of the accused. To require the presence of the accused merely to hear the *ex parte* statements of witnesses without allowing him to show by cross examination that they are untrue or unreliable, defeats the real object of the law, for it deprives the accused of any substantial benefit of being present, 21 C. 632 at 685; 7 A. 862. An exception is made in S. 512, *infra*, to record evidence behind the back of the accused if he is absconding, and in all other cases evidence must be recorded in the presence of the accused in Court, 7 A. 862; 22 A. 433; 23 C. 351. To expedite a Sessions trial, the Attorney for the accused suggested that the depositions of the witnesses for the prosecution taken before the Committing Magistrate should be read out in Court and treated as examination-in-chief of the witnesses and he should be allowed to cross-examine the witnesses. The Public Prosecutor also consented to such a course and the Court adopted the procedure suggested. It was held by the High Court that the procedure was illegal but inasmuch as it had not occasioned a failure of

justice a retrial was not ordered, 9 M. 83. See 1915 M.W.N. 544—6 Cr. L. Rev. 68—80 Ind. Cas. 439 where a witness examined before the Committing Magistrate was merely tendered for cross-examination and the evidence before the Magistrate was marked as an exhibit in the Sessions Court, it was held that the procedure was illegal. See also 45 M. 766 ; 11 Bom. L.R. 1162—10 Cr. L. J. 588—4 Ind. Cas. 278.

For the expression "*before the Committing Magistrate*" the words "*under Chapter XVIII*" have been substituted. Where a witness makes a statement to a police-officer or to an investigating Magistrate it is no evidence against the accused. Even if the statement to the investigating Magistrate is made in the presence of the accused this section will not apply as it was not made under Chapter XVIII, 31 M. 127 at 130. The testimony of a witness given before the Committing Magistrate alone can be accepted as substantive evidence if the witness is examined at the Sessions trial and his testimony before the Committing Magistrate may be preferred to the evidence which he gives at the trial. But any statement made by him on any other occasion cannot be treated as evidence; e.g., the statement made by a witness during a search which he subsequently retracts cannot be used as evidence under this section 36 M. 159. The expression "*Committing Magistrate*" which existed before in this section and now retained in S. 287 means merely a compendious way of referring to the Magistrate or Magistrates who hold the preliminary inquiry under Chapter XVIII on which the committal was made. Where, therefore, a District Magistrate himself commits for trial in the exercise of his powers under S. 437, *infra* setting aside an order of discharge, the evidence of the witnesses and the statement of the accused recorded by the Committing Magistrate who discharged the accused will be receivable in evidence under this section or S. 287, *supra*, 31 M. 40. See S. 350, which permits a committal to be drawn up by a Magistrate who succeeds the Magistrate who held the preliminary inquiry and recorded the evidence. The statement of an approver made before the Committing Magistrate and retracted in the Sessions Court is admissible under this section, 21 A. 175.

MAY IN THE DISCRETION OF THE PRESIDING JUDGE.—The discretion is to be exercised upon substantial materials rightly before the Court and reasonably sufficient to guide the judgment of the Court of the truth of the matter, and not upon mere speculation or conjecture, 21 W.R. (Cr.) 49 at 51. There must be great caution on the part of the Judge before acting under this section, 4 C.W.N. 49 at 55 ; 23 A. 443 ; 27 C. 295 at 300. Such a statement should be accepted with great caution like every other statement of a person who has changed his story at different stages, 45 M. 766 at 769. The exercise of the discretion by a Judge under this section considering it, as a matter of fact or law, is open to review by the High Court in appeal, and the High Court may order a new trial in special cases on the ground that there has been a misuse by the Sessions Judge of his discretion which may have caused a failure of justice, 11 B.H.C.R. 281.

IF SUCH WITNESS IS PRODUCED AND EXAMINED.—Unless the witness is produced and examined at the trial this section has no operation, 24 W.R. (Cr.) 11. This section is not an exception to S. 286, *supra*. It does not dispense with the production and examination of the witness at the trial, 9 M. 83. The former deposition ought not to be read until the examination of the witness in Court, 1 W.R. (Cr.) 14.

BE TREATED AS EVIDENCE IN THE CASE.—Statements before Committing Magistrate when witness retracts them in the Sessions Court may be used as evidence, 46 B. 97 ; 45 M. 766. A statement when once duly admitted in evidence was on the same footing as any other piece of evidence on record. 47 M. 232. Its value as evidence is a question for the Judge, jury or assessor, but it is not restricted by anything in this section. It may be treated as substantive evidence on which a conviction can be based, 28 A. 683. It was contended in 24 M. 414, that such a statement could not be used as substantive evidence but only be used to contradict evidence on record, but the Court held that if this view was accepted the provision would be quite unnecessary and superfluous inasmuch as such evidence could be adduced for the purpose stated under the Indian Evidence Act, A Sessions Judge would not be justified in basing a conviction solely on the statements made before the Committing Magistrate and

retracted before him, more especially when the evidence given at the Sessions trial has been found to be false, 21 W.R. (Cr.) 49; 27 C. 295; 12 M. 123; 47 M. 232. Such statements are admissible in evidence and if the High Court is satisfied that they are true and the subsequent statements before the Sessions Judge are false it is open to the High Court to uphold the conviction relying on such previous statements, 47 A. 276 where 21 A. 111; 22 A. 449 and 28 A. 683 all referred to.

FOR ALL PURPOSES.—The addition of these words newly made must be with a set design and for the purpose of attaining a definite object. These words are added to remove the limitation to the value of that evidence as fixed by the cases such as 27 C. 295; 3 Pat. 781; 22 A. 449; 28 A. 683; 5 Lah. 324; 6 Lah. 199; 27 Bom. L.R. 113—26 Cr. L.J. 705—86 Ind. Cas. 145. Under the present section as amended it must be held that the evidence received by the Committing Magistrate if admitted under this section must be treated as evidence for all purposes, even as a basis of a finding or verdict and on a par with any other evidence before the Sessions Court or as substantial evidence on which a verdict of the jury or a judgment of the judge can be based, 42 C.L.J. 205 at 210. The rule that in the absence of corroboration in material particulars the evidence admitted under this section should not form the basis of a conviction is a mere rule of practice and not a rule of law, 47 M. 232 at 243; 6 Lah. 199 and 171. A Judge is bound to put to the witness whom he proposes to contradict by his previous statement made before the Committing Magistrate the whole of his deposition as he intends to rely on in his decision so as to afford him an opportunity of explaining their meaning or denying that he made such statement, 7 M. 862. So also if a Counsel for the defence desires to use previous statements made before the Committing Magistrate by prosecution witnesses, he must have drawn their attention to such contradictions so as to afford them an opportunity to explain them, 31 C. 142 (F.B.) 7 A. 862; 23 Cr. L.J. 218.

SUBJECT TO THE PROVISIONS OF THE INDIAN EVIDENCE ACT.—These words were newly added merely to prevent the admission of irrelevant evidence inadvertently recorded by the Committing Magistrate, 26 Cr. L.J. 1063—86 Ind. Cas. 7. It is certainly difficult to understand correctly what the amendment intended to effect. Sections 92, 93, 145, 155 and 157 of the Evidence Act cannot have any bearing. There is indeed in the Evidence Act nothing at all which permits the use of the evidence taken before a Magistrate as evidence at a trial. What however is really meant by the amendment is that evidence duly taken before a Magistrate can be used for all purposes in a trial Court so long as the evidence is evidence within the meaning of the Indian Evidence Act, or in other words, that Magisterial deposition can be utilised in a trial Court as of evidential value, only if the matter contained therein is according to the rules of evidence laid down in the Indian Evidence Act, of evidential value, e.g., hearsay evidence in a Magisterial deposition cannot be used by the Sessions Judge as of evidential value at the trial, [1926] Pat. 187. This section as it now stands does not prevent the Session Judge from utilising the Magisterial depositions subject to the provisions laid down in the Evidence Act as to evidential value. But unless there is clearly present, besides the evidence given before the Magistrate, evidence which will show that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge, the evidence given before the Magistrate cannot be effectively utilised in support of the conviction, 26 Cr. L.J. 270—84 Ind. Cas. 385, where 7 A. 862; 27 C. 295; 24 M. 414; 7 C.W.N. 345; 28 A. 683; 46 B. 97 are referred to; 47 A. 276; 5 Lahore 324. 27 Cr. L.J. 438—83 Ind. Cas. 230; 42 C.L.J. 111—26 Cr. L.J. 1853—80 Ind. Cas. 433; 26 Cr. L.J. 1063—87 Ind. Cas. 7. The addition of the words 'for all purposes' by the new amendment removes the limitation to the value of the evidence and the evidence recorded by the Committing Magistrate, if admitted under this section must be treated as evidence for all purposes even as the basis of founding a verdict and on a par with any other evidence before the Sessions Court or as substantial evidence on which the verdict of a jury or judgment of the Judge can be based, 53 C. 181.

Procedure after examination of witnesses for prosecution.

289. (1) When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

(2) If he says that he does not, the prosecutor may sum up his case; and, if the Court considers that there is no evidence that the accused committed the offence, it may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict of not guilty.

(3) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is no evidence that the accused committed the offence, the Court may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict of not guilty.

(4) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is evidence that he committed the offence, or if, on his saying that he does not mean to adduce evidence, the prosecutor sums up his case and the Court considers that there is evidence, that the accused committed the offence, the Court shall call on the accused to enter on his defence.

SCOPE OF THE SECTION.—The language of sub-sections (1) and (2) suggests that they contemplate the case where there is only a single accused, while sub-sections (3) and (4) contemplate the case of more than one accused when one or more of them express an intention to adduce evidence. Where there is only one accused before the Court the procedure laid down by this section is quite clear, but when there are more than one accused and they adopt different defences and mean to adduce evidence, a real difficulty arises as to the procedure to be adopted by the Court. Where there are several accused and one of them stated that he meant to adduce evidence, the procedure to be followed so far as his case is concerned must be adopted also in the case of all the other accused who did not want to adduce evidence and the prosecutor will not be entitled to sum up under sub-section (2) of this section even against those who did not want to adduce evidence, and the prosecutor will have a right of reply under S. 292, *infra*, even in the case of those who did not want to adduce evidence, 18 B. 864.

EXAMINATION (IF ANY) OF THE ACCUSED ARE CONCLUDED.—After examination of the prosecution witnesses, under S. 342 the Court may examine an accused for the purpose of explaining any circumstances appearing in evidence against him, but the Court should not do so until all the prosecution evidence is taken, and the accused is to be called upon to enter upon his defence. The result of such examination of the accused by the Court should appear on the record and the nature of the defence entered on behalf of the accused should be indicated and duly considered by the Court, 9 M. 221 at 244. This section relates to the procedure to be followed after the examination of the prosecution witnesses. The words "if any" is significant. It is not imperative for a Session Judge to examine an accused under S. 342 especially when the accused admits his guilt. The words "if any" clearly indicate that such an examination is not necessary in all cases, 9 C.L.J. 55-10 Cr. L.J. 338-3 Ind. Cas. 625, but Sessions Judges will do well if they examine the accused persons in their own Courts even in cases where the Committing Magistrate has examined the accused with great care. It makes considerable difference to listeners like the jury whether a statement is read over by the Court interpreter or whether the accused person is examined carefully in the presence of the jury and his answers and demeanour noted by them so that the

defence of the accused and its hollowness, if untenable may be fully impressed in the mind of the jury, 26 Cr. L.J. 1876-90 Ind. Cas. 536. The examination of the accused and recording the same closes the case for the prosecution and after that the prosecution is not entitled to call further evidence except through Court under S. 540, *infra*. When it is intended to use against an accused person a letter not proved to be in his handwriting it is fair that in the exercise of the powers conferred by this section and S. 342, *infra* to examine the accused about it and put such questions as will enable him to explain its significance and where such a course is not followed the letter must be ignored or the fairest construction possible should be put upon it, 38 M. 159.

ACCUSED SHALL BE ASKED WHETHER HE MEANS TO ADDUCE EVIDENCE.—

When, on being asked under this section the accused stated he meant to adduce evidence but on further consideration did not do so, the Court is not entitled to make a presumption adverse to the accused from his failure to adduce evidence, 10 C. 110.

SUB-SECTION (2).—This sub-section deals with the case of the accused who says he does not mean to adduce evidence and the prosecutor is entitled to be heard before the accused is acquitted. Even though an accused says he does not mean to adduce evidence and the prosecutor sums up his case under this sub-section he is not precluded from changing his mind and adducing evidence. When the accused is called upon to enter upon his defence under sub-section (4) and enters on it, he may call defence evidence although the prosecutor had disclosed all his points at the earlier stage. The right to sum up under this sub-section is quite distinct from that given under S. 292, *infra*, which though termed reply, is a summing up of the whole case, 18 B. 361. The right under S. 292, *infra*, arises after the accused has been called upon to enter on his defence and adduces evidence in support of his defence under S. 290, *infra*.

THERE IS NO EVIDENCE.—The words "no evidence" must not be read as meaning no satisfactory trustworthy or conclusive evidence. If there is evidence, the trial must go on to its close. When the trial is by jury, the jury and in other trials the Judge after consulting the opinion of the assessors have to find on the facts, 16 B. 414 at 422-423; 10 A. 414; Weir II, 382; 12 A. 551; 1888 A.W.N. 153. All the evidence recorded even if true would not amount to legal proof of the offence charged, then the Judge is entitled to record a finding of not guilty without consulting the assessors, 10 A. 414. When there is no evidence, it is not clear what purpose will be served in asking the accused whether he means to adduce evidence without which he is entitled to an immediate acquittal. A scintilla of evidence is not sufficient. There must be some evidence from which a jury could reasonably come to a conclusion, 19 C.W.N. 533.

SUB-SECTION (3).—If the accused says he means to adduce evidence, the prosecutor is not given at this stage a right to sum up as in sub-section (2). The Court proceeds at once to consider whether there is any evidence to support the charge. This section applies only where there is no evidence and cannot apply to a case where the Court considers the charge to be improper, 12 A. 551 at 552. If the Court is of opinion that there is no evidence, it will record an order of acquittal, but if it considers that there is evidence, it will call upon the accused to enter upon his defence. This sub-section therefore permits an abrupt termination of the trial in the middle, and a consequent acquittal of the accused. There is no warrant under the Code to record a finding of "not proven." The proper course is to record a finding of "not guilty," Weir, II, 381. A Session Judge is not competent to exclude the assessors from their share of the trial before him without consulting the opinion and using the judgment of the assessors by finding the evidence was not to be believed and by directing an acquittal. It is clear that it is not the intention of the Legislature that the Judge should have such a power, or that the assessors might be confined to the function of giving their opinion on the evidence in those cases only in which the Judge was inclined to believe the evidence for the prosecution, 10 A. 414 at 415. An accused person cannot be convicted solely on the evidence adduced by his co-accused where there is no evidence for the prosecution that he committed the offence charged against him, 5 M.L.T. 78-10 Cr. L.J. 68-2 Ind. Cas. 525.

SUB-SECTION (4).—If the Court does not act under sub-sections (2) and (3) it is bound to call upon the accused to enter upon his defence. This is not a mere formality but is an essential part of a criminal trial. Non-compliance with this sub-section must be deemed to have occasioned a failure of justice, 23 C. 282 but see 16 A.L.J. 41. The close of the prosecution and the entering of the accused upon his defence is a well-known stage in a criminal trial after which the prosecution is not entitled to adduce evidence except through Court under S. 540, *infra*, 4 C.L.R. 338 at 340. Once the accused has entered on his defence his right to call evidence is unaffected by the fact that at an early stage he stated that he did not mean to adduce evidence under sub-section (2) of this section. S. 290 governs the case at this subsequent stage.

290. The accused or his pleader may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) may sum up his case.

Defence.

The accused or his pleader may open the case. It is the right of the accused under, S. 340 *infra* to be defended by a pleader and once a pleader has been retained, the conduct of the case should be left to him by the accused. Under this section the case may be opened by stating the facts on which it is intended to rely, the commenting on the prosecution evidence and examining the witnesses. The right to have the last word with the jury really depends on what the accused does under this section. If there are more accused than one and if one of them adduces evidence, the prosecutor gets a right of reply by the action of several accused. It is contrary to the administration of justice and practice of criminal law that counsel for prisoners should state to the jury as alleged existing facts, matters which are told to them in their instructions, on the authority of the prisoner but which they do not propose to prove in evidence, *Arch. Cr. Pl. and Pr.*, p. 197 (25th Ed.)

291. The accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance; but he shall not, except as provided in sections 211 and 231, be entitled of right to have any witness summoned, other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial.

Right of accused as to examination and summoning of witnesses.

Right of accused to obtain summons for his witnesses is subject to the restriction contained in this and proviso to S. 216, *supra*. It is not open to a Judge to decide on the credit to be attached to the evidence of witnesses before he had, an opportunity of hearing the same, 19 M. 378 at 381. Nor can a Magistrate inquire generally as to the nature of the defence with a view to abstain from summoning the witnesses after knowing the nature of the defence, 3 C. 573 at 583, *Weir II*, 283; A Judge is not entitled arbitrarily to limit the quantity of evidence that shall be adduced by the accused who alone is to decide the question affecting his interest, 7 C.W.N. 188. A Judge has power if he thinks it proper to summon witnesses other than those whose names were given in the list to the committing Magistrate, 3 A. 668. see 16 W.R. (Cr.) 14. It is the duty of the Judge to secure the attendance of the witnesses once summoned and served and he cannot discharge a jury in the middle of the trial simply because a defence witness is absent, 4 Bom. L.R. 939. The Magistrate is bound to summon the witnesses mentioned in the first list given by the accused. 11 C. 762; 12 W.R. (Cr.) 22; 23 W.R. (Cr.) 84.

Prosecutor's right
of reply.

292. The prosecutor shall be entitled to reply—

- (a) if the accused or any of the accused adduces any *oral* evidence ;
or
(b) *with the permission of the Court, on a point of law ; or*
(c) *with the permission of the Court, when any document which does not need to be proved is produced by any accused person after he enters on his defence :*

Provided that, in the case referred to in clause (c) the reply shall, unless the Court otherwise permits, be restricted to comment on the document so produced.

AMENDMENT.—The words in italics are newly added. The words "any evidence" has been altered into "any oral evidence" thereby overruling 10 C. 140 and other decisions giving a right of reply in cases where documentary evidence is produced for cross-examining prosecution witnesses. The new amendment seeks to define more clearly as to the circumstances in which the prosecution is entitled to reply and to reconcile the various conflicting rulings. The amendment is to do away with the objectionable practice of having a right of reply to the prosecution when the accused in cross-examining a prosecution witness puts in a document in the shape of a previous statement contradicting his evidence or otherwise proves a document produced before the Committing Magistrate but withheld by the prosecution

OBJECT OF THE SECTION.—The object of the law as laid down in this section is that each side should have an opportunity of commenting upon the evidence of the other side, 10 C. 140 ; 30 B. 321 at 325. This section is intended to give a right of reply to the prosecution wherever, at any stage evidence is recorded, for the defence of which the prosecution cannot be deemed to have had notice, and the prosecution is presumed to have had notice of all relevant facts within the knowledge of its witnesses. This *dictum* has no application to those cases where the accused actually leads evidence under S. 289. In such cases, the section directly applies and the question of notice to the prosecution is immaterial, 8 Cr. L.J. 215. The right of reply would seem to depend not in what may be said, but on what is done and if no evidence is produced there should be no right of reply by the prosecutor, Ratanlal 938. The right of reply is now confined to the three cases mentioned in this section as amended.

ENTITLED TO REPLY.—The word "reply" in this section must mean reply generally on the whole case. It cannot be that the prosecutor is to sum up as to such of the accused as do not call evidence and reply only on the evidence that may have been adduced by the others, 18 B. 364 at 365.

ALL OR ANY OF THE ACCUSED ADDUCES ORAL EVIDENCE.—To adduce evidence is to lead evidence and not merely an intention to adduce evidence which was not eventually done. 30 B. 421 at 425. Mere putting in a document through a witness for the prosecution in the course of ordinary cross-examination is not adducing any evidence within this section, 11 Bom. L.R. 177 at 190=9 Cr. L.J. 282=1 Ind. Cas. 280, but tendering documents not forming part of the record sent up by the Committing Magistrate may constitute adducing evidence, 31 C. 1050. When documents are put in by defence under S. 155 (3) of the Indian Evidence Act to contradict a prosecution witness while under cross-examination, this is not adducing evidence. This section and S. 289, *supra* should be read together. The right to reply arises only if the accused or any of the accused takes advantage to adduce evidence after the case for the prosecution is concluded. The right of reply is not lost by putting in some documents in cross-examining a prosecution witness, 43 C. 428 ; with the permission of the Court, the prosecutor is to have the right to reply on a point of law and also in a case where a document which need not be proved is produced by any accused after he enters on his defence.

In these cases there can possibly be no prejudice to the defence by the right of reply being granted by the Court ; on the other hand such a course will further the ends of justice.

PROVISO TO THE SECTION.—The proviso makes it clear that when an accused in cross-examining any witness for the prosecution either proves a previous statement of such a witness for contradicting him or proves any document produced either before the committing Magistrate or at the trial, such accused shall not be deemed to have adduced evidence within this section so as to give the prosecution a right to reply. 31 C. 1030 ; 10 Cr. L.J. 24. But if a document not coming under either of these two categories is proved by the defence by prosecution witnesses while under cross-examination, that would be *adducing evidence* within this section entitling the prosecution a right to reply, 18 A. 88 at 101 ; 11 M. 339 ; 30 B. 421 ; 43 C. 426.

293. (1) Whenever the Court thinks that the jury or assessors should view the place in which the offence charged is alleged to have been committed, or any other place in which any other transaction material to the trial is alleged to have occurred, the Court shall make an order to that effect, and the jury or assessors shall be conducted in a body, under the care of an officer of the Court, to such place, which shall be shown to them by a person appointed by the Court.

(2) Such officer shall not, except with the permission of the Court, suffer any other person to speak to, or hold any communication with, any of the jury or assessors, and, unless the Court otherwise directs, they shall, when the view is finished, be immediately conducted back into Court.

If a view of the place of alleged occurrence is thought necessary or desirable, the judge should give notice to the parties and should proceed thither with the assessors and the parties, and not after the close of the case and after recording the opinion of assessors, 1 C.L.R. 143. The jury should be conducted in a body under the care of an officer of the Court. A Judge cannot delegate his function of examining witnesses on the spot to the assessors, 3 W.R. (Cr.) 59. It is competent to the Judge even without the consent of the prosecutor to permit the jury to view the *locus in quo* at any time during the trial. *Arch. Pl. & Pr.* p. 200. (25th Ed).

294. If a juror or assessor is personally acquainted, with any relevant fact, it is his duty to inform the Judge that such is the case, whereupon he may be sworn, examined, cross-examined and re-examined in the same manner as any other witness.

MAY BE SWORN AND EXAMINED.—A juror may give evidence of any fact material to be communicated in the course of the trial but of course he must be sworn. Generally it is most undesirable that any one appearing in one capacity at a trial should appear in any other. *Ros. Cr. Ev. & Pr.* p. 108. See 4 B.L.R. (Ap. Cr.) 15. It is undoubtedly a well established rule that a juryman may be sworn and examined as a witness and is not disqualified by reason of his having given evidence from continuing to sit as a juryman or taking part in delivering the verdict. 4 B.L.R. (Ap. Cr.) 15 at 17-18 W. R. (Cr.) 60.

295. If a trial is adjourned, the jury or assessors shall attend at the adjourned sitting, and at every subsequent sitting, until the conclusion of the trial.

Jury or assessors to attend at adjourned sitting.

A Judge is not justified in discharging a jury merely on the ground that a defence witness who was summoned was absent, 4 Bom. L.R. 939. but he may adjourn the case when the witness summoned is absent, especially if he is a material witness in the case, *Welz* 11,383 ; 15 W.R. (Cr.) 34 ; 18 W.R. (Cr.) 20 ; 23 W.R. (Cr.) 58. Sections 318 and 332 provide punishments for non-attendance of juror or assessor and the Court is also empowered to remit the fine wholly or in part for sufficient cause being shown.

296. The High Court may, from time to time, make rules as to keeping the jury together during a trial before such Court lasting for more than one day ; and, subject to such rules, the presiding Judge may order whether and in what manner the jurors shall be kept together under the charge of an officer of the Court, or whether they shall be allowed to return to their respective homes.

Looking up jury.

In England under 60 and 61 Vict. Ch. 18 (*Juries Detention Act, 1897*), the Court may, allow a jury in a criminal case to separate, if the charge is not one of murder, treason, or treason felony, but in India such a rule is not observed and jurors in all cases are allowed to return to their respective homes every day without any restriction whatever.

F.—Conclusion of Trial in Cases tried by Jury.

297 In cases tried by jury, when the case for the defence and the prosecutors reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided.

Charge to jury.

OBJECT OF THE SECTION.—The object of the heads of charge is to inform the Court of Appeal, should occasion arise, of what direction the judge gave in law to the jury and the nature of his summing up the evidence not only for the prosecution but also for the defence. The heads of charge are not intended to be an exhaustive detail of every particular which the judge might have addressed the jury. The judge is not bound to address himself in every particular and in every detail to every suggestion put forward by the defence. It is the duty of the judge, fairly and candidly to point out the main and salient features of the case from the point of view of the prosecution and the defence respectively. In doing so he is entitled to take into consideration the speeches made on both sides in presenting the evidence to the jury. The heads of charge should record in an intelligible form and with sufficient fulness the points of law and the directions given by the judge to the jury, and the record should represent with accuracy the substance of the charge. 47 C. 798 followed in 27 C. L.J. 49—51 Ind. Cas. 225 ; 43 C.L.J. 537 ; 28 C.W.N. 998 ; 42 C.L.J. 503. The charge must be recorded in such a way as would enable a Court of Appeal to say whether the facts and circumstances of the case are properly placed before the jury as also whether the law has been correctly explained. 34 C. 698 ; 25 C. 736 ; 47 C. 46 ; 63 C. 372.

WHEN CASE FOR DEFENCE AND PROSECUTOR'S REPLY (IF ANY) ARE CONCLUDED, COURT SHALL PROCEED TO CHARGE JURY.—The Court in summing up the case after the conclusion of the evidence and arguments, usually directs the jury, as to the law applicable, and may go through and comment on the evidence given and may even comment on the absence of evidence which might have been given. But a summing up is not so essential a part of the trial where the facts are clear and the law simple that the Court of Appeal will necessarily quash the conviction, where there has been no summing up.

The facts must be left to the jury to decide and the judge must not usurp their function but he is entitled to express his opinion strongly in a proper case provided he leaves the issues to the jury. *Arch Cr. Pl. and Pr. p. 202 (25th Ed.)*. The summing up by the judge as contemplated by law is a fairly full and distinct statement of the evidence with such advice as to the legal hearing of that evidence and the weight which properly attaches to the several parts of it, as a sound judicial discretion would suggest. The judge in a proper summing up must formulate and specify simple issues for consideration, and collate the evidence *pro* and *con*-hearing upon the issues in order to assist the jury to arrive at the correct decision thereon. Merely summarising the evidence, examination in chief, cross-examination, and re-examination of the different witnesses who have deposed at the trial and putting before the jury all that has been said by the witnesses or by the lawyers appearing on the two sides and huddling together important facts as well as trivial points without any attempt at discrimination, instead of aiding the jury only confuse them. 29 C.W.N. 526=26 Cr. L.J. 1009=87 Ind. Cas. 833. The judge in his charge to the jury should not be dogmatic as to the view of the evidence nor is it his province to ridicule the defence story. Even when he expresses his own opinion, he must warn the jury that it is not binding on them but they are entitled to form their own opinion; He must not make an appeal or exhortation to the jury and he is bound to direct the attention of the jury on all the salient features of the case. 25 Cr. L.J. 761=81 Ind. Cas. 249; 26 Cr. L.J. 567=85 Ind. Cas. 711; 27 Cr. L.J. 1038=96 Ind. Cas. 990 following 34 C. 698; 36 C. 281; 26 C.W.N. 996=36 C.L.J. 437=24 Cr. L.J. 8=71 Ind. Cas. 55. A judge's record of his heads of charge to the jury is not a matter to be treated cavalierly or lightly thrown away on the ground of insufficiency or misdirection. S. 537 *infra* expressly provides that no finding, sentence, or order on account of the faulty nature of a charge to the jury shall be set aside unless a failure of justice was occasioned, while S. 423 (2) states that a verdict of a jury shall not be altered or reversed on appeal unless the appellate Court regards such verdict as erroneous owing to misdirection by the Judge or misunderstanding by the jury of the law as explained to them by the judge, 4 Pat. 626. An appellate Court will naturally be cautious in treating an omission in the heads of charge to the jury as amounting to misdirection for two reasons: (1) In order to constitute misdirection the point omitted must be of such importance that an omission to refer to it renders the summing up unfair. (2) The judge is not required to make a verbal transcript of his summing up. It is only the heads of charge to the jury which he is required to record. Heads of charge must indicate the matters on which he proceeded but many matters which find a place in the charge will not find a place in the record. 27 Cr. L.J. 785=95 Ind. Cas. 395 where 1 Pat. L.J. 217=17 Cr. L.J. 383=28 Ind. Cas. 657, is referred to. Expressions in the charge verging on politics should not be used. It will be an evil day for the administration of justice if political considerations should, influence the judicial mind of the Judge which should be free from all taint of bias on political, racial, social or personal grounds, 30 C.W.N. 693=43 C. L.J. 637. This section specifically enacts that the Judge shall only charge the jury when the case for the defence and the prosecutor's reply are concluded, *i.e.*, after all the evidence had been taken on both sides and Counsel on both sides have finished addressing the jury. Where therefore a Judge heard arguments and took verdicts as regards the remaining accused, it was held that the procedure adopted by the Judge was illegal although the Judge was no doubt swayed by the laudable desire to save time which object was admittedly not obtained, 36 M. 585 at 588. Where certain persons were tried for the offence of dacoity, the Judge after examining five witnesses asked the jury whether they wished to hear any more evidence and on their stating that they did not believe the evidence and wished to stop the case, the Judge recorded a verdict of acquittal, it was held that the procedure adopted by the Judge was not warranted by any provision of law, as the Judge could not ask the opinion of the jury until he had duly recorded the whole of the prosecution evidence. The High Court further remarked that no final opinion as to the falsehood or insufficiency of the prosecution evidence ought to be arrived at by the Judge or jury until the whole of that evidence is before them and has been considered, and the jury ought to have been cautioned by the Judge to that effect. If however at the end of the prosecution evidence, the Public Prosecutor waives his right to sum up the evidence where he has such right, and the jury then express their opinion that the evidence is incredible, and the Judge agrees with them, it may

not be necessary for the Judge to go through the formality of summing up the case to the jury, and their opinion might in that case be accepted as a verdict, 20 M. 438 at 446. Nor is it open to a Judge after hearing one witness for the prosecution to tell the jury that it would be unsafe to convict, and there is no necessity to hear further evidence. Unless the Public Prosecutor withdraws the charge with the leave of the Court, the Judge is bound to allow the evidence to be placed before the jury, Weir II, 384. To allow a jury to pronounce their verdict before the accused is called upon to enter on his defence is illegal although the Judge omits to charge the jury at all under this section. S. 537 will not cure such a defect, 23 C. 252.

SUMMING UP THE EVIDENCE FOR PROSECUTION AND DEFENCE.—The duty of the Judge in summing up, is to place the entire evidence, for or against the accused before the jury and leave the ultimate decision of the question of fact to them. He is not debarred from expressing his own opinion upon the evidence but it should be done in such a way as not to create any impression in the mind of the jury that it was a direction from the Judge which they should follow; and such opinion should not be expressed as has been observed in 35 C. 698; 36 C. 281; 28 C.W.N. 996, strongly and dogmatically. Any advice from the Judge to ignore or neglect any evidence is improper. The entire evidence should be left for consideration to the jury, 48 C.L.J. 488—27 Cr. L.J. 1033—96 Ind. Cas. 990. The summing up must give a fair summary of the evidence, on both sides pointing out to the jury the flagrant contradictions in the evidence naturally recalling to them any explanation of the contradiction which has been suggested and leaving it to them to decide on its adequacy, 27 Cr. L.J. 755—95 Ind. Cas. 385. A Judge is not bound to point out to the jury every bit of evidence and it is enough if he directs their attention to the salient portion of the evidence for prosecution and defence, 28 Cr. L.J. 47. Where the Judge does not sum up the evidence at all, the conviction cannot be sustained and a new trial will be ordered on the ground of misdirection, 9 W.R. (Cr.) 51; 25 C. 861; 30 C. 822; 4 C.W.N. 193. The Judge is bound to lay carefully and plainly before the jury the evidence as recorded by him, noting discrepancies and inconsistencies and pointing out generally the way in which it is favourable or unfavourable to the accused, 25 W.R. (Cr.) 54. A Judge in summing up is entitled to have regard to the elaboration and skill with which the rival contentions have been placed before the jury by the Advocates on both sides, but he should not in doing so omit pointedly to call the attention of the jury to matters of prime importance, especially if they favour the accused, merely because they have been discussed by the Advocate. Such an omission would amount to non-direction on the part of the Judge in summing up the evidence, 27 B. 634 at 635. See 29 C. 379 where it was held that it was immaterial how often the jury may have been addressed by the pleaders on both sides upon the law, and the responsibility of laying down the law for the guidance of the jury lay entirely with the Judge and in the absence of such a direction the verdict was invalid. It is absolutely the duty of the Judge to give a narrative and history of the case and to place before the jury the facts and evidence in a clear way so as to enable them to grasp the details and to come to a right decision, 6 Bom. L.R. 31. Where the charge as a whole is distinctly in favour of the defence it is not enough for establishing misdirection that more stress could have been laid by the Judge on the defects in the prosecution case, 27 Cr. L.J. 176—91 Ind. Cas. 980. In every case of a serious nature, the evidence of the principal, if not of all, the witnesses should be read over to the jury. This is a practice universally adopted by English Judges to preclude the possibility of the jury coming to a decision without having all the facts fresh in their memory, 5 B.H.C.R. (Cr. Ca.) 80, but it was held in 36 C. 381 that there is nothing that makes it incumbent upon any Judge to read the whole of the depositions of the witnesses to the jury. Failure on the part of the Judge to read material portions of the evidence to the jury in itself is not sufficient for a reversal of the verdict of the jury and the question in such a case will be, whether the omission was such as to mislead the jury, and the Court of appeal will not interfere unless the accused is prejudiced thereby, 27 Cr. L.J. 217—92 Ind. Cas. 169. It would be a clear misdirection if the Judge calls the attention of the jury to all the evidence against the prisoner and omits altogether to allude or call attention to the evidence in his favour, 5 W.R. 80 (F.B.), but where the charge is on the whole favourable to the accused and most of the points of importance

in his favour were more or less dealt with by the Judge, the mere fact that some of the points were omitted or not dealt with sufficiently will not render the verdict bad, 27 B. 626. Where the Judge omitted to call specific attention of the jury to the defence evidence in the case, it was held to be a misdirection as he failed to comply with the provisions of this section, 35 C. 531; 18 M.L.J. 541. It is a misdirection if the defence is not adequately put before the jury and admission of evidence which ought not to have been admitted, 27 Cr. L.J. 176=91 Ind. Cas. 960. So also if the Judge fails to mention to the jury the case of each of the accused, 30 C. 822, 18 M.L.J. 250, and the evidence against each of the accused, 29 C. 782; 30 M. 40. Putting the accused's case to the jury does not mean putting to the jury every argument and comment of the counsel for the defence, 38 C.L. J. 411; 27 Cr. L.J. 785=93 Ind. Cas. 335. The Judge is only to sum up the evidence for the prosecution and defence, and he is not entitled to express an unqualified opinion of his own. The question of believing the evidence is for the jury, 7 C.L.J. 246; 35 C. 535. The Judge's duty is to present the facts in their natural aspect, and not to suggest far-fetched explanations on points that tell in favour of or against either party, Weir II, 366. It is improper for a Judge to tell the jury that there is no sufficient evidence to establish the plea of the accused, 20 B. 215 at 224. Nor can a Judge direct the jury to neglect any portion of the evidence as they are to give their verdict upon the whole evidence recorded, 6 Bom. L.R. 31; 43 C.L.J. 488. Non-direction when it consists in omission to put material facts or to put the defence to the jury is sufficient to cause the Court to quash the conviction if the Court comes to the conclusion that it is reasonably probable that the verdict of the jury was affected thereby. A grave omission to direct the jury to a cardinal point in the case cannot be made good by Counsel calling attention to it at the termination of the summing up. It is one thing to indicate agreement with a submission made by Counsel. It is another thing to direct jury effectively. The line of defence adopted by Counsel does not relieve the judge of his duty to draw the attention of the jury to what appears to be a possible answer to the charge against the accused even on the prosecution evidence notwithstanding it may have escaped the attention of the Counsel for the accused. Even in a case where the defence counsel did not press seriously the defence evidence it will not relieve the Judge of his duty to sum up the evidence for the defence, 38 C.L.J. 411. In giving a warning to a jury not to disbelieve a mass of otherwise consistent evidence because in one or two minor immaterial points the witnesses made contradictory statements, a Judge exercises a wise discretion and affords no ground for objection, 1 W.R. (Cr.) 17.

LAYING DOWN THE LAW BY WHICH THE JURY ARE TO BE GUIDED.—Laying down the law does not signify laying down the whole law on the subject irrespective of the facts of the particular case. A reasonable construction of this section is that the judge should lay down the law so far as it bears upon the evidence adduced in the particular case. The mere fact that the defence Counsel failed to present to the Court a particular aspect of the case cannot justify an omission on the part of the judge to draw the attention of the jury to what appears to be a possible answer to the charge against the accused, 19 C.W.N. 663 (F.B.) = 21 C.L.J. 377 = 16 Cr. L.J. 861 = 30 Ind. Cas. 113. It is a serious misdirection vitiating the charge to tell the jury that finding of recently stolen property in accused's possession is sufficient to prove they were thieves or dacoits, a rebuttable presumption which by adducing sufficient proof the accused are to establish their innocence, 53 C. 137 where 52 C. 223 and 24 C.W.N. 619 = 31 C.L.J. 310 are followed. It is necessary for a Judge to read the very words of the section itself to the jury, if he purports to give what are the provisions of the section, and then, if necessary, to explain what is the meaning of the section, 26 C.L.J. 171 at 174. It is not sufficient for the Judge merely to read to the jury the definition of the offence from the statute and leave it to them to find out whether the evidence for the prosecution made out a case against the accused. It is his duty to call their attention to the elements constituting the offence and to deal with the evidence by which it is proposed to make the accused liable, 25 C. 711. It should appear on the face of the record that the law bearing on the charge under trial has been explained to the jury. It is incumbent on the Judge to explain the law to the jury, mere reference to sections unless jurors are trained men cannot be of much assistance to them, 25 C. 561; 4 C.W.N. 193; 8 M.L.T. 82 = 11 Cr. L.J. 432 = 7 Ind. Cas. 401; 11 Cr. L.J. 222 = 6 Ind. Cas. 14

Where the Judge charged the Jury to the effect "nature of the charge is no doubt familiar to you all. It must be proved that there was robbery committed by five people or more and also that each of the accused took part in the robbery," it was held that this amounted in no sense to laying down the law by which the jury are to be guided within the meaning of this section and the omission is not merely an irregularity but the failure to comply with an express provision of law which vitiated the trial and conviction, 25 Cr. L.J. 1129-81 Ind. Cas. 953. Omission to give a detailed definition of the offence charged does not amount to misdirection when it is clear that the nature of the offence has been described in detail and its constituent factors fully understood by the Jury, 25 Cr. L.J. 1032-81 Ind. Cas. 808. The Judge in his heads of charge to the Jury should state at length how he explained the various relevant sections of the I.P.C. to the jury and not merely state that those sections had been read and explained. He should also explain the sections by applying them to the facts of the case and also tell them what is necessary for them to find with reference to the facts of the case in order to give a verdict on the various charges, 26 Cr. L.J. 1279-88 Ind. Cas. 1055. The Judge must give sufficient direction on the law as bearing upon the fact and the explanation must be sufficiently comprehensive to enable them to decide the particular issue, 8 C. 789. Where the charge as a whole is distinctly in favour of the defence it is not enough for establishing misdirection that more stress could have been laid by the Judge on the defects in the prosecution, 27 Cr. L.J. 175-91 Ind. Cas. 960. It is immaterial how often the jury may be addressed by the pleaders on both sides upon the law. The responsibility of laying down the law for the guidance of the jury rested entirely with the Judge, and the verdict arrived at by the jury in the absence of such direction on the law by which they should be guided cannot be accepted as a valid verdict, 29 C. 379. Where a charge to the jury stated that the law on the subject has already been presented to them by the public prosecutor and that in the opinion of the Judge no different point of law arose in the case, it was held that it was not a sufficient compliance with this section which required the Judge to lay down the law by which the jury are to be guided, 28 Cr. L.J. 1090-88 Ind. Cas. 178. A Judge should not hand over a copy of the Penal Code to the jury nor allow them to study a commentary on the law but should himself explain any point on which they might have expressed and he had given an opinion on them, they were not allowed to be read to the jury in the address of the prisoner's Counsel to them. Where the jury is in need of directions, and the Judge made over to them a copy of the Indian Penal Code leaving them to decide under what sections the offence fell it was held that he had failed in his duty of "laying down the law," 6 Bom. L.R. 258 at 260-261; see also 14 C. 164 and 43 C.L.J. 537. Where the principles or rules of law on any matter have been laid down in general terms by the Legislature, a Judge will in most cases be wise to refer to the exact terms of the law and then instruct the jury with regard to its application to the facts of the case before them, instead of adopting as principles passages from text-books, (however eminent the writer may be) which briefly refer to what is laid down (or is supposed to be laid down) in reported cases or even to passages from judgments of reported cases themselves which may mislead by not being correctly understood in relation to the facts of the particular case, or possibly even by not containing an accurate exposition of the law, 28 M. 1 at 16. A large number of cases should not be cited to the jury, for such a course is calculated to confuse them and to lead to a miscarriage of justice; 1 C.L.J. 169. Rulings are not to be cited to the jury asking them to differentiate between them. It is for the Judge and the Judge only to lay down the law. The minds of the jury should never be confused by having a number of conflicting authorities or any authorities laid before them. By confusing the jury by laying before them a number of conflicting authorities and leaving it to them to choose between them amounts to a misdirection, 16 C.W.N. 46-13 Cr. L.J. 26-13 Ind. Cas. 218. The Judge ought not to discuss and argue points of law with the jury but he is merely to state the law as it stands; such discussion and argument, however careful and learned as to what the law is, invariably tend to confuse and mislead the jury, 8 W.R. (Cr.) 87. Omission (1) to state the elements of theft, 6 M.L.T. 324, or (2) to explain what constitutes robbery, 30 M. 44; 2 Cr. L. Rev. 210-11 Cr. L.J. 164-4 Ind. Cas. 1071; 29 C. 379, or (3) to explain the difference between murder and culpable homicide not amounting to murder, 38 C. 531; 38 C. 381, or (4) omission to direct jury as to right of private defence of property under S. 109, I.P.C., 29 C. L.J.

525, or (5) to lay down the elements which constitute fraudulent possession of a forged document, 16 B. 165, or (6) omission to explain wrongful gain and loss showing intention in a case of breach of trust, 15 Cr. L.J. 287—28 Ind. Cas. 365, or (7) omission to state that accused is not bound to call defence evidence but can rely on the weakness of the prosecution, 15 C.W.N. 198—11 Cr. L.J. 557—8 Ind. Cas. 52, or (8) to give directions as to accomplice's testimony, 5 W.R. 80 (F.B.); 12 M. 196; 5 M.L.T. 355—1 Ind. Cas. 547; 29 C. 782; 10 B. 319; 12 Cr. L.J. 537—12 Ind. Cas. 513; 8 A. 308 and 309 (but it has been held in 82 C. 895 that an approver need not be corroborated as regards every single statement and if the Judge directs the jury that if the approver was corroborated on some points they might act on his evidence, it is no misdirection), or (9) omission to warn jury to pay attention to the result of previous proceedings; 31 C.L.J. 305—21 Cr. L.J. 554—55 Ind. Cas. 858 or (10) to state the value to be attached to retracted confessions, 21 M. 88; 26 M., 38; 31 M. 127; 20 A. 133; 11 Cr. L.J. 538—7 Ind. Cas. 915; 83 M. 46; 26 Cr. L.J. 360—84 Ind. Cas. 712; 26 Cr. L.J. 1146—88 Ind. Cas. 458; 4 Cr. L.J. 502; or (11) to direct a jury to give benefit of doubt to the accused, 1 M.L.T. 350, (but in 27 Cr. L.J. 217—32 Ind. Cas. 169, it was held that such omission is not a misdirection vitiating the trial though as a matter of practice it is usual to end the charge with these words), will be non-compliance with this section amounting to misdirection. It was held to be a misdirection for the Judge to tell the jury that there was no evidence and ask them to return a verdict of not guilty, when he refused an adjournment applied for by the Public Prosecutor, empannelled a jury and asked the Public Prosecutor to open the case, the Public Prosecutor stating that he had no witnesses present in Court, 30 C.W.N. 190. Omission to point out all the points in the accused's favour on the question of identification of property is not a non-direction justifying the reversal of the verdict when the evidence has, on the whole been fairly put to them, 82 C. 223. Mere non-direction is not necessarily misdirection. Those who allege misdirection must show that something wrong was said or that something was not said which was left to be understood. Every summing up must be regarded in the light of the conduct of the trial and the questions raised by Counsel on both sides, 19 C.W.N. 653 (F.B.)—21 C.L.J. 377—16 Cr. L.J. 561—30 Ind. Cas. 113. The charge to the jury must be read as a whole. If there are salient propositions of law in it, these will of course be the subject of separate analysis. But in a protracted narrative of fact, the determination of which is ultimately left to the Jury, it must needs be, that the view of the Judge may not coincide with the views of others who look upon the proceedings in black type. It would however not be in accordance either with usual or with good practice to treat such cases as misdirections, if upon the general view taken, the case has been fairly left within the Jury's province. . . . These observations are made in order to discountenance the idea that in the region of fact unless something gross amounting to a complete misdescription of the whole hearing of the evidence has occurred, there should not be any interference. 41 C. 1023 (P.C.) at 1062 63. Omission to charge the jury on points of capital importance telling in favour of the accused, 17 Bom. L.R. 1059; 18 C.W.N. 180—18 Cr. L.J. 147—22 Ind. Cas. 723; 11 Cr. L.J. 13—4 Ind. Cas. 587 or omission to direct the jury on an important point which may serve to help the defence 44 C.L.J. 283 is a misdirection.

APPEALS.—S. 418 lays down that where the trial was by jury, appeal shall be on a matter of law only and S. 423 (b), *infra*, deals with the powers of the Appellate Court. Where the Appellate Court is satisfied that there was a misdirection to the jury, it is not bound to order a retrial solely on the ground of misdirection. The question for further consideration is whether the accused has been in fact prejudiced thereby and whether upon a proper summing up of the entire evidence, the jury would have come to a different conclusion, 8 W.R. 80 (F.B.) at 90; 1 W.R. (Cr.) 81; 26 M. 1; 25 C. 230; 30 C. 822; 29 C. 782.

Duty of Judge.

298. (1) In such cases it is the duty of the Judge—

(a) to decide all questions of law arising in the course of the trial, and especially all questions as to the relevancy of facts which it is

proposed to prove, and the admissibility of evidence or, the propriety of questions asked by or on behalf of the parties; and, in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties;

(b) to decide upon the meaning and construction of all documents given in evidence at the trial;

(c) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given;

(d) to decide whether any question which arises is for himself or for the jury, and upon this point his decision shall bind the jurors.

(2) The Judge may, if he thinks proper, in the course of his summing up, express to the jury his opinion upon any question of fact or upon any question of mixed law and fact, relevant to the proceeding.

Illustrations.

(a) It is proposed to prove a statement made by a person not being a witness in the case, on the ground that circumstances are proved which render evidence of such statement admissible.

It is for the Judge, and not for the jury, to decide whether the existence of those circumstances has been proved.

(b) It is proposed to give secondary evidence of a document the original of which is alleged to have been lost or destroyed.

It is the duty of the Judge to decide whether the original has been lost or destroyed.

PROVINCE OF JUDGE AND JURY.—“The distinction between the province of the Judge and that of the jury is in the English law, clearly defined and observed with jealous accuracy. The Jury must in all cases determine the value and effect of evidence which is submitted to them. They must decide what degree of credit is to be given to a witness, and hold the balance between conflicting probabilities. The law throws upon them the whole responsibility of ascertaining *facts* in dispute and the judge does not attempt to interfere with the exercise of their unfettered discretion in this respect. But on the other hand the judge has his peculiar duty in the conduct of a trial. He must determine whether the kind of evidence offered is such as ought or ought not to be submitted to the jury and what liabilities it imposes. Where any questions of law arise he alone determines them, and their consideration is absolutely withdrawn from the jury who must in such cases follow the direction of the judge, or if they perversely refuse to do so, their verdict will be set aside and a new trial granted. If in order to determine this, it is necessary to have recourse to evidence, as for instance to show that a proposed witness is incompetent, this evidence must be received by the judge, and adjudicated upon by him alone. The rule cannot be better or more concisely enunciated, than as laid down in a recent case. . . . ‘If the evidence offered at the trial by either party is evidence by law admissible for the determination of the question before a jury, a judge is bound to lay it before them and to call upon them to decide upon the effect of such evidence. But whether such evidence when offered is of that character and description which makes it admissible by law, is a question for the determination of the judge alone and is left, solely to his discretion’ *Forsyth, His. of Tr. by Jury, pp. 282-83*. Where the judge charges the jury to the effect that there is not sufficient evidence to establish the plea of the accused he is really trenching upon the peculiar province of the jury who are the sole judges of fact, 29 B. 215.

JUDGE TO DECIDE QUESTIONS OF LAW.—The questions (1) whether a communication is privileged, 10 W.R. (Gr.) 15; (2) whether the offence of rape was committed

when complainant was found to be a consenting party, 19 B. 735 ; (3) whether a child is competent to give evidence, are questions of law, for the Judge to decide ; but a question as to a previous conviction of the accused is a question of fact for the jury to decide, 8 W.R. (Cr). 80 ; 20 W.R. (Cr.) 40.

JUDGE TO DECIDE QUESTIONS AS TO RELEVANCY OF FACTS.—It is for the Judge and not for the jury to decide all questions as to the relevancy of facts. As to relevancy of facts see Ss. 4 to 16 of the Indian Evidence Act. The question as to the relevancy of a confession is for the Judge to decide, 26 M. 38.

THE ADMISSIBILITY OF EVIDENCE.—In a Sessions trial what the jury are to receive is for the Judge and what they are to believe is for the jury. The question whether a confession was voluntarily made or not, has to be decided by the Judge for admitting or excluding it in evidence. The Judge must admit it if it was made voluntarily and not caused by inducement, threat or promise, 11 Bom.L.R. 332. Whether there be any evidence is for the Judge and whether sufficient evidence is for the jury. *Kos. Cr.Ev. & Pro.*, p. 98; (*13.h Et.*) see also 20 B. 218. So also whether the accused was in police custody so as to make the confession admissible in evidence, 31 M. 127. It is also for the Judge to determine whether confession retracted at the trial are admissible. The admissibility of a confession is for the Judge and its truth or falsity is for the jury. If a confession is voluntary but false the Judge must admit it in evidence and put it to the jury with proper directions as to its falsity for the purpose of appraisalment of its worth. If the Court doubts the voluntariness of a confession, it must be excluded from evidence, 52 C. 67. It is in the province of the Judge to judge the intention of the accused as it is in the province of the jury to weigh the evidence as to the truth or falsity of the same, 3 W.R. (Cr.) 58. Under this section it is the duty of the Judge to decide the admissibility of the evidence and he has to discharge this duty irrespective of the question whether objection has or has not been taken by the parties. When a confession is retracted, he has to decide whether it has been duly recorded and free from infirmities and made voluntarily, 28 Cr. L.J. 606—85 Ind. Cas. 830.

PROPRIETY OF QUESTIONS ASKED.—In this connection see (1) Ss. 141 to 143 Indian Evidence Act as to leading questions, (2) S. 146 as to lawful questions in cross-examination, (3) S. 151 as to indecent and scandalous questions, (4) S. 152 as to questions intended to insult or annoy (5) S. 131 questions regarding conduct as Judge or Magistrate.

IN HIS DISCRETION PREVENT PRODUCTION OF INADMISSIBLE EVIDENCE.
—The Judge is given a discretion to prevent the letting in of inadmissible evidences. The moment a witness begins to give hearsay evidence which is inadmissible, it is the duty of the Judge to stop the witness. It is not enough if the Judge subsequently asks the jury to reject such hearsay evidences and decide on legal evidences, 7 W.R. (Cr.) 25 ; and 8 M.L.T. 372—11 Cr. L.J. 683—8 Ind. Cas. 873. It is the duty of the Judge to see that the evidence which should not be allowed to go in, say a privileged communication under Ss. 126 and 127 of the Indian Evidence Act, statement to a pleader or his clerk, is not let in, though no objection is raised by the accused, 25 C. 735 ; 52 C. 67 at 77. Where material evidence which ought not to have been admitted is allowed to go in along with other legally admissible evidence, it would be mere speculative refinement to hold that the jury must have relied upon the latter and rejected the former, 27 B. 625 at 633.

SUB-SECTION (1) (b) :—MEANING AND CONSTRUCTION OF DOCUMENTS.—Interpretation and application are two distinct things falling under different categories. Interpretation of a document is for the Judge and its application to a particular case is the function of the jury. A Judge is entitled to draw attention to an alteration on the face of a document alleged to be false. 7 W.R. (Cr.) 58. It is for the judge to point out to the jury the legal effect of a document or a portion of it relied on by the prosecution or defence, 3 W.R. (Cr.) 69.

SUB-SECTION (2).—This sub-section enables the Judge to express his opinion to the jury as to the effect of certain portions of the evidence, but at the same time he must be careful to add that they are not bound by his opinion, but that it is for the jury to form their opinion.

on the evidence on record, 10 C. 970 ; 34 C. 698 ; 25 M. 467 ; 14 A. 25 ; 6 Bom. L.R. 31 ; 85 C. 531 ; 25 C. 230. When a Judge lays down that there is not sufficient evidence to establish the plea of the accused, he, in fact, trenches upon the peculiar province of the jury, 20 B. 215. The Judge should not state his own view of important matters of fact so positively as to leave to the jury no loop-hole for taking any other view, 1 W.R. (Cr.) 26 ; Ratanlal 748 ; 13 W.R. (Cr.) 34 ; 20 W.R. (Cr.) 41. Native juries are in all cases too apt to follow what they imagine to be the opinion of the presiding officer and any expression of the Judge's own sentiments should be avoided. The most that a charge should contain is a statement of the evidence *pro* and *con* with a running commentary as to its agreement or disagreement with the other facts of the case. 1 W.R. (Cr.) 26. They are too apt to take what they think of the Judge's opinion as their guide without paying any attention to the facts of the case and so a Judge should go no further than a general commentary on the evidence and a statement of what is the legal offence proved should such evidence be credited. 1 W.R. (Cr.) 3. But in the matter of sifting evidence and of weighing of probabilities the Judge may probably have more experience than the jury and there is no reason why the jury should not have the benefit of that experience. 1864 W.R. (Cr.) 5. It is no objection that the Judge lets the jury know the impression which the evidence has made on his mind and at all events the party objecting to such a course should show that the impression entertained by the judge was not justified by the evidence. 5 W.R. 80 (F.B.) at 87.

ANY QUESTION OF MIXED LAW AND FACT.—For example (1) the question whether there is any evidence to go to the Jury, (2) the question as to the reasonable time for postponing a trial under S. 344, *infra*, (3) the question whether a child of tender years is competent to give evidence, (4) the question as to *bona fides*, negligence, reasonable cause, due diligence, etc.

Duty of jury.

299. It is the duty of the jury—

(a) to decide which view of the facts is true, and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned ;

(b) to determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine, whether such words occur in documents or not ;

(c) to decide all questions which according to law are to be deemed questions of fact ;

(d) to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning.

Illustrations.

(a) A is tried for the murder of B.

It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide, and to tell them under what views of the facts A ought to be convicted of murder, or of culpable homicide, or to be acquitted.

It is the duty of the jury to decide which view of the facts is true, and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong, and whether they do or do not agree with it.

(b) The question is whether a person entertained a reasonable belief on a particular point—whether work was done with reasonable skill or due diligence.

Each of these is a question for the jury.

TO DECIDE WHICH VIEW OF THE FACTS IS TRUE.—The whole view of the facts alleged, is to be taken into consideration and then decide whether the view taken of the facts by the prosecution leads to the conclusion as to the guilt of the accused person. See the illustrations to the section. For example, in a case of perjury for making two contradictory statements by an accused person, it is sufficient for the jury to find whether the allegations made against the accused are proved and it is quite unnecessary for them to state which of the two alleged statements is false. It is the duty of the Judge to call the attention of the jury to the facts, and then leave it to them to decide whether from those facts they conclude that a particular criminal act was committed by the accused, and then the Judge is to direct them that the case falls within a particular section of the Indian Penal Code, 4 C.W.N. 193. Where in a charge of murder grave and sudden provocation causing loss of self-control is pleaded as a defence, the judge should explain to the jury the distinction between murder and culpable homicide and then it is for the jury to decide the question as to provocation. 11 C. 410. Whether there be any evidence is a question for the Judge and whether sufficient evidence is for the jury, *Ros. Cr. Ev. & Pro*, p. 98, (13th Ed.). The jury must take into consideration all the facts for or against the accused and decide which of the two views put forward is to be accepted, 21 W. R. (Cr.) 72 at 86. The plea of grave and sudden provocation causing loss of the power of self-control is for the jury to decide; as also whether possession of stolen property is recent enough to warrant a conviction for dacoity, 26 M. 467. It is for the jury to decide whether an expert is to be relied upon or not, 9 C.W.N. 320. Identification of thumb impression by comparison is a matter entirely for the jury and not for the Judge, 1 C.L.J. 385. The jury can take into consideration the fact that the prosecution witnesses had been sometime or other concerned in criminal cases either started by them or against them and can come to the conclusion that the evidence for the prosecution is one which they cannot accept. 28 C.L.J. 1.

RETURN THE VERDICT WHICH UNDER SUCH VIEW OUGHT TO BE RETURNED.—There is no provision in the Code for permitting a "special verdict", i.e., where the jury state the findings on facts themselves, leaving it to the Judge to apply the law on those facts and himself find the accused guilty or not guilty. In such a case the Judge is empowered to ask the jury to return a simple verdict of guilty or not guilty, 13 Cr. L.J. 886—15 Ind. Cas., 1002. This will enable the jury to ignore the graver charges on which the accused person is tried and return a verdict of guilty on a lesser charge on the evidence placed before them. 3 W.R. (Cr.) 41.

WORDS USED IN AN UNUSUAL SENSE.—See S. 98 I.P.C. which enacts that evidence may be given to show the meaning of words used in a peculiar sense. See also 17 B. 143.

SUB-SECTION (c).—For example (1) The laws, usages and customs of foreign countries and laws of physical science; (2) Questions as to the identity of thumb impression in two or more documents; (3) Question as to proof of previous convictions; (4) Questions falling under Ss. 81, 300, 352, 358 and 403 I.P.C.

300. In cases tried by jury, after the Judge has finished his charge, the jury may retire to consider their verdict.

Except with the leave of the Court, no person other than a juror shall speak to, or hold any communication with, any member of such jury.

Juries are expected to give the best of their brains to consideration of the matters placed before them and to give a sound and honest verdict. If that is not done it must bring the jury system into disrepute. As regards belief of witnesses, juries should not expect the witnesses to come to the reputed standard of Washington but must take people as they are and try and discover the truth on a consideration of the evidence so that truth may prevail and justice may be meted out in the acquittal of an innocent person and the conviction of a

Retirement to consider.

guilty one. Before a jury can convict an accused they must come to certain conclusion leaving no reasonable doubt, 12 Cr. L.J. 829—10 Ind. Cas. 929. The verdict of a jury is vitiated by the mere fact that one of the jurors, having without the leave of the court and after retirement to consider the verdict, spoken to, or held any communication with a person not a jury and a Judge is not bound to inquire into the nature of the subject matter of the conversation or communication. Learned Judges should take proper precautions to make it impossible, after the jury retire to consider their verdict, for any one other than a juror to speak to the jury or communicate with the jury without the leave of the Court. Failure to take proper precautions will result in a fresh trial and waste of time of the court, 46 C. 207; but the mere fact that when the jurors are either in a waiting room or perhaps on their way to the Court or out of Court, one of them is addressed by a stranger to whom apparently the jury man makes no reply or whose remarks the juryman does not look upon as worthy of consideration, cannot have the effect of invalidating the trial, 44 C. 723 at 727. It is undesirable that the police officer should be stationed in a position in which he can hear the deliberations of the jurymen. It is undesirable that anybody should be in a position where it is possible for him to know the form the deliberations of the jury took or what view any particular juror expressed about the matter, 44 C. 723 at 728, 729. This section does not contemplate that the jury after the Judge has summed up the case to them should leave the precincts of the court or be at large but clearly contemplates that after the Judge has delivered the charge, the jury must retire to the jury room and then and there consider its verdict and emphasis is placed upon this construction of the section by the latter portion of the section which states that except with the leave of the court, no person other than a juror should speak or hold communication with the jury. This particularly means that the jury shall have no chance of communicating with any outside person while considering their verdict. The obvious disadvantage which might appertain to any other form of procedure by allowing them to disperse after delivery of the charge will open the door to all kinds of possible abuses such as the chance of an improper communication being made to the jury by persons, or by the jury to persons interested in the subject matter of the trial. Where, after Judge's charge to the jury, the jury were allowed to disperse for several hours and then permitted to return to consider and deliver their verdict the trial was held bad, 26 Cr. L.J. 861—86, Ind. Cas. 717. See also 22 C.W.N. 730—27 C.L.J. 553—19 Cr. L. J. 737—46 Ind. Cas. 513. At the conclusion of the trial the jury are not allowed to separate until they have considered and returned their verdict or have been discharged for failure to agree. The verdict is to be delivered by the foreman and the assent of the jurors to a verdict pronounced by the foreman in the presence and hearing of the rest without their express dissent is to be conclusively presumed. *Arch. Cr. Pl. & Pr.*, p. 208 (25th Ed.) If a juror after the summing up separates himself from his colleagues and not being under the control of the court converses or is in a position to converse with other persons, it constitutes an irregularity which renders all the proceedings abortive, and the only course open to the court is to discharge the jury and commence the proceedings afresh. If the jury are unable to agree upon their verdict without retiring from their box they may withdraw to a convenient place appointed for that purpose, an officer being sworn to keep them, and to suffer none to speak to them without leave of the Court or speak to them himself except only to ask them whether they are agreed, *Ibid.* 211.

301. When the jury have considered their verdict, the foreman shall inform the Judge what is their verdict, or what is the verdict of a majority.

Delivery of verdict.

The law does not prescribe any particular form in which the jury ought to return their verdict, and they are at liberty to deliver it in any form which they think fit, 14 W.R. (Cr.) 39. The jury may ignore the grave charges and return a verdict of guilty on a lesser charge, 3 W.R. (Cr.) 41. A jury trying an offence has authority under S. 398, *supra* to find as an incident in such trial, that certain facts only which constitute a minor offence have been proved and return a verdict of guilty of such offence, though such minor offence be not triable by jury and the accused is not charged with such minor offence, [28 M. 243. If the

jury wish to say something in addition to their verdict, they must be allowed to do so, e.g., a recommendation for mercy, and a Judge ought not to stop them the moment the verdict of "guilty" or "not guilty" is delivered by the foreman. In this country it is undesirable to stop the jury at such a stage of the proceedings, for it may so happen that before the verdict is recorded, the foreman of the jury may make some observation in respect of that verdict which may show to the presiding judge that the jury have not properly understood the case and that it would be the duty of the Judge not to record the verdict but to re-charge the jury so as to lay the case properly before them, and when the words which the foreman attempted to add were very material, the High Court ordered a retrial, as the accused was prejudiced, 30 C. 485. The verdict of the jury should be the collective opinion of the jury as a body arrived at after mature consideration and ascertained and announced by the foreman. Individual opinion cannot be asked by the Judge even where they are sitting as assessors on some of the charges, 36 M. 585 at 588. Where there are more than one accused and where there are several charges, it would be a convenient course if the officer of the Court were to take the verdict of the jury upon each charge separately, 50 C. 658 at 663. The sworn statements of jurors and the evidence of admission by them as to the mode in which their verdict has been arrived at are inadmissible but the evidence of other persons as to the same is admissible, 40 C. 693.

302. If the jury are not unanimous, the Judge may require them to retire for further consideration. After such a period as the Judge considers reasonable, the jury may deliver their verdict, although they are not unanimous.

Procedure where jury differ.

This section lays down the procedure to be followed when the jury differ. It is only in cases where the jury are not unanimous in their verdict that a Court may require them to retire for further consideration but after delivery of the verdict the Judge cannot direct the jury to retire for further consideration. Where it is unanimous, it must be received by the Judge unless it is contrary to law, 5 C. 871 at 873; 15 Cr. L.J. 678—25 Ind. Cas. 1006; 3 Cr. L.J. 1. When the jury are not unanimous in the verdict, the proper course for the Judge is to require them, under this section, to retire for further consideration giving them further direction on matters of law, 6 Bom. L.R. 258 at 261; 8 C. 736 at 754. In cases of disagreement among the jury the individual opinions of the members are never intended to be disclosed, 36 M. 585. In cases of disagreement among the jury, the individual opinion of the jurors by name are not intended to be disclosed, and such a procedure is irregular, 26 Cr. L.J. 1346—89 Ind. Cas. 386 where 36 M. 585 is followed. When the Judge agrees with the verdict of the majority such a verdict in law, has the same effect as a unanimous verdict, 16 Cr. L.J. 261.

303. (1) Unless otherwise ordered by the Court, the jury shall return a verdict on all the charges on which the accused is tried, and the Judge may ask them such questions as are necessary to ascertain what their verdict is.

Verdict to be given on each charge. Judge may question jury.

(2) Such questions and the answers to them shall be recorded.

Questions and answers to be recorded.

SCOPE OF THE SECTION.—The verdict is to be received in the form in which it is given; the Judge has no power to control it, 7 W.R. (Cr.) 22; 2 A.L.J. 475—2 Cr. L.J. 357 but to ascertain the true verdict questions may be put to the jury and such questions and answers are to be recorded, 8 C. 739 at 754; 50 C. 658 but where a clear verdict is given there is no power to question the jury, 9 C. 53; 30 M. 469; 2 A.L.J. 475—2 Cr. L.J. 357.

SHALL RETURN A VERDICT ON ALL THE CHARGES.—When the verdict given by the jury was confused and unintelligible it was the duty of the Judge to obtain from them a proper and correct verdict before accepting the same. When an accused was charged under §§. 304 and 352 I.P.C. and the jury returned a verdict of not guilty under S. 304 and on being asked their verdict on the other charge returned a verdict of guilty under S. 324, I.P.C., it was not proper for the Judge to have accepted that verdict, 43 C.L.J. 537.

The verdict may be general or special. A general verdict is the ordinary verdict of "guilty" or 'not guilty' but a special verdict is one where the jury state their findings on all questions of facts which are necessary to decide the case and it remains for the Judge to apply the law to those findings under S. 299 (a), *supra*. Verdict means the collective opinion of the jury as a body arrived at after mutual consultation ascertained and pronounced by their foreman. 26 Cr. L.J. 1236 (1)—89 Ind. Cas. 386. The jury are not bound to return the verdict in any particular form. See also 36 M. 585. Unless otherwise ordered by the Court, the jury are bound to return a verdict on all the charges on which the accused is tried. 41 C. 1072 at 1083. The requirements of the law are satisfied, if in returning the verdict the jury returns a verdict of guilty on a minor offence forming part of one of the charges, 3 C. 871 at 873.

JUDGE MAY ASK SUCH QUESTIONS AS ARE NECESSARY.—This section which permits questions to be put to the jury in order to ascertain what their verdict is negatives by implication a power on the part of the presiding Judge to question them otherwise. 29 M. 91. This section no doubt empowers the Judge to ask the jury such questions as are necessary to ascertain what their verdict is, but it was never contemplated that on ascertaining that the jury are not unanimous the Judge should make minute inquiries to learn the nature of the majority and its opinion as a verdict according as it coincides with his own opinion or not. 10 C. 140; 15 B. 452. There is no provision of law which empowers a Judge to question the jury as to their reasons for an unambiguous verdict. 28 B. 412; 15 B. 452; 30 M. 469; 13 Cr. L.J. 586—15 Ind. Cas. 1003; 22 M.L.J. 355—13 Cr. L.J. 268—14 Ind. Cas. 689. The Judge may question the jury to ascertain what their verdict really is, e.g., where there is apparently some lurking uncertainty in their mind, but he must not cross-examine them for the purpose of showing that the verdict is unreasonable or with a view to afterwards dispute the finality of the verdict, 21 W.R. (Cr.) 1. Where the verdict is ambiguous, it is the duty of the Judge to ascertain what they meant, and for this purpose he may question them, 7 C.W.N. 125. The Judge has no right to put questions to the jury when they had returned a plain simple verdict of "not guilty", 27 C.W.N. 628. It may have been erroneous but it certainly was not ambiguous and the duty of the Judge was to receive it and record it without asking questions about it, 9 C. 53; 32 C. 739. Where the jury returned a verdict "of guilty but not voluntarily" in a trial under S. 326, I.P.C., and the Judge without further questioning them accepted the verdict as one of guilty and convicted the accused under S. 338, I.P.C., it was held by the High Court that the verdict was in effect a verdict of "not guilty" and the Judge was wrong without further questioning the jury in treating it as a verdict of "guilty", 12 C.W.N. 530. When the jury returned a verdict on a general issue of 'guilty' or "not guilty" and there is ambiguity as to the precise offence of which the accused are convicted or acquitted, this section does not authorise the Judge to question the jury, as the only questions he is entitled to put to the jury are such questions as are necessary to ascertain what their verdict is, 30 M. 469 applied in 13 Cr. L.J. 586—15 Ind. Cas. 1002; 43 M. 744; 27 C.W.N. 626; 2 A.L.J. 478. But where the verdict returned was not a simple verdict of *guilty* or *not guilty* but a special or qualified verdict to ascertain the exact scope and import of which it was the Judge's duty to ask the jury such necessary questions, the Judge's omission to question will create a difficulty in the High Court deciding whether the verdict was proper or not, it being not in a position to know the materials on which the verdict is based or what it really means, 25 Cr. L.J. 332—85 Ind. Cas. 372. This section does not give any power to a Judge to call upon the jury to give their reasons for their verdict to make a reference to the High Court under S. 307, 43 M. 744. In 38 C.L.J. 185 at 188 it was held that whatever may be the proper practice as regards asking jury for their reasons in a case where they return a verdict of not guilty, it cannot be

left out of sight, the fact that the jury had reasons for their verdict which they had not mentioned, which the High Court may take into account before setting aside their unanimous verdict. Where a Judge directed the jury to give a clear verdict in respect of offences under Ss. 147, 148, 304, 325, and 326, I.P.C., and they returned a verdict of guilty under S. 147 against some, and under S. 148 against the rest and added none of them guilty under S. 149, it was held that the verdict was incomplete and the Judge was justified under this section in putting them further questions to ascertain precisely their verdict as to other offences and the further verdict of the jury that the accused were guilty under S. 326 read with S. 149, I.P.C., was legal, 80 C. 658. This section limits the power of the Judge to question the jury only in cases in which it is necessary to ascertain what the verdict is, that is where the verdict being delivered in ambiguous terms or with uncertain sound the meaning is not clear. There is no provision of law which empowers a Judge to question the jury as to their reasons for a unanimous verdict, where there is nothing ambiguous in the verdict itself and no lurking uncertainty in the mind of the jury themselves regarding it, 28 B. 412; 22 M.L.J. 335-13 Cr. L.J. 288-14 Ind. Cas. 669; 6 Bom. L.R. 258; 15 B. 452; 20 B. 215. There is no justification to question the jury after they have given a unanimous verdict. 15 C.W.N. 198-11 Cr. L.J. 557. But after they have given a clear and unambiguous verdict even though not unanimous and the Judge differs from it he has no power to question them but the proper procedure is to make a reference under S. 307, *infra*, 15 Cr. L.J. 678-25 Ind. Cas. 1008.

SUB-SECTION (2).—When it becomes necessary to question the jury, the questions and the answers are to be recorded, (1911) 1 M.W.N. 190 at 191-9 M.L.T. 335-12 Cr. L.J. 140-9 Ind. Cas. 788; 8 C. 739; 14 W.R. (Cr.) 89. A statement that the verdict is one of guilty where there are several charges without eliciting from the jury a separate verdict on various charges recording the questions put and the answers under this section is not a sufficient compliance with law, 26 Cr. L.J. 1090-88 Ind. Cas. 178.

304. When by accident or mistake a wrong verdict is delivered, the jury may, before or immediately after it is recorded, amend the verdict, and it shall stand as ultimately amended.

OBJECT OF THE SECTION.—In England if by mistake the jury deliver a wrong verdict (as when it is delivered without concurrence of all) and it is recorded and a few minutes elapse before they correct the mistake, the record of verdict may be corrected. When a verdict of not guilty was entered by the clerk purely by mistake and the prisoner discharged, the mistake was immediately corrected and the prisoner brought back and sentenced, the Court of Crown Cases Reserved held the verdict was properly amended, *Ros. Cr. Ev. & Pr.*, p. 189 (13th Ed.). This section obviously contemplates cases where the verdict delivered is not in accordance with what was really intended by the jury and does not apply to a case where the jury owing to a misunderstanding of the law arrive at a wrong conclusion, but there is no accident or mistake in the delivery of the verdict. If the jury returned a verdict owing to a misapprehension of the law it can be corrected by the Judge disagreeing with the jury and referring the case under S. 307 *infra* to the High Court, 28 B. 412.

BY ACCIDENT OR MISTAKE A WRONG VERDICT IS DELIVERED.—This section refers to cases where by mistake the jury returned a verdict of not guilty when they meant guilty. Where a prisoner was discharged on a mistaken verdict of not guilty being returned by the jury, but some of the jurymen interposed immediately and the accused was brought back at once, and the jury were questioned again as to their verdict to which they replied *guilty*, the accused was sentenced by the Judge. This section provides for an amendment of a wrong verdict delivered by accident or mistake, but it clearly contemplates that such verdict can be amended only before or immediately after it is recorded, in other words before the jurors have left the Court and where they are still under the observation of the presiding Judge. For once the jurors have left the Court they are liable to outside influence and it would be in the highest degree dangerous thereafter to accept

statements or affidavits on the part of individual juror to the effect that a verdict publicly announced by the foreman in the hearing of all the jurors and without dissent on the part of any of them was in fact not their verdict but the verdict of other members. A mistake of this kind may no doubt, lead to a miscarriage of Justice, but while such a result is to be deplored, it would be far more disastrous to the course of Justice, if the Courts allowed verdicts openly given to be disturbed. A mistake is not likely to occur very frequently, and it would perhaps be impossible if in practice the ancient *formula* used by the Clerk of the Crown in England is adopted, "Gentlemen of the jury, hearken to your verdict, while the Court records it. You say that the prisoner is (guilty or not guilty) and that is the verdict of you all." 1 Cr. L.Rev, 155 (F.B.) at 158, 159—13 Cr. L.J, 815—17 Ind. Cas, 559. Where a verdict is wrongly recorded, no erroneous verdict has been delivered by mistake or accident within this section.

Courts in India cannot travel beyond the scope of this section. Jurisdiction in criminal cases is not to be assumed and in regard to matters, for which the Legislature has made express provision it certainly must not be assumed in excess of the jurisdiction so conferred. 1 Cr. L. Rev, 155 at 164—13 Cr. L.J. 815—17 Ind. Cas, 559. Where there is no doubt as to the verdict of the jury, the Judge has no power to question their reasons for the verdict. It is this questioning and the conversation which then followed which led two of the jury to say they had been misled as to the evidence by the notes of the foreman and they would like to reconsider the case with the result that the jury unanimously brought in a verdict exactly the opposite to that previously given. This is not a case in which it can be said that a wrong verdict was delivered by accident or mistake within S. 304. To hold that the section could be invoked to legalise the procedure followed by the Judge in the case would render ineffective the limitation imposed by the Legislature in S. 303 on the Judge's power to interrogate the jury. The High Court directed a retrial remarking that it may be open to the judge either to accept that verdict or to refer the case under S. 307, 22 M.L.J, 355—13 Cr. L.J 285—10 Ind. Cas, 569. There is no power in a Judge to present a case to a jury subject to conditions. Once a verdict is delivered by the jury there is no power in the Court or in the jury to reconsider it except as provided by this section with this exception, the jury is *junctus officio* as soon as the verdict is delivered. Once it is delivered it is illegal to admit further evidence and invite the jury to give a fresh verdict, 25 Cr. L.J, 377—77 Ind. Cas, 425.

305. (1) When in a case tried before a High Court, the jury are unanimous in their opinion, or when as many as six are of one opinion, and the Judge agrees with them the Judge shall give judgment in accordance with such opinion.

Verdict in High Court when to prevail.

(2) When in any such case the jury are satisfied that they will not be unanimous, but six of them are of one opinion, the foreman shall so inform the Judge.

Discharge of jury in other cases.

(3) If the Judge disagrees with the majority, he shall at once discharge the jury.

(4) If there are not so many as six who agree in opinion, the Judge shall, after the lapse of such time as he thinks reasonable, discharge the jury.

Under English Law the verdict must be unanimous and if the jury are unable to agree the court may discharge them and have the prisoner retried by another jury. The unanimous verdict of a jury in a case tried before the High Court Sessions the Judge is bound to accept. The question of option comes in only when they are not unanimous. Then the Judge may take one of the courses specified in this section, 18 Cr. L.J. 676—80

Ind. Cas. 724. The fact that in a charge of dacoity the jury returned a unanimous verdict of guilty of abetment of robbery does not necessarily invalidate the verdict. 16 Cr. L.J. 678 = 30 Ind. Cas. 724.

306. (1) When in a case tried before the Court of Session the Judge does not think it necessary to express disagreement with the verdict of the jurors or of a majority of the jurors, he shall give judgment accordingly.

Verdict in Court of Session when to prevail.

(2) If the accused is acquitted, the Judge shall record judgment of acquittal. If the accused is convicted, the Judge shall, *unless he proceeds in accordance with the provisions of section 562*, pass sentence on him according to law.

The words in italics in sub-section (2) are new. Once the verdict of the jury is accepted by the Judge and the case is postponed for sentence only, it is not open to him to reconsider his order, any more than it would be for the jury to reconsider their verdict once given and recorded, and refer the case to the High Court under S. 307, *infra*, 4 C.W.N. 683. Mere sex of the criminal is no ground for not passing a sentence appropriate in the case of a man, 16 Cr. L.J. 20 = 26 Ind. Cas. 324. The Judge is not entitled to pass a nominal sentence because he does not agree with the verdict of the jury as to accused's guilt. By so doing he usurps the function of the jury; he must pass an adequate sentence, Weir II, 37.

307. (1) If in any such case the Judge disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which *any accused person* has been tried, and is clearly of opinion that it is necessary for the ends of justice to submit the case *in respect of such accused person* to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and when the verdict is one of acquittal, stating the offence which he considers to have been committed, *and in such case, if the accused is further charged under the provisions of section 310, shall proceed to try him on such charge as if such verdict had been one of conviction.*

Procedure where Sessions Judge disagrees with verdict.

(2) Whenever the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which *such* accused has been tried, but he may either remand *such* accused to custody or admit him to bail.

(3) In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict *such* accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and, if it convicts him, may pass such sentence as might have been passed by the Court of Session.

AMENDMENT.—By the new amendment it is made clear that when a Judge accepts the verdict of the jury in respect of some of the accused but not of others, he needs only refer the case of the latter to the High Court. Powers are also given to pass orders under S. 562,

infra. If the Judge decides to make a reference to the High Court he is enabled, where there is a further charge, to complete the record by trying the further charge. This section provides the only way in which the miscarriage of justice by a perverse verdict of a jury can be remedied by the High Court, 13 M. 343.

OBJECT OF THE SECTION.—This section clearly gives to the Judge a discretion in referring a case to the High Court and it is only when he is clearly of opinion that it is necessary for the ends of Justice to submit the case to the High Court that he shall so submit it. If he is not clearly of that opinion his failure to submit a case is not a subject of interference by the High Court on appeal, 50 C. 653 at 663. The discretion should always be exercised where the Judge thinks that the verdict is not supported by the evidence. It is no longer the law that before making a reference the Judge must be satisfied that the verdict is perverse. It is sufficient if he is clearly of opinion that the ends of justice require a reference, 41 C.L.J. 320—26 Cr. L.J. 1006—37 Ind. Cas. 608; 27 Cr. L.J. 393—33 Ind. Cas. 48; 52 C. 987. It is open to a Judge to disagree with the Jury and it is his duty to do so if he is clearly of opinion that such a course is necessary for the ends of Justice; but this does not require that he should make reflections upon their conduct which are not supported by evidence on record such reflections are unfair as they are made behind the back of the Jurors, without their knowledge and after they have finished their labours especially as they are labouring under a disadvantage of having no opportunity to state the grounds of their opinion. These reflections are unfair to the Judge himself as they detract from the value of his opinion. They are unfair to the accused who are entitled to have due weight attached by the High Court to the opinion of the Jury as expressed without any aspersions against them. They are unfair to the High Court, whereon the duty is imposed to consider the entire evidence and acquit or convict the accused after giving due weight to the opinions of the Judge and Jury. Such opinion of the Judge is his opinion on the merits of the case, on the evidence placed before him, and does not include his speculation as to what might or might not have influenced the Jurors, 51 C. 418. In dealing with a case referred to the High Court under this section, the High Court is first called upon to consider the entire evidence and then give due weight to the opinion of the Session Judge and that of the Jury and then acquit or convict the accused. The opinion of the Jury is the verdict of the Jury. The measure of relative weight to be attached to these two factors, *vis.*, opinion of the Judge and that of the Jury cannot be crystallised into an inflexible formula. The answer must depend upon the circumstances of each case. When the verdict is not unanimous the weight to be attached to it necessarily diminishes. Where the Judge accepts the verdict as to some accused and not to others, his opinion is weakened in a corresponding measure, 51 C. 317; 45 M.L.J. 408—48 L.W. 432—(1923) M.W.N. 695. The High Court should not interfere with an unanimous verdict of the Jury unless it can say decidedly that the verdict is clearly wrong, 51 C. 347; 29 C.W.N. 12—26 Cr. L.J. 1298—39 Ind. Cas. 232 and with a verdict of acquittal, unless it is perverse and clearly and manifestly wrong, 46 A. 265, but considering the important changes introduced by the amendment in 1923 especially S. 449, *infra*, where it is laid down that notwithstanding the provisions of S. 418 or S. 423 (2), *infra* or the Letters Patent of any of the High Courts an appeal may lie to the High Court on a matter of fact as well as a matter of law. Thus in a case tried under Chapter XXXIII of the Code the finding of the Jury on a question of fact is no longer final and it cannot therefore be safely said that the High Court will not interfere in a case referred under this section unless the verdict is shown to be perverse or unreasonable, 6 Lah. 98.

SUB-SECTION (1).—It is not in every case of doubt nor in every case in which a view different from that of the jury can be entertained on the evidence that a reference under this section is to be made to the High Court, but the verdict of the jury should be manifestly wrong before such a reference is made. 6 B. 731; 9 M.L.T. 291—12 Cr. L.J. 48—9 Ind. Cas. 288. It is not sufficient to show that another jury might have formed a different opinion but what has to be shown is that no reasonable body of men would have returned the verdict complained of, 27 Cr.L.J. 1041 at 1059—37 Ind. Cas. 17 following 26 Cr. L.J. 366—38 Ind. Cas. 712. If the High Court is to interfere in every case of doubt, in every case in which it may with propriety be said that the evidence would have warranted a different verdict, then a real

trial by jury is absolutely at an end, and that the verdict of the jury has no more weight than the opinion of assessors, 41 C. 621 at 631; 50 C. 41; 23 Cr. L.J. 211—83 Ind. Cas. 995. A reference should only be made when the Judge is clearly of opinion that he should do so for the ends of justice, 25 C. 555; 50 C. 658. The discretionary power to refer the case to the High Court should always be exercised when the Judge thinks that the verdict is not supported by the evidence. It is the only way by which a miscarriage of justice owing to a perverse verdict can be remedied as there is no appeal on facts, 13 M. 343; 14 M. 36; 4 M.L.T. 483; 10 C. 1029. Where several accused were tried together before a Judge and Jury for the same offence and the evidence was the same against all and the Sessions Judge summed up in favour of the defence, but the Jury returned a verdict of "guilty" against five of the accused and "not guilty" against one and the Judge agreeing with the Jury acquitted the one and convicted the rest, held that the Judge should certainly have referred the verdict as flagrantly perverse, 23 L.W. 90. It is not always true that a Judge having accepted the jury's verdict on graver charges cannot make a reference with a view to have some of the accused convicted on a minor charge, 37 C.L.J. 34; 42 C. 789. If the jury has returned an erroneous verdict owing to misapprehension of law, the mistake can be corrected only by the Judge making a reference under this section, 28 B. 412. It is necessary when the charge to the jury is meagre that the Judge should state in his reference the evidence for the prosecution and the defence. He should also state the facts which in his opinion are proved upon the evidence recorded and the conclusions to which those facts lead him. The High Court ought to have the opinion of the Judge upon the evidence, before it can deal with the case, 6 Bom. L.R. 599; 10 Bom. L.R. 173; 7 C.W.N. 345. Where the Judge in his reference merely stated that the verdict was against the weight of evidence and expressed no other opinion, it was held he ought to have set out portions of the evidence or of facts disclosed by the evidence on which, in his opinion, the accused should have been convicted, 7 C.W.N. 315. The letter of reference must clearly state what witnesses the Judge believes, as he had an opportunity to see and hear the witnesses, 10 Bom. L.R. 173. Where the verdict of the jury is brief and the Judge disagrees with it, he should before making a reference put such questions as may bring out their meaning more precisely, 16 Cr. L.J. 587—30 Ind. Cas. 139.

SUB-SECTION (2).—Pending a reference to the High Court, there is no conviction or acquittal in the Sessions Court and the law before the amendment was that it was only after a conviction by the High Court that the accused can be called upon to plead to a previous conviction, and the Sessions Judge ought not to call upon the accused to plead, pending reference to the High Court, 30 M. 134, but now S. 310, *infra*, enables a Judge when the jury or a majority of jury gives a verdict of not guilty, in his discretion to proceed to try the accused on the charge of the previous conviction and, if he does so, to submit his finding along with the reference, and thus avoid the round-about procedure. A reference under this section is not invalid if made by an officer who held the trial, but who at the date of the reference has ceased to be a Judge. The Judge who may make a reference under this section must be one who held the trial and heard the evidence, and not the officer who succeeds him as Judge. That this is a reasonable construction of the section seems to be clear from the procedure laid down in sub-section (3) which provides that the High Court is to give weight to the opinion of the Sessions Judge and the jury, 2 C.L.J. 48 at 49. The new amendment is in accordance with 42 C. 789, where it was held that this sub-section contemplates a reference in the case of those persons in respect of whom the Judge declines to accept the verdict.

SUB-SECTION (3).—This section lays down that in dealing with a case submitted thereunder, the High Court may exercise any of the powers which it may exercise on an appeal and that, subject thereto, it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it. The duty of the High Court accordingly is to consider the evidence on the record as it stands, to weigh the respective opinions of the Sessions Judge and the jury and then to form its own conclusion. The verdict of the jury is first in the field and S. 299, *supra*, makes it primarily the function of the jury to decide which view of the facts is true and then return

a verdict and to decide all questions which according to law are to be deemed questions of fact. On general principle therefore, it appears that, when the process which this section directs has been carried out and the opinions of the judge and jury have been measured, the verdict of the jury should stand unless the evidence and opinion of the judge shows clearly that it is wrong and that in the interests of justice it ought to be reversed. But neither the Sessions Judge, nor the High Court would interfere with the verdict of the jury unless there are strong reasons for doing so, 51 C. 160; 38 C.L.J. 1. This section requires the High Court to give due weight to the opinions of the Sessions Judge and of the jury, after considering the entire evidence and then to acquit or convict the accused. It does not require the High Court to attempt to reconstruct the verdict of the jury. In giving due weight to the opinion of the jury the High Court should always hesitate to reverse an unanimous verdict unless it holds it to be unreasonable. 40 C.L.J. 133 at 132; 25 Cr. L.J. 785-81 Ind. Cas. 303. From the mere fact that the jury are unable to give reasons for returning a verdict of 'not guilty' beyond saying that they give the benefit of doubt to the accused, the High Court cannot hold that the jury had no adequate reasons for bringing the verdict of 'not guilty.' Even trained intellects often find it difficult to formulate and put before the Courts reasons for the opinion which they hold or which they wish to propound, 41 C.L.J. 33-26 Cr. L.J. 805-83 Ind. Cas. 393. In dealing with a case referred under this section the High Court is first called on to consider the entire evidence and then give due weight to the opinions of the Sessions Judge and that of the jury. The opinion of the judge is his opinion on the merits of the case and does not include speculations as to what external considerations if any which might have affected the judgment of the jury. The opinion of the jury is the verdict of the jury. The measure of relative weight to be attached to these two factors cannot be crystallised into an inflexible formula. When the verdict of the jury is not unanimous the weight to be attached to it necessarily diminishes. When the judge accepts the verdict as to some accused and not to others his opinion is weakened in a corresponding measure, 51 C. 337 and 418; 45 M.L.J. 406-18 L.W. 482-(1923), M.W.N. 695. The duty of the High Court under this section does not end by merely finding that the defence story is one that cannot be accepted. It has to find whether on the evidence such as appears on the record it was possible for the jury to take the view which they have taken in the case with reference to the accused whose case has been referred to the High Court. That is to say whether the jury were entitled to discount the evidence which has been given by the prosecution witnesses because of the fact that the witnesses were highly interested. 38 C.L.J. 1 In dealing with a case under this section the High Court which had not the opportunity of seeing the witnesses must act with great caution and will not be justified in interfering with the verdict of the jury because in its opinion the evidence would have warranted a different verdict, "The most careful note must often fail to convey the evidence fully in some of its most important elements. It cannot give the look or manner of the witness, his hesitation, his doubts, his variation of language, his confusion or precipitancy, his calmness or consideration. It cannot give the manner of the prisoner, where that has been an important bearing upon the statement of anything at a particular moment. It is in short, or it may be the dead body of the evidence without its spirit which is supplied, when given openly and orally by the ear and eye of those who receive it." 51 C. 271 at 276. In a reference under this section it is not for the High Court to judge of the case on the merits. Although the case is one of great suspicion, the High Court has to consider whether the verdict of the jury should be set aside. 38 C.L.J. 133. The High Court should not interfere with a unanimous verdict of the jury unless the verdict of guilty is clearly wrong. 51 C. 347; 27 Cr. L.J. 773-95 Ind. Cas. 309. But a verdict of acquittal should be perverse and clearly and manifestly wrong for the High Court to interfere, 41 C. 632; 25 Cr. L.J. 788; 46 A. 285; 16 Cr. L.J. 440-29 Ind. Cas. 72. When the High Court is of opinion that the jury's verdict is perverse it is entitled to substitute its own opinion on the evidence for the opinion of the jury, 25 Cr. L.J. 211-83 Ind. Cas. 955. The High Court on a reference under this section is reluctant to interfere with a unanimous verdict of jury and if that verdict is not unreasonable and can on the evidence, be supported it should accept it even though it may not wholly agree with it, 30 C.L.J. 803. The High Court before it can refuse to accept the verdict of the jury in a case under this section has got to find that the verdict is unreasonable, 52 C. 987. The effect of a reference under this

section is to open up the whole case and to render it the duty of the High Court to consider whether the evidence against the accused is sufficient to justify a conviction for all or any of the offences charged inclusive of the offences of which the jury have acquitted the accused, 35 M. 585 at 587. The High Court is not confined to the grounds of difference between the Judge and the jury, but the whole case is thrown open to the Court and it must be decided after giving due weight to the opinion of the Judge and jury, 10 Bom. L.R. 632; 36 C. 629; 29 C. 128; 9 C.L.J. 432; 29 M. 91. By the expression "*opinion of the jury*" in this section is meant the conclusion of the jury, i.e., the verdict and not the reasons on which that conclusion is based, 18 C.W.N. 615=18 C.L.J. 522=15 Cr. L.J. 31=22 Ind. Cas. 175; (1922) Pat. 218=23 Cr. L.J. 421=67 Ind. Cas. 581. There is nothing in this section warranting the interpretation that the term "*opinion*" in it means anything other than the respective conclusions of the Judge and jury. In dealing with a reference, the High Court must consider the entire evidence and give due weight to the opinions of the Judge and jury including the opinion of the minority of the jury when the verdict is divided, 36 C. 629; 17 C.W.N. 1077=14 Cr. L.J. 556=21 Ind. Cas. 156; 18 Cr. L.J. 430=29 Ind. Cas. 72; 37 C.L.J. 30 at 32; 23 Cr. L.J. 244=66 Ind. Cas. 180. There is no provision to ascertain the opinion of the jury, and a reference to the High Court when a Judge differs from the jury will not be vitiated on account of its not containing the opinion of the jurors, 18 C.W.N. 615. Apart from their verdict, the *opinion* of the jury in this sub-section is the conclusion of the jury, and not the reasons on which that conclusion is based. In a reference under this section although it may be expedient to have before the Court the reasons of the jury for the view taken by them when they have been given, but the circumstance that no such reasons have been ascertained does not warrant the High Court to decline to go into the evidence and arrive at its own judgment after giving due weight to the views taken by the Judge and jury as to the guilt or innocence of the accused, 29 M. 91 (F.B.); 25 Cr. L.J. 145=76 Ind. Cas. 289; 41 C. 662; 20 Cr. L.J. 20=48 Ind. Cas. 500; 55 Ind. Cas. 282 and 29. The Court is also bound to consider the entire evidence and give weight to the opinion of the Sessions Judge and Jury. Failure on the part of the Judge to record the reasons of the jury for their verdict enhances the responsibility of the High Court and requires it to go into the evidence more carefully, 6 Pat. L.J. 263 at 267. See 26 Cr. L.J. 856=56 Ind. Cas. 712, where it was held following 21 Cr. L.J. 829=52 Ind. Cas. 829, that it was not competent to the Sessions Judge after a clear verdict was returned by the jury to ask them for their reasons, and the view expressed in 6 Pat. L.J. 263 and 23 Cr. L.J. 421=67 Ind. Cas. 581, to the contrary are *disapproved*. It is open to a Judge when he disagrees with a verdict and intends to make a reference to the High Court to ask the jury the reasons for their verdict and he should record the same for the information and guidance of the High Court, 27 Cr. L.J. 773=86 Ind. Cas. 309 where 36 C. 629, Weir II, 388 are *followed*. With regard to the opinion of the jury most of the reasons given by the foreman may not commend themselves to the High Court or may not be very convincing and such reasons need not necessarily be taken as constituting all the grounds which the jury may have had for their verdict. It is well known that even trained minds find it difficult when asked offhand to formulate all the grounds in support of the opinion they have formed. What the High Court has got to find before it can refuse to accept the verdict is that it is unreasonable, 26 Cr. L.J. 1256 at 1262=88 Ind. Cas. 1000. When a reference is made to the High Court under this section, it has all the powers of an appellate Court and should form its own opinion after considering the entire evidence, giving due weight to the opinion of the Judge and the jury, 15 Cr. L.J. 813; 29 C. 128; 9 C.L.J. 432=10 Cr. L.J. 57=2 Ind. Cas. 593; 25 C. 852; When a reference is made to the High Court the language of the Code does not justify any undue preference being given to the opinion of the jury over that of the Judge. The High Court has to weigh both the opinions and consider the entire evidence, on record just as it would do in any Criminal matter coming before it for decision, 25 Cr. L.J. 785=81 Ind. Cas. 305. The High Court is empowered on a reference under this section to convict the accused of an offence not triable by jury but only by assessors, on a consideration of the evidence and giving due weight to the opinions of the Judge and jury, 37 M. 236, where 22 M. 15; 23 M. 641, and the view of *Bhashyam Aiyangar, J.*, in 26 M. 243 are *followed*. The power of the High Court under this section is not limited to interference or

questions of law, *i.e.*, misdirection by the Judge or misapprehension of the law by the jury as laid down by the Judge, 9 A. 420, but the High Court will not interfere unless it was established in the clearest possible manner that the jury were wholly miscarried in their conclusions upon the case, 20 W.R. (Cr.) 83 and 73; 11 C. 85; Weir II, 388, and the High Court will not interfere merely because it is of a different opinion from that arrived at by a unanimous verdict of the jury, 2 A.L.J. 475; 9 C. 53. Where one of two inferences is possible on the evidence, the Court of Reference will not interfere with the finding of the Jury even though the High Court is of opinion that it would have drawn the other inference if it had been a Court of Appeal. But where the inference drawn by the jury is manifestly inconsistent with the documentary evidence and with the conduct of the parties it is obligatory on the Court to interfere, 27 Cr.L. J. 1031 at 1039—97 Ind. Cas. 17. The High Court is to accept the opinion of the Judge and jury when they agree and it is not open to believe evidence disbelieved by both Judge and jury, 41 C. 662. When the Judges hearing a reference under this section differ in their opinion, the procedure to be followed is that laid down in S. 439 *infra*, *vis.*, the case shall be laid before a third Judge, 2 C.L.J. 77; 18 B. 482.

G.—Re-trial of Accused after Discharge of Jury.

308. Whenever the jury is discharged, the accused shall be detained in custody or on bail (as the case may be), and shall be tried by another jury, unless, the Judge considers that he should not be re-tried, in which case the Judge shall make an entry to that effect on the charge, and such entry shall operate as an acquittal.

Re-trial of accused after discharge of jury.

WHENEVER THE JURY IS DISCHARGED.—This section will apply when a jury is discharged for misconduct not provided for specifically, in the Code and it seems clear that the Judge must have such powers, 50 C. 872 at 873, if one of the jury die before the delivery of verdict the remaining eleven will be discharged and a new jury may be sworn or a new jurors added to the eleven. So also if one of the jurors is taken so ill that he is not able to proceed with the trial. Where misconduct on the part of one of the jurors is discovered before verdict the Court may discharge the jury. Where in the course of a trial one of the jurors without leave left the jury box and also the Court, the jury had to be discharged. So also where in the course of a trial it was discovered that a person was in the jury who was not on the jury panel and who had by mistake been summoned as a jury man and when it is accidentally elicited during the course of the case for the crown that the defendant had been previously convicted, the jury is frequently discharged in the interests of defendant. *Arch. Cr. Ev. and Pro., p. 214 (25th Ed.)*.

A Sessions Judge has inherent power to discharge the jury and to empanel another for misconduct on the part of the jury, 33 C.L.J. 123—25 C.W.N. 240; 51 C. 418; 26 Cr. L.J. 1009—87 Ind. Cas. 833. But such power to discharge should not be exercised lightly or until the Judge has satisfied himself from inquiry that reasonable grounds for exercising such a right exist. The matter is one for the Judge's own discretion, 37 C.L.J. 595; 7 C.W.N. 83. But the Advocate-General may exercise his powers under S. 393 *infra* and, *enter a nolle prosequit*. The trial before a fresh jury is a continuation of the first trial on the original plea, 41 C. 1072.

H.—Conclusion of Trial in Cases tried with Assessors.

309. (1) When, in a case tried with the aid of assessors, the case for the defence and the prosecutor's reply (if any) are concluded, the Court may sum up the evidence for the prosecution and defence, and shall then require each of the assessors to state his opinion orally *on all the charges on which the accused has been tried*, and shall record such opinion, and for that purpose may ask the assessors such questions as are necessary to

Delivery of opinions of assessors.

ascertain what their opinions are. All such questions and the answers to them shall be recorded.

(2) The Judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.

Judgment.

(3) If the accused is convicted, the Judge shall, *unless he proceeds in accordance with the provisions of section 562*, pass sentence on him according to law.

AMENDMENT.—The words in italics are new.

SCOPE OF THE SECTION.—The assessors are no doubt to assist the Judge, but nowhere in the Code of Criminal Procedure has the Legislature invested the assessors with the power of appreciating the evidence so as to bind the Judge. The theory of trial with the help of assessors is that the system of assessors forms as it were a stage towards the ultimate introduction of trial by a jury. That was the object with which the assessors' system was introduced in the earlier years of the introduction of Criminal Law by the British Indian Legislature in this country. The opinion of the assessors must have no doubt, regard paid to it, but after all it is the Judge who is to decide the case on the facts as well as law. His is the final responsibility. 14 Bom. L.R. 710 at 711—13 Cr. L.J. 677—16 Ind. Cas. 325. There is nothing in the Code authorising or forbidding the Judge to allow consultation between the assessors and there is nothing prohibiting the Judge in his discretion to allow it. The opinion of Bashiyyam Ayengar, J., in 24 M. 523 went to the extent of holding that the Judge is entitled to have before him each assessor's individual and independent opinion, 2 L.W. 913—16 Cr. L.J. 717—30 Ind. Cas. 1005.

MAY SUM UP.—The law gives the Judge a discretion to sum up the evidence for the benefit of the assessors if he thinks necessary, but it gives him no power to question them until they have delivered their opinions orally and he has recorded such opinions. If there is anything obscure in their opinion, there is no objection to the Judge asking questions to clear up such obscurity, but he is bound to allow the assessors to express their opinion independently in their own words on the whole case before interfering with them in any way or asking them any questions whatever except "what is your opinion," 30 C. 163 at 165. The provision as to summing up should be availed of by Judges where facts are complicated and it may therefore be expedient to explain the same, 24 M. 523 at 537; 9 C. 875.

REQUIRE EACH ASSESSOR TO STATE HIS OPINION ORALLY.—If a Judge should decide a case without inviting the opinions of assessors, he virtually holds the trial without the aid of assessors, and his finding and sentence cannot be regarded as one passed by a Court of competent jurisdiction, 24 M. 523 at 535. The opinion of each assessor shall be given orally and shall be recorded in writing. Such record shall contain not only the conclusion arrived at by each assessor but also the grounds of his opinion, 9 C. 875. To state his opinion means that the assessor is required to give a definite opinion whether the prisoner is guilty of either, and if so which of the charges preferred against him and it is not sufficient if he should merely express his opinion that the accused did certain acts. It is imperative for a Judge to take the opinion of the assessors on the charge it is proposed to convict the accused on. It is not open to the Judge to put merely the charge of murder to the assessors and when they give their opinion on that charge and that charge only, then on his own motion and without asking any further opinion of the assessors find the accused guilty of some other offence quite distinct. When an accused is charged with a major offence and in the alternative with a minor offence being in effect an accessory to the crime the case will be different, 26 Cr. L.J. 394—84 Ind. Cas. 938 where 25 Bom. L.R. 231 is distinguished. The assessors ought not to be allowed to put in written opinions like judgments. They are to state their opinions orally and the Judge is to record them. To allow assessors to put in written opinions defeats the intention of the section, 33 C. 119 at 122. But see the opinion expressed by the Privy Council, (1925) M.W.N. 418 where their Lordships held that if the assessors gave their opinion in writing it has not been shown that it led to any miscarriage of

Justice at all. In order to comply with the provisions of this section the Judge should record the opinion expressed by the assessors in writing when given in his own words by each assessor. Where the accused is tried in one trial of two offences one of which is a jury case and the other an assessors case and the Judge after recording the verdict of the jury only took the opinion of two of the assessors on the other charge without taking the opinion of all the jurors as assessors as required by S. 269, *supra*, it was held that the conviction was bad and S. 537, *infra*, could not cure such a defect. 28 M. 598; 21 M.L.J. 320. Assessors are appointed to assist the Court in the trial and are to give their opinion, and when that opinion differs from that formed by the Judge, he should always ascertain the grounds of their opinion, 3 W.R. (Cr.) 21, and assessors should be invited and encouraged by the Judge to state briefly the grounds of their opinion as well as the result, 2 Bom. L.R. 322. The addition in sub section (1) of the words "and for the purpose of ascertaining such opinion shall ask each assessor such questions, as he thinks necessary, such questions and answers thereto shall be recorded" assimilates the procedure by which the assessors give their opinion to that adopted for ascertaining the verdict of the jury, namely, by question and answer, to be recorded. See S. 303, *supra*.

THE JUDGE MAY ASK SUCH QUESTIONS.—Cross-examination of the assessors is entirely contrary to law. This section gives the judge no power to question the assessors until they have delivered their opinion orally and the Judge has recorded such opinion. If there is any obscurity in the opinion then there is no objection to ask questions to clear up the obscurity. 13 Cr. L.J. 497—15 Ind. Cas. 641; 41 C. 350.

SHALL RECORD SUCH OPINION.—By the new amendment the power is given to the Judge to put such questions to the assessors as are necessary to ascertain what their opinion is and to record such opinion. The grounds on which the assessors have their opinion are also to be recorded especially when the Judge differs from their opinion. It is too much the custom to neglect the opinion of the assessors and put them in such a shape that the High Court can make nothing of them. There is all the difference between the verdict of the Jury and the opinion of the assessors. The former is the simple and conclusive verdict of guilty or not guilty. The other is not a verdict but an opinion and not having any legal validity the weight seems to depend solely on the reason and sense by which it is supported. In recording in writing the opinion of each assessor as required by this section the Judge should not merely put in his judgment, that he concurs with or differs from the assessors, but should separately record the opinion of each assessor and should invite and encourage each assessor to make that opinion more than a mere expression for or against the prisoner, but an opinion on the case stating the view that the assessor takes of the facts and the consideration (in brief) on which his opinion is founded, 3 W.R. (Cr.) 6. "State his opinion" means that the assessor is required to give a definite opinion whether the prisoner is guilty of either and if so which of the charges preferred against him and it is not sufficient if he should merely express an opinion that the accused did certain acts, 22 W.R. (Cr.) 44. Where the assessors are not asked and apparently not allowed to give an independent opinion in their own words on the whole case, the trial is altogether bad, 13 Cr. L.J. 497—5 Ind. Cas. 641. Once a trial has been held and the opinion of the assessors recorded the Judge is not entitled to cancel the trial and order a new trial on the ground that a charge has been improperly joined. He has no option after recording the assessors' opinion but to give judgment in accordance with this section, 17 Bom. L.R. 1074.

THE JUDGE SHALL THEN GIVE JUDGMENT.—Under this section the judge is bound to give judgment after recording the opinion of the assessors. The fact that the accused is charged in the same trial with another offence triable by jury and the judge disagrees with the jury and makes up his mind to make a reference to the High Court will not absolve the judge from his duty to give judgment on the charge tried with the aid of assessors and when the judge without doing so made a reference to the High Court, it was held that the reference was premature and the case sent back to rectify the error and then act according to law. 36 M.L.J. 462—9 L.W. 376—26 M.L.T. 45—20 Cr. L.J. 352—50 Ind. Cas. 832.

SHALL NOT BE BOUND TO CONFORM TO OPINION OF ASSESSORS.—The opinion of an assessor is certainly not a judicial opinion in any sense though one may not be

so hypocritical as to object to its being characterised or referred to as quasi-judicial. Assessors are analagous to expert witnesses and in principle the opinion of an assessor is substantially on the same footing as the opinion evidence of an expert witness. 24 M. 523 at 543. The assessors like a jury are not Judges of all questions of fact. The opinion of the assessors must have no doubt, regard paid to it, but after all it is the Judge who is to decide the case on the facts, as well as law. The function no doubt is to assist the Judge but they are not invested with the power of appreciating the evidence so as to bind the Judge who must pay regard to their opinion but after all, he is to decide the case on the facts as well as the law. His is the final responsibility, 14 Bom. L.R. 710 ; 13 Cr. L.J. 677—16 Ind. Cas. 325. Under the law the jury is required to deliver its verdict, but assessors are appointed to aid the Judge in the trial and are to give their opinion and when that opinion differs from that formed by the Judge the latter should always ascertain the grounds of the assessor's opinion. The decision does not rest with them but they are to assist the Judge at the trial and in no better mode can they assist him by stating the reason for their opinion when the case is one in which there may be a difference of opinion. 3 W.R. Cr. 21.

Under sub-section (3) a Judge is now empowered expressly by the addition newly made to pass an order under S. 562, *infra*, releasing the accused on probation of good conduct or release him on admonition.

I.—Procedure in case of Previous Conviction.

310. In the case of a trial by a jury or with the aid of assessors when the accused is charged with an offence and further charged that he is by reason of a previous conviction liable to enhanced punishment or to punishment of a different kind for such subsequent offence, the procedure prescribed by the foregoing provisions of this Chapter shall be modified as follows, namely:—

(a) Such further charge shall not be read out in Court and the accused shall not be asked to plead thereto, nor shall the same be referred to by the prosecution, or any evidence adduced thereon unless and until,

(i) he has been convicted of the subsequent offence, or

(ii) the jury have delivered their verdict, or the opinions of the assessors have been recorded, on the charge of the subsequent offence.

(b) In the case of a trial held with the aid of assessors, the Court may, in its discretion, proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction,

AMENDMENT.—This section which deals with the procedure in the case of a trial by a jury or with the aid of assessors when a previous conviction has to be proved, has been recast in order to avoid the inconveniences which may at present arise in cases tried by assessors (whose opinion is not binding on the Judge) and in cases in which a Judge decides to make a reference to the High Court under S. 307. Under the amendment, if a jury delivers a verdict of not guilty on the charge of the subsequent offence for which the accused is primarily being tried, or in any trial held with aid of assessors the Court is given a discretion to proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction.—*Statement of Objects and Reasons.*

SCOPE OF THE SECTION.—This section lays down a special form of trial of the issue of liability to enhanced punishment in consequence of previous conviction, and it is expressly made applicable to trials before the Courts of Session only, and does not apply to trials before a Magistrate, 50 C. 367 at 369. It is not easy for Magistrates to keep their mind entirely free from prejudice. When the records show that the accused has been previously

convicted. But this section insists that in Sessions trials the fact of a previous conviction is rightly to be withheld from the jurors and assessors until the accused has pleaded to the charge or has been found guilty. This shows the importance of complete exclusion of such knowledge in weighing the evidence as to the truth or otherwise of the charge against the accused, S. 54 of the Indian Evidence Act also lays down that a previous conviction is inadmissible in evidence except where evidence of bad character is relevant, 25 Cr. L.J. 618—81 Ind. Cas. 108.

PREVIOUS CONVICTION.—The question of previous conviction is one of fact which ought to be determined by the jury, 21 W.R. (Cr.) 40. When the verdict of jurors or majority of jurors has been delivered, or the opinion of the assessors has been recorded on the charge of the subsequent offence, the accused may be called upon to plead to the charge of previous conviction and evidence on that charge may be adduced now. Also a discretion is given to the Judge to proceed or refrain from proceeding with the trial after the jury or majority of jury have returned a verdict of not guilty on the charge on the subsequent offence. Before making reference under S. 307, *supra*, the Judge may now ask the accused to plead to the previous conviction and take evidence and the procedure suggested in 30 M. 133, is not of much importance now. The High Court instead of remanding the case as it did in 2 Bom. L.R. 336, to record the plea and to pass sentence, may now itself do so as the Judge has now to record the plea of the accused as to the previous conviction and take evidence in support of the same in the exercise of the discretion given to him. In cases tried with the aid of assessors a discretion is given to the Court to proceed or not; with the charge of previous conviction.

311. Notwithstanding anything in the last foregoing section, evidence of the previous conviction may be given at the trial for the subsequent offence, if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act, 1872.

When evidence of previous conviction may be given.

See S. 511, *infra* which provides for special means of proving previous conviction,

J.—List of Jurors for High Court, and summoning jurors for that Court.

312. *The High Court may prescribe the number of persons whose names shall be entered at any one time in the special jurors' list:*

Number of special jurors.

Provided that no definite number of Europeans or of Americans or of Indians shall be so prescribed.

This section has been newly substituted by Act XII of 1923. The proviso restricts the power of the High Court prescribing a definite number of Europeans or Americans or Indians. The High Court is empowered only to prescribe the number of persons whose names shall be entered in the special jurors' list.

313. (1) The Clerk of the Crown shall, before the first day of April in each year, and subject to such rules as the High Court from time to time prescribes, prepare—

Lists of common and special jurors.

- (a) a list of all persons liable to serve as common jurors; and
- (b) a list of persons liable to serve as special jurors only,

(2) Regard shall be had, in the preparation of the latter list, to the property, character, and education of the persons whose names are entered therein.

(3) No person shall be entitled to have his name entered in the special jurors' list merely because he may have been entered in the special jurors' list for a previous year.

(4) The Governor-General in Council or the Local Government in the case of the High Court at Fort William in Bengal, and, in the case of other High Courts, the Local Government, may exempt any salaried officer of Government from serving as a juror.

(5) The Clerk of the Crown shall, subject to such rules as aforesaid, have full discretion to prepare the said list as seems to him to be proper, and there shall be no appeal from, or review of his decision.

Discretion of officer preparing lists.

314. (1) Preliminary lists of persons liable to serve as common jurors and as special jurors, respectively, signed by the Clerk of the Crown, shall be published once in the local official Gazette before the fifteenth day of April next after their preparation.

Publication of lists, preliminary and revised.

(2) Revised lists of persons liable to serve as common jurors and special jurors, respectively, signed as aforesaid, shall be published once in the local official Gazette before the first day of May next after their preparation.

(3) Copies of the said lists shall be affixed to some conspicuous part of the Court-house.

315. (1) Out of the persons named in the revised lists aforesaid, there shall be summoned for each sessions *in the town which is the usual place of sitting of each High Court as many* of those who are liable to serve on special or common juries *respectively as the Clerk of the Crown considers necessary.*

Number of jurors to be summoned.

(2) No person shall be so summoned more than once in six months unless the number cannot be made up without him.

(3) If, during the continuance of any sessions, it appears that the number of persons so summoned is not sufficient, such number as may be necessary of other persons liable to serve as aforesaid shall be summoned for such sessions.

Supplementary summons.

This section provides for summoning jurors for the High Court Sessions in the Presidency Towns.

316. Whenever a High Court has given notice of its intention to hold sittings at any place outside the town *which is the usual place of sitting of such High Court* for the exercise of its original criminal jurisdiction, the Court of Session at such place shall, subject to any direction which may be given by the High Court, summon a sufficient number of jurors from its own list, in the manner hereinafter prescribed for summoning jurors to the Courts of Session.

Summoning jurors outside the place of sitting of High Courts.

This section provides for summoning of jurors when a High Court intends to hold its Sessions in any place outside the Presidency Town. The Court of Sessions at such a place of sitting is to summon a sufficient number of jurors from its own list subject to any direction which the High Court may give.

HIGH COURT HAS GIVEN NOTICE.—See Ss. 335 and 336, *infra*.

IN THE MANNER HEREINAFTER PRESCRIBED.—See S. 326, *infra*.

317. (1) In addition to the person so summoned as jurors, the said Court of Session shall, if it thinks needful, after communication with the Commanding Officer, cause to be summoned such number of commissioned and non-commissioned officers in Her Majesty's Army resident within ten miles of its place of sitting as the Court considers to be necessary to make up the juries required for the trial of persons charged with offences before the High Court as aforesaid.

Military jurors.

(2) All officers so summoned shall be liable to serve on such juries notwithstanding anything contained in this Code; but no such officer shall be summoned whom his Commanding Officer desires to have excused on the ground of urgent military duty or for any other special military reason.

318. Any person summoned under section 315, section 316 or section 317, who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Judge, or fails to attend after an adjournment of the Court after being ordered to attend, shall be deemed guilty of a contempt, and be liable, by order of the Judge, to such fine as he thinks fit; and, in default of payment of such fine, to imprisonment for a term not exceeding six months in the civil jail until the fine is paid:

Failure of jurors to attend.

Provided that the Court may in its discretion remit any fine or imprisonment so imposed.

S. 295 *supra* enacts that if a trial is adjourned, the jurors shall attend at the adjourned sitting and at every subsequent sitting, until the conclusion of the trial. See in this connection S. 332, *infra* which deals with similar cases before the High Court Sessions. See also, 8 W.R. (Cr) 83; 1897 A.W.N. 167; 1899 A.W.N. 13; 6 C.W.N. 107 as to the power of High Court to revise orders passed under this section fining jurors.

"For a term not exceeding six months" these words were added in the Code of 1898.

The proviso was added in the Code of 1898 and gives a wide discretion to the presiding Judge to remit the fine or imprisonment imposed by him.

K.—List of Jurors and Assessors for Court of Session and summoning Jurors and Assessors for that Court.

319. All male persons between the ages of twenty-one and sixty shall, except as next hereinafter mentioned, be liable to serve as jurors or assessors at any trial held within the district in which they reside.

or, if the Local Government, on consideration of local circumstances, has fixed any smaller area in this behalf, within the area so fixed.

320. The following persons are exempt from liability to serve as jurors or assessors, namely:—

- Exemptions.*
- (a) officers in civil employ superior in rank to a District Magistrate;
 - (b) salaried Judges;
 - (c) Commissioners and Collectors of Revenue or Customs;
 - (d) police-officers and persons engaged in the Preventive Service in the Customs Department;
 - (e) persons engaged in the collection of the revenue whom the Collector thinks fit to exempt on the ground of official duty;
 - (f) persons actually officiating as priests or ministers of their respective religions;
 - (g) persons in Her Majesty's Army, except when, by any law in force for the time being, they are specially made liable to serve as jurors or assessors;
 - (h) surgeons and others who openly and constantly practise the medical profession;
 - (i) legal practitioners (as defined by the Legal Practitioners' Act, 1879), in actual practice;
 - (j) persons employed in the Post-Office and Telegraph Departments;
 - (k) persons exempted from personal appearance in Court under the provisions of the Code of Civil Procedure, sections 640 and 641 [Sections 132 and 133 of Act V of 1908];
 - (l) other persons exempted by the Local Government from liability to serve as jurors or assessors.

SCOPE OF THE SECTION.—This section provides exemptions from liability to serve as jurors or assessors. There is a clear distinction between exemption and disqualification. The

persons specified in this section are not doubtfully qualified and capable of serving on the jury. But they are exempted. See S. 278, *supra*, which deals with disqualification to serve on the Jury.

Cl. (b): **SALARIED JUDGES**.—The word "salaried" was newly added in the Code of 1898 to make "Honorary Magistrates" who are "Judges" but not "salaried Judges" liable to serve as jurors or assessors.

Cl. (d): **POLICE OFFICERS**.—This was newly added in the Code of 1898.

Cl. (g).—Persons employed in the Army are generally exempted but when necessity arises, the Court is empowered to summon them as jurors. See Ss. 316, 317 and 326 (4), *infra*.

Cl. (l) was newly added in the Code of 1898. Advocates, Vekils and Attorneys of the High Court are specially exempted in the Presidency of Madras—*Fort St. George Gazette*, 1876, *sup.*, p. 1 and *Ibid.*, 1874, p. 105.

Cl. (k).—See Ss. 132 and 133, Civil Procedure Code, Act V of 1908.

321. (1) The Sessions Judge, and the Collector of the district or such other officer as the Local Government appoints in this behalf, shall prepare and make out in alphabetical order a list of persons liable to serve as jurors or assessors and qualified in the judgment of the Sessions Judge and Collector or other officer as aforesaid to serve as such, and not likely to be successfully objected to under section 278, clauses (b) to (h), both inclusive.

List of jurors and assessors.

(2) The list shall contain the name, place of abode and quality or business of every such person, and, if the person is an European or an American, the list shall mention the race to which he belongs.

This section provides for making a list of jurors or assessors qualified to serve as such. Due consideration ought to be given to the provisions of S. 278, cls. (a) and (b) *supra*, *vis.*, presumed or actual partiality and personal disqualification, such as alienage, etc. In selecting persons, a Sessions Judge should choose persons of independent condition in life and men of judgment and experience, 23 W.R. (Cr.) 33, and persons of very high social position should not be placed in the list of assessors as native sentiment is rightly or wrongly not in favour of such nomination, 1897 A.W.N. 167.

322. Copies of such list shall be stuck up in the office of the Collector or other officer as aforesaid, and in the Court-houses of the District Magistrate and the District Court and extracts therefrom in some conspicuous place in the town or towns in or near which the persons named in the extract reside.

323. To every such copy or extract shall be subjoined a notice stating that objections to the list will be heard and determined by the Sessions Judge and Collector or other officer as aforesaid, at the sessions court-house, and at a time to be mentioned in the notice.

Objections to list.

The section only says that to every such copy or extract shall be subjoined a 'notice' and does not contemplate personal service of notice stating that objections will be heard.

324. (1) For the hearing of such objections the Sessions Judge shall sit with the Collector or other officer as aforesaid, and shall, at the time and place mentioned in the notice, revise the list and hear the objections (if any) of persons interested in the amendment thereof, and shall strike out the name of any person not suitable in their judgment to serve as a juror or as an assessor, or who may establish his right to any exemption from service given by section 320, and insert the name of any person omitted from the list whom they deem qualified for such service.

Revision of list.

(2) In the event of a difference of opinion between the Sessions Judge and the Collector or other officer as aforesaid, the name of the proposed juror or assessor shall be omitted from the list.

(3) A copy of the revised list shall be signed by the Sessions Judge and Collector or other officer as aforesaid and sent to the Court of Session.

(4) Any order of the Sessions Judge and Collector or other officer as aforesaid in preparing and revising the list shall be final.

(5) Any exemption not claimed under this section shall be deemed to be waived until the list is next revised.

(6) The list so prepared and revised shall be again revised once in every year.

(7) The list so revised shall be deemed a new list, and shall be subject to all the rules hereinbefore contained as to the list originally prepared.

325. In the case of any district for which the Local Government has declared that the trial of certain offences shall, if the Judge so direct, be by special jury, the Sessions Judge and the Collector of such district or other officer as aforesaid shall prepare, in addition to the revised list hereinbefore prescribed, a special list containing the names of such jurors as are borne on the revised list and are in the opinion of such Sessions Judge and Collector or other officer as aforesaid, by reason of their possessing superior qualifications in respect of property, character or education, fit persons to serve as special jurors :

Preparation of list of special jurors.

Provided always that the inclusion of the name of any person in such special list shall not involve the removal of his name from the revised list nor relieve him of his liability to serve as an ordinary juror in cases not tried by special jury.

This section enables the preparation of special jury-list out of ordinary jury-list, and empowers the Local Government to direct that the trials for certain offences in particular districts shall, if the Sessions Judge so directs, be by special jury.

326. (1) The Sessions Judge shall ordinarily, seven days at least before the day which he may from time to time fix for holding the sessions, send a letter to the District Magistrate requesting him to summon as many persons named in the said revised list or the said special list as seem to the Sessions Judge to be needed for trials by jury and trials with the aid of assessors at the said sessions, the number to be summoned not being less than double the number required for any such trial *and including where any accused person is an European or an American, as many Europeans or Americans as may be required for the purpose of choosing jurors or assessors for the trial.*

(2) The names of the persons to be summoned shall be drawn by lot in open Court, excluding those who have served within six months unless the number cannot be made up without them; and the names so drawn shall be specified in the said letter.

(3) *Where the accused requires, and is entitled to be tried under the provisions of section 275, there shall be chosen by lot, in the manner prescribed by or under section 276, from the whole number of persons returned the jurors who are to constitute the jury until a jury containing the proper number of Europeans or Europeans and Americans or of Indians, as the case may be, has been obtained :*

Provided that, in any case in which the proper number of Europeans or Americans cannot otherwise be obtained, the Court may, in its discretion for the purpose of constituting the jury, summon any person excluded from the list on the ground of his being exempted under section 320.

(4) *Where, under the proviso to sub-section (3), the Court proposes to summon as a juror any person in His Majesty's Army, the provisions of section 317 shall apply in like manner as they apply for the purpose of the summoning of military jurors for a trial under section 316.*

AMENDMENT.—The italicised words in sub-section (1), sub-sections (3) and (4) were added by Act XII of 1923, *Racial Distinctions Act*. "Seven days" has been substituted for "three days" in the Code of 1898.

OBJECT OF THE SECTION.—The object of this and Ss. 276 and 279, *supra*, is to secure an impartial trial by rendering impossible any intentional selection of jurors to try a particular case, and an accused has a right to claim to be tried by a jury chosen with strict regard to all the safeguards provided by law to secure perfect impartiality, 7 C.W.N. 188. If a Judge is unable to comply with the provisions of this section, he will do well to postpone the trial.

DISTRICT MAGISTRATE TO SUMMON.—The provisions of Chapter VI relating to service of summons apply to summoning jurors and see Sec. V From No. 82 *infra* as to the form of precept to District Magistrate, to summon jurors and assessors. Where a summons to a juror was not served personally but a copy was affixed to the outer door of his house in his absence and he had no knowledge of such service of summons, it was held he could not be fined for non-attendance, 6 C.W.N. 887; 1899 A.W.N. 13. An assessor cannot be held to have lawfully summoned to act as such on a particular day unless the summons issued to him

was for his attendance on that day and no other. What the Legislature has contemplated as the ordinary or normal procedure is that all assessors should be summoned on the first day on which the Sessions commence, however many trials it may propose to hold in the course of that Sessions. This procedure has been found to be unnecessarily burdensome for the persons summoned in view of the length to which the Sessions are apt to run in many districts. The practice commonly followed, *viz.*, to summon four assessors for each date is not objectionable in law, but is far from being obligatory and is not even the normal procedure. 7 Cr. L. Rev. 267 = 17 Cr. L. J. 17 = 32 Ind. Cas. 135. Where a judge had requested the District Magistrate to summon five assessors to attend the Court on a particular day and when the case was taken up he found only one of those persons present and thereafter directed a search in the Court precincts of any person acquainted with English who could be required to act as an assessor and a Nazir of the Court was produced, and he without any objection by the accused acted as an assessor it was held that as the Nazir was not summoned to act as an assessor and as there was nothing to show that he was on the list of assessors and could be summoned the trial was illegal and S. 537 *infra* cannot cure a defect as to the constitution of the Court even though the accused did not object to the course adopted. 11 Cr. L. J. 724 = 8 Ind. Cas. 874 where 15 B. 514; 25 B. 694 at 696; 3 Bom. L. R. 274 are referred to.

SUB-SECTION (3).—This sub-section is new. Before the amendment S. 462, now repealed, dealt with summoning jurors when a mixed jury was claimed. Now under S. 275 Indian British Subjects can also claim like European British subjects a trial by a jury the majority of which is to be Indians in trials before the High Court. This provision is extended to trials in Sessions Court as well by the amendment.

SUB-SECTION (3).—This sub-section is also new. The power of the Court of Session to try European British subjects is now extended and therefore the power is given to summon Military jurors a power which the High Court alone possessed before the amendment. S. 320 (g) exempts generally persons employed in the Army but they can be summoned when necessity arises.

327. The Court of Session may direct jurors or assessors to be summoned at other periods than the period specified in section 326, when the number of trials before the Court renders the attendance of one set of jurors or assessors for a whole session oppressive, or whenever, for other reasons, such direction is found to be necessary.

Power to summon another set of jurors or assessors.

328. Every summons to a juror or assessor shall be in writing, and shall require his attendance as a juror or assessor, as the case may be, at a time and place to be therein specified.

Form and contents of summons.

S. 68 *supra* is the only provision in the Code for service of summons and any other mode adopted for such service, is illegal. The issue of a summons to an assessor to attend the Sessions Court by registered letter is illegal and not authorised by law and the person summoned cannot be held guilty under S. 332, I.P.C., for non-attendance, 1 C.W.N. cxvi. See forms 32 and 33 of Sch. V for summons to juror or assessor.

329. When any person summoned to serve as a juror or assessor is in the service of Government or of a Railway Company, the Court to serve in which he is so summoned may excuse his attendance if it appears on the representation of the head of the office in which he is employed, that he cannot

When Government or Railway servant may be excused.

serve as a juror or assessor, as the case may be, without inconvenience to the public.

Court may excuse attendance of juror or assessor.

330. (1) The Court of Session may, for reasonable cause excuse, any juror or assessor from attendance at any particular session.

Court may relieve special jurors from liability to serve again as jurors for twelve months.

(2) The Court of Session may, if it shall think fit, at the conclusion of any trial by special jury, direct that the jurors who have served on such jury shall not be summoned to serve again as jurors for a period of twelve months.

List of jurors and assessors attending.

331. (1) At each session the said Court shall cause to be made a list of the names of those who have attended as jurors and assessors at such session.

(2) Such list shall be kept with the list of the jurors and assessors as revised under section 324.

(3) A reference shall be made in the margin of the said revised list to each of the names which are mentioned in the list prepared under this section.

332. (1) Any person summoned to attend as a juror or as an assessor who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Court, or fails to attend after an adjournment of the Court, after being ordered to attend, shall be liable by order of the Court of Session to a fine not exceeding one hundred rupees.

Penalty for non-attendance of juror or assessor.

(2) Such fine shall be levied by the District Magistrate by attachment and sale of any moveable property belonging to such juror or assessor within the local limits of the jurisdiction of the Court making the order.

(3) For good cause shown, the Court may remit or reduce any fine so imposed.

(4) In default of recovery of the fine by attachment and sale, such juror or assessor may, by order of the Court of Session, be imprisoned in the civil jail for the term of fifteen days, unless such fine is paid before the end of the said term.

An order under this section passed by a Sessions Judge fining an assessor is not appealable, and the High Court cannot interfere in Revision where there was nothing illegal in the order passed. 8 W.R. (Cr.) 83. See S. 318 *supra* which relates to failure to attend at the Sessions. See also 1899 A.W.N. 13; 1897 A.W.N. 187; 6 C.W.N. 887 as to powers of the High Court to revise orders fining juror or assessor.

SUB-SECTION (3).—An assessor on account of illness failed to attend Court and a medical certificate as to his illness was produced, an hour or two after the order of the Judge fining him for non-attendance. In such a case there is no reason why it should not have been received and favourably considered by the Judge to remit or reduce the fine imposed. 8 W.R. (Cr.) 88.

L.—Special Provisions for High Courts.

333. At any stage of any trial before a High Court under this Code before the return of the verdict, the Advocate-General may, if he thinks fit, inform the Court on behalf of Her Majesty that he will not further prosecute the defendant upon the charge; and thereupon all proceedings on such charge against the defendant shall be stayed, and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs.

SCOPE OF THE SECTION.—This section deals with the power of the Advocate General to stay prosecution by entering what is called a *nolle prosequi*. *Nolle Prosequi* (not willing to prosecute) is an entry on the record of a statement that the prosecutor will not proceed further. The entry when made has not the effect of a judgment on the merits, but puts an end to the indictment on which the prisoner is brought before the Court and prevents the issue of further process therein. It is not equivalent to a pardon or an acquittal, for raising a plea of *autrefois acquit*. The prisoner cannot be proceeded against on the same charges, but the rule does not affect the legality or otherwise of any proceedings taken hereafter by the Crown against him, 82 C. 590. A *nolle prosequi* does not operate as a bar or discharge or acquittal on the merits, but the party remains liable to be re-indicted. The power of the Attorney General in England is not subject to any control by the Courts; but that power does not interfere with the right of the Judge to allow a case to be withdrawn on the application of a private party. *Arch. Cr. Pl. and Pr.*, p. 121. (25th Ed.)

ADVOCATE GENERAL MAY INFORM COURT HE WILL NOT FURTHER PROSECUTE.—For definition of the term "Advocate General," see S. 4 (1) (a) *supra*. At the Criminal Sessions of the Calcutta High Court the trial had commenced before *Rampini, J.*, and evidence was partly recorded when the presiding Judge retired from the case under section 556 *infra* on account of personal interest as being a shareholder in the prosecuting bank but he did not discharge the jury. The Chief Justice purporting to act under clause 13 of the Charter Act appointed *Stevenson, J.*, to try the case and in answer to a question by the Judge the Standing Counsel intimated that he intended to proceed with the trial from where it had been left. An objection was raised on behalf of the accused that *Stevenson, J.*, could not proceed with the trial as *Rampini, J.*, and the jury empanelled before him had still the *assisn* of the case, and the Advocate General entered a *nolle prosequi*, and the Judge discharged the accused observing that that was the way to get rid of the many difficulties arising in the case, 2 C.W.N. 481. For similar instances where the Advocate General exercised his powers under this section, see 7 C.W.N. xxxi; 8 C.W.N. xlviii. A *nolle prosequi* puts an end to the prosecution, but does not bar a second trial, see 41 C. 1072. Where the Judge disagreed with the verdict of the Jury who by a majority of seven to two returned a verdict of "not guilty" the Advocate General under this section entered *nolle prosequi* and the accused was discharged. A discharge under this section will not amount to an acquittal unless the presiding Judge otherwise directs, 41 C. 1072; 29 C. 726. This is important as a discharge does not debar a second trial, see S. 403 *infra*. An order of discharge does not operate as any bar to fresh proceedings being taken before a competent Magistrate upon a complaint or police report or under S. 190 (1) (c) *supra*, whether such a discharge was by a Presidency Magistrate or a Provincial Magistrate or by a Court of Session or by the High Court. Where the Advocate General entered *nolle prosequi* in a case tried in the Calcutta High Court Sessions on objection

being raised that the offence was committed outside the original jurisdiction of the High Court and the accused was discharged, it was held that the order of discharge did not prevent a Provincial Magistrate from starting fresh proceedings. 1 Cr. L. Rev. 164.

334. For the exercise of its original criminal jurisdiction, every High Court shall hold sittings on such days and at such convenient intervals as the Chief Justice of such Court from time to time appoints.

Time of holding sittings.

335. (1) The High Court shall hold its sittings at the place at which it now holds them, or at such other place (if any) as the Governor-General in Council in the case of the High Court at Fort William, or the Local Government in the case of the other High Courts, may direct.

Place of holding sittings.

(2) But it may, from time to time, in the case of the High Court at Fort William with the consent of the Governor-General in Council, and in all other cases with the consent of the Local Government, hold sittings at such other places within the local limits of its appellate jurisdiction as the High Court appoints.

(3) Such officer as the Chief Justice directs shall give notice beforehand in the local official Gazette of all sittings intended to be held for the exercise of the original criminal jurisdiction of the High Court.

Notice of sittings.

See S. 316 *supra* which provides for jurors being summoned in cases contemplated by this section. The Court of Sessions of the place where the sitting is to be held is to summon the jurors from its own list.

336. Omitted by Act XII of 1923, S. 20.

CHAPTER XXIV.

GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS.

337. (1) In the case of any offence triable exclusively by the High Court or Court of Session, or any offence punishable with imprisonment which may extend to ten years, or any offence punishable under section 211 of the Indian Penal Code with imprisonment which may extend to seven years, or any offence under any of the following sections of the Indian Penal Code namely, sections 216A, 369, 401, 435 and 477A, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or any Magistrate of the first class may, at any stage of the investigation or inquiry into, or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances

Tender of pardon to accomplice.

within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof :

Provided that, where the offence is under inquiry or trial, no Magistrate of the first class other than the District Magistrate shall exercise the power hereby conferred unless he is the Magistrate making the inquiry or holding the trial, and, where the offence is under investigation, no such Magistrate shall exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof.

(1A) Every Magistrate who tenders a pardon under sub-section (1) shall record his reasons for so doing, and shall, on application made by the accused, furnish him with a copy of such record :

Provided that the accused shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost.

(2) Every person accepting a tender under this section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any.

(2A) In every case where a person has accepted a tender of pardon and has been examined under sub-section (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court, as the case may be.

(3) Such person, unless he is already on bail, shall be detained in custody until the termination of the trial.

AMENDMENT.—Old sub-section (4) has been split up, first part of it coming in more appropriately at the end of sub-section (1) and the latter part is rendered unnecessary by the addition of the new sub-section (2A). It is now made clear that sub-section (2) applies to the Court of the Magistrate holding the original inquiry. Sub-section (1) has been redrafted with many additions to make the meaning of the section more clear.

OBJECT OF THE SECTION.—The object of the section is, that in cases involving offences of great magnitude liable to be punished with heavy punishments, to prevent the escape of the offenders from punishment. For attaining this object, conditional pardon is tendered to the accomplice for the purpose of obtaining evidence in grave crimes by holding out the hope to him that if he should disclose the truth as a witness at the trial and thus bring the offenders to justice, he will himself go unpunished. Such conditional pardon protects from prosecution the approver who makes a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and the offenders. "If it should ever be laid down as a practical rule in the administration of justice that the testimony of an accomplice should be rejected as incredible, the most mischievous consequences must necessarily ensue because it must not only happen that many heinous crimes and offences will pass unpunished but great encouragement will be given to bad men, by withdrawing from their minds the fear of detection and punishment through the instrumentality of their partners in guilt and thereby universal confidence will be substituted for that distrust of each other which

naturally possesses men engaged in wicked purposes and which operates as one of the most effectual restraints against the commission of those crimes to which the concurrence of several persons is required"—per *Abbot, L.C.J.*, in his charge to Grand Jury in 1820. There is no law that every offender ought to be prosecuted and it is well known that offenders manage to conceal their misdeeds or that evidence to prosecute has often been found to be insufficient. There is nothing to prevent the prosecuting authority from refraining to prosecute any individual and that discretion is inherent in the authority to whom the law has entrusted the power of instituting prosecution. The competency of a person whom an assurance of not prosecuting is given, to be a witness is in no way affected though it may affect his credibility, 26 Cr. L.J. 1487—39 Ind. Cas. 1035. The procedure laid down in this section is an exception to the general rule that the statement of an accused person is not to be used as evidence against a co-accused unless he implicates himself to the same extent and runs the same risk as those jointly accused with him. The tendering of conditional pardon under this section is different from the withdrawal of a charge under S. 494, *infra*. In the latter case, there is a discharge or acquittal of the accused unconditionally, while under this section the tender of pardon is made on condition of his making a full and true disclosure of the whole of the circumstances connected with the offence and, if he fails to do so, the pardon may be forfeited and he can be tried for the same offence. The pardon can be granted only by any of the Magistrates mentioned in this section and for offence, triable exclusively by High Court or Court of Session and punishable under certain sections herein mentioned, 1 Lah. 102; 33 C. 1383. The pardon can be tendered even when the offence is under police inquiry, 3 Lah. 431. The pardon tendered is of no avail unless the Magistrate is competent to tender the same, 20 A. 40. Under this section as amended certain modifications have been introduced and pardon granted by a Magistrate inquiring into a case exclusively triable by a Court of Session with regard to some offences and others not so triable will not invalidate a pardon granted with regard to offences so exclusively triable and once a pardon is granted it extends to all charges and all the accused, 26 Cr. L.J. 1045—37 Ind. Cas. 955. The Local Government has no power to offer a conditional pardon and the evidence of the accused taken on such a conditional pardon is wholly inadmissible, 10 C.W.N. 847. S. 529 (*g*) enacts that if a pardon is tendered by a Magistrate not empowered but who acts erroneously but in good faith his proceedings will not be set aside. The words "*a full and true disclosure . . . under inquiry*" refer to the importance, when a pardon is tendered, for encouraging the approver to give the fullest details so that points may be found in his evidence which may be capable of corroboration, 11 A. 79. When a pardon is tendered and accepted, the fullest faith must be kept on both sides, 12 C.L.R. 226. An accused who has been discharged is a competent witness against the other accused and there is no illegality in the procedure of withdrawing the case against the discharged accused though the more reasonable and proper procedure would be to tender a pardon to him and make him an approver. When an accused is discharged there is no fear of any action under S. 399, *infra*, hanging over his head. For normally he could not be proceeded in connection with the original offence under the ordinary law applicable, 27 Cr. L.J. 807—35 Ind. Cas. 471.

SUB-SECTION (1).—Before the amendment this section applied to cases exclusively triable by Court of Session or the High Court. But now other offences not so exclusively triable are within the scope of this section, 26 Cr. L.J. 1115—38 Ind. Cas. 283. Conditions other than those mentioned in this sub-section are of no avail, *e.g.*, it cannot be stipulated that the accomplice should testify to his having been present at the scene of murder when the offence was committed. The condition can only be of his making a full and true disclosure of the whole of the circumstances within his knowledge and of the person or persons concerned in the commission of the offence, Ratanlal 612. The words "suppose to have been directly or indirectly concerned or privy to the offence" are in accordance with the decision in 6 W. R. (Cr.) 94. See in this connection 16 Cr. L.J. 832—30 Ind. Cas. 456.

SUB-SECTION (1A).—This sub-section was originally the first part of sub-sec. (4), now repealed. The recording of reasons by the Magistrate is not a condition precedent to the tender of pardon and its acceptance by the approver, 13 Cr. L.J. 588—15 Ind. Cas. 1004. The Magistrate is to record his reasons for doing so and he is also bound to furnish a copy of

the same to the accused on his application, In 36 C. 629; 5 Cr. L.J. 142 and 5 C.L.J. 224, it was held that omission to record reasons was only an irregularity.

SUB-SECTION (2).—The validity of a pardon tendered cannot be affected by the fact that a co-accused against whom the approver's evidence was used was ultimately convicted of a minor offence and even if the pardon was invalid it would not prevent the approver being examined in the Sessions Court when he is not committed with the other accused, 27 Cr. L.J. 1103—97 Ind. Cas. 267. This sub-section provides that a person accepting the pardon is to be examined as a witness in the Court of the Magistrate taking cognizance of the offence. That condition is fulfilled when the approver is examined as a witness before the Magistrate. This sub-section does not mean that it is compulsory to examine the approver in the Sessions Court if he has shown by his evidence in the Magistrate's Court that he is an untrustworthy witness. It is contrary to all principles that the Crown should be obliged to examine as a prosecution witness one who has shown himself by his evidence in a previous stage of the case to be untrustworthy, 42 C. 856 at 870; 24 M. 321; 29 A. 24; 33 M. 513; 23 B 675; 13 Cr. L.J. 33—13 Ind. Cas. 273. An accused person who after accepting the conditional pardon shows an intention not to give the evidence which he has led the prosecution to expect, ought not to be put back in the dock without being examined as a witness under this sub-section and then dealt with under S. 339, *infra*. Such a person should, if tried, be tried separately and after the trial of the other accused, 31 M. 272. See also the new proviso to S. 339 (1) which enacts that the trial is to be separate and not with the other accused.

SUB-SECTION (2A).—The word "him" occurring in this sub-section does not refer to the person who has accepted a tender of pardon but refers to the accused. What the provision of law means is, that whenever an approver is examined, the Magistrate has no jurisdiction to proceed with the trial, but must commit the accused to the Court of Session. It does not mean that the approver should be committed for trial along with the accused person. It is the common rule of interpretation that the pronoun refers to the person immediately preceding which herein is the accused and not the approver. The direction is that the approver unless he is already on bail shall be detained in custody until the termination of the trial, a direction for which there is no necessity if he is to be committed along with the accused to the Court of Session, 26 Cr. L.J. 1218—88 Ind. Cas. 736. A Magistrate specially empowered was trying a case against persons including an approver, and mean while the amended Act came into force and the Magistrate had closed the evidence. The Magistrate was therefore bound under S. 347, *infra*, to commit the case to the Court of Session and he should not try the same, 26 Cr. L.J. 549—85 Ind. Cas. 643. This sub-section enacts that if after examination of the approver under sub-section (2) the Magistrate is satisfied that there are grounds for believing that the accused is guilty, he may commit him for trial, but a District Magistrate empowered under S. 30, *supra*, who has not tendered the pardon may himself try the case instead of committing the accused. The prohibition contained in the proviso is in accordance with the ruling in 10 C.W.N. 847. When a Magistrate empowered under S. 30, *supra*, tenders a pardon to one of the accused he must not try the case himself but should commit the accused to the Sessions Court, as this sub-section governs S. 30 *supra*, also, 25 Cr. L.J. 1341—82 Ind. Cas. 373. So also in case of robbery where a Magistrate tendered pardon to an approver and is satisfied a *prima facie* case is made out, he must commit the case to the Court of Session under this sub-section, 26 Cr. L.J. 829—85 Ind. Cas. 477. There is no provision of Indian Statute Law nor is there any principle of natural justice which makes an accomplice as such, an incompetent witness at the trial of another person in respect of an offence. A refusal to admit his evidence merely because the case is outside the purview of this section would be a clear error of law, 21 A.L.J. 42—26 Cr. L.J. 174—76 Ind. Cas. 398.

SUB SECTION (3).—This sub-section contemplates only a case where there has been a commitment made by a Magistrate to the Court of Session or the High Court. It omits to consider the case where the Magistrate himself on his own responsibility discharges the accused person. It seems manifest that the meaning of this sub-section is merely that the

approver shall not be set at large until the judicial proceedings pending against the accused are finished. It is for the purposes of this section immaterial, whether the proceedings are finished by the magisterial order of discharge before trial or by a Judge's order of acquittal after trial. In the case of the magisterial discharge the sub-section would be satisfied if the approver was detained in custody or on bail until the order of discharge was made. When the magisterial order of discharge was made, the provisions of this sub-section were spent and are inapplicable to any proceedings held thereafter, 37 B. 158 at 180. It was held in 30 B. 611 that at the termination of the trial either in the Sessions Court or in the High Court, the approver must be discharged immediately by the Court. It is not for the Court to exercise a discretion in the matter and to say that it will detain him in order that further proceedings be instituted against him. See also 37 C. 835; 46 B. 120.

338. At any time after commitment, but before judgment is passed, the Court to which the commitment is made may, with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender, or order the committing Magistrate or the District Magistrate to tender, a pardon on the same condition to such person.

Power to direct tender of pardon.

ANY TIME AFTER COMMITMENT :—The words "after commitment" denote that a pardon could be tendered not only during the trial but before the trial actually begins.

OF ANY PERSON :—These words will include an accused person before the Sessions Judge, S. 348, *infra*, supports this view and it is difficult to see any other case to which the section would apply, 7 Cr. L. Rev. 64—16 Cr. L.J. 832—30 Ind. Cas. 486.

ANY SUCH OFFENCE.—These words restrict the scope of this section to the offences referred to in the preceding section and a pardon cannot be tendered with regard to offences not specified in S. 337, *supra*. See 10 M.L.J. 147 (F.B.). A pardon may be tendered at any time after commitment and before judgment is passed. There is nothing to preclude a Sessions Judge tendering pardon to a person who has pleaded guilty to the charge and his being examined subsequently as a witness against his co-accused, 7 A. 160. The words "supposed to have been directly or indirectly concerned" occurring in this and S. 337, *supra* must be taken merely as intended to exclude the case of a person who has been actually convicted, 7 A. 160; Ratanlal 750.

339. (1) Where a pardon has been tendered under section 337 or section 338, and *the Public Prosecutor certifies that in his opinion* any person who has accepted such tender 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, or for any other offence of which he appears to have been guilty in connection with the same matter :

Commitment of person to whom pardon has been tendered.

Provided that such person shall not be tried jointly with any of the other accused, and that he shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was made; in which case it shall be for the prosecution to prove that such conditions have not been complied with.

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him *at such trial*.

(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court.

AMENDMENT.—(1) The Public Prosecutor is now to certify that in his opinion the conditions have not been fulfilled by the approver. (2) The approver is to be tried separately from the other accused. (3) The approver may plead that he has complied with the conditions of the tender. (4) It is for the prosecution to prove affirmatively that the conditions of the tender have been broken.

SCOPE OF THE SECTION.—This section is an empowering section addressed to certain Courts of Justice and has nothing to do with the powers of discretion of an Executive such as a Local Government instituting or refraining from instituting any prosecution, 21 A.L.J. 42. This section contemplates a pardon being forfeited under it, but neither in it nor in any other part of the Code is it enacted that the forfeiture of pardon depends on the opinion of the Judge or Magistrate, 30 B. 611, followed in 12 Cr.L.J. 326—10 Ind. Cas. 622. No formal withdrawal and no formal declaration of forfeiture is necessary. 42 C. 756 ; 14 Cr. L.J. 401—20 Ind. Cas. 228. But now the Public Prosecutor is to certify that in his opinion the approver has not complied with the conditions on which the tender of pardon was made. It is a matter of great importance which cannot be too emphatically insisted upon, that the strictest faith should be kept with the accomplice, even though his statement may reveal him to be one of the vilest of criminals and the mere failure of his evidence to procure conviction of his alleged associates in crime is clearly insufficient for withdrawing the pardon tendered and for putting him on his trial, 12 J.L.R. 226 ; 24 M. 321 ; 32 M. 173 ; 7 M.L.T. 121. It is open to an accused person who has accepted pardon in the first instance, to renege from that pardon and say that he does not want the pardon and that he is not willing to give evidence but wishes to be tried so that his character may be cleared. The acceptance of a pardon continues till the person pardoned actually gives evidence and it is only then any question will arise whether he has forfeited his pardon by not giving true evidence. A pardon which though accepted for a time is rejected by himself before he gave evidence cannot be treated as falling under this section and therefore there is no objection to such an accused being tried jointly with the other accused, 43 M.L.J. 613—18 L.W. 606—(1923) M.W.N. 697. It is for the prosecution to prove that the pardon has been forfeited. 32 M. 173 and the accused can plead the pardon in bar of his trial. 24 M. 323 ; 32 M. 173 ; 14 A. 386 ; 23 B. 675 ; 30 B. 611 ; 27 C. 137.

SUB-SECTION (1).—It should be for the prosecution to decide whether the approver should be prosecuted. The Public Prosecutor is to certify that in his opinion the approver is to be prosecuted. The certificate of the Public Prosecutor is a condition precedent to the validity of the trial of the approver ; and in the absence of such a certificate, vitiates the trial of the approver. 26 Cr. L.J. 237—85 Ind. Cas. 61 ; 5 Lah. 379 ; followed in 27 Cr. L.J. 940 (2)—88 Ind. Cas. 396 (2) ; 26 Bom. L.R. 1240—26 Cr. L.J. 439—85 Ind. Cas. 149, but the production of a certificate after commitment before the Sessions Court validates the trial even though the commitment was irregular, 3 Rang. 55. Where a Sessions Judge in a Sessions trial found out the absence of a certificate of the Public Prosecutor for prosecuting an approver as required by this section and adjourned the trial and on the adjourned day the certificate was produced and the accused was tried and convicted, it was held that the proceedings before the Magistrate was merely an inquiry and not a trial within this section and it was open to the Sessions Judge to accept the commitment even though it was irregular and the defect was cured by the production of the certificate in the Sessions Court before the trial. 3 Rang. 55. But in a case where a pardon has been declared forfeited by a Magistrate, this section cannot apply. 26 Cr L.J. 353—82 Ind. Cas. 715. The provision of law contained in this section aims at obtaining true evidence of offences by the grant of pardon to accomplices. It is nowhere laid down that if a witness first makes a full and true

disclosure, he is at liberty to contradict his statement, deny its truth, without fear of forfeiting his pardon. The transaction is one of utmost good faith on both sides, and the approver commits a breach of the condition if he fails to make a full and true disclosure throughout. It is not enough for him to make such a disclosure before the Committing Magistrate if he withdraws it in the Sessions Court, or to make it when examined-in-chief if he withdraws it in cross-examination, 33 M. 514 at 517. Whether the conditions of the pardon have or have not been complied with is a question of fact, 20 A. 329. There must be clear finding as to whether the accused had or had not complied with the conditions of the pardon. When the approver is a person of low intellect who would make what is familiarity known as a "bad witness" and made a very bad statement on the whole he cannot be held to have deliberately broken the conditions upon which he had been granted pardon. 27 Cr. L.J. 786—95 Ind. Cas. 288. The refusal of an approver to give evidence after accepting the conditional pardon amounts to a breach of the condition and his pardon may legally be withdrawn, 29 A. 25. If an approver denied all knowledge of the offence when examined as a witness the proper course is to try him for the offence which he is alleged to have committed with the certificate of the Public Prosecutor that he has not complied with the conditions of his pardon, 26 Cr. L.J. 1396—89 Ind. Cas. 708. The pardon is offered on two conditions (1) that the approver shall make a full and (2) true disclosure of all he knew about the crime. Pardon is forfeited if he fails to comply with these two conditions in two corresponding ways, first by concealing some material evidence, i.e., by not making a full disclosure, or secondly giving false evidence, i.e., by not making a true disclosure. The words "false evidence" must be read subject to the limitation of their contents as defining one of the modes of non-compliance with the conditions of the pardon and not in their literal sense, 30 B. 611 at 620; 32 M. 173. When a pardon was granted by the Magistrate in Calcutta which was never withdrawn, the accused was entitled to be protected from a trial at Benares on charges which related and closely mixed up with those tried at Calcutta. It must be borne in mind in countenancing these pardons to accomplices the law does not invite a cramped and constrained statement by the approver; on the contrary, it requires a thorough and complete disclosure of all the facts within his knowledge bearing upon the offence or offences, as to which he gives evidence and he has given evidence. The question how far it is to protect him and what portions of it should protect him ought not to be treated in a narrow spirit, 11 A. 79 at 86. When at the conclusion of the trial a Sessions Judge directed certain approvers to whom pardons were tendered by the District Magistrate be committed for trial on the original charge it was held that the Sessions Judge had jurisdiction to pass the order and the accomplices could plead their pardon and it was for the trial Court to decide whether the pardon had been forfeited, 1 Lah. 218. Where an accused person had been tendered a pardon for a dacoity committed in E. District and he made a confession admitting his complicity in the dacoity in question and also of another dacoity in another District one month previously, it was held, there was nothing in this section which forbade the confession of the accused made before the Committing Magistrate being put in evidence and no pardon could legally be pleaded in bar of his trial in respect of the offence committed in the district other than the E. District, 48 A. 286 (F.B.) where 11 A. 79 is distinguished.

PROVISO.—This new proviso expressly enacts that the approver is entitled to plead that he has complied with the conditions of the tender made to him. The Court has to try this issue first, 32 M. 173; 42 C. 866; 16 Cr. L.J. 234—27 Ind. Cas. 908, and he should be tried separately and not jointly with the other accused, and it is for the prosecution to prove that the approver had forfeited the pardon by a breach of the conditions, 32 M. 173. No action is to be taken until the conclusion of the trial and the proper course is to detain the approver in custody until the conclusion of the trial of the co-accused and then proceed against him if necessary, 10 Cr. L.J. 418—3 Ind. Cas. 922; 24 M. 321 at 324; 27 C. 137; 23 B. 493.

SUB-SECTION (2).—Under the Code no formal withdrawal of a pardon and no formal declaration that the pardon has been forfeited are required, 32 C. 786 at 788. The words "or the statement made by" person who has accepted the tender of pardon "are wide enough to cover a statement made before the pardoning Magistrate. 25 Cr. L.J. 1385—82 Ind. Cas. 715. The question whether a pardon is forfeited which must be tried and found is one of

fact, 26 B. 575. The statement made by the person who accepted the conditional pardon is not governed by S. 24 of the Evidence Act and can be used as evidence against him, 5 A.L.J. 691.

SUB-SECTION (3).—The object of this sub-section is to safeguard persons whose pardons have been withdrawn against a prosecution for false evidence unless and until the propriety of such prosecution has been sanctioned by the highest criminal tribunal of the Province. Sanction of the High Court is necessary for the prosecution of the approver for perjury. The prosecution for perjury is an exceptional measure and sanction under this section ought not to be granted where material for contradiction has been provided by an unnecessary examination of an approver on oath which should not be encouraged. To grant sanction under such circumstances would be practically to approve the practice of making a special and separate examination of an approver on oath before examining him as a witness in order that in the event of his making contradictory statement in two examinations the materials furnished by his unnecessary examination can be used as a basis for prosecution for perjury. 3 Rang. 224. Sanction ought not to be given merely because there is a contradiction. Such person should be given every possible, *locus penitentiæ*. 11 A.L.J. 954—15 Cr. L.J. 76—22 Ind. Cas. 428. The sanction is to be obtained before the commencement of the prosecution, 10 B. 180. The want of sanction of the High Court cannot be considered as a mere irregularity, but it is an illegality and S. 537, *infra*, does not apply to this section, 27 C. 137. An application to the High Court for sanction must be made in open Court on motion on behalf of the Crown, 32 M. 47; 24 C. 492; and not by a letter of reference, 13 Cr. L.J. 451—15 Ind. Cas. 83; 1893 A.W.N. 13.

Procedure in trial
of person under
S. 339.

339A. (1) *The Court trying under section 339 a person who has accepted a tender of pardon shall—*

(a) *if the Court is a High Court or Court of Session, before the charge is read out and explained to the accused under section 271, sub-section (1), and*

(b) *if the Court 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 conditions on which the tender of the pardon was made.

(2) *If the accused does so plead, the Court shall record the plea and proceed with the trial, and the jury, or the Court with the aid of the assessors, or the Magistrate, as the case may be, shall, before judgment is passed in the case, find whether or not the accused has complied with the conditions of the pardon, and if it is found that he has so complied, the Court shall, notwithstanding anything contained in this Code, pass judgment of acquittal.*

This section is new and prescribes the procedure to be adopted in the trial of an approver on forfeiture of his pardon. The Court is bound to ask the accused whether he pleads his pardon in bar of trial, having complied with the conditions on which the tender of pardon was made and if he so pleads the Court shall record the plea and proceed with the trial. The Court is also bound to record a finding whether or not the accused has complied with the conditions of his pardon and if he has so complied he ought to be acquitted. The section lays down that the Court trying a person who has accepted a tender of pardon, shall, if the Court is a Court of Session before the Charge is read out and explained to the accused, ask him whether he pleads that he has complied with the condition on which the tender of

pardon was made. The terms of the section should be strictly complied with by making it clear to the accused that he could plead the pardon as a bar to his trial and the conviction had without strictly complying with the provisions of this section is illegal and cannot stand, 26 Cr. L. J. 237—84 Ind. Cas. 61.

Right of person against whom proceedings are instituted to be defended and his competency to be a witness.

340. (1) *Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader.*

(2) *Any person against whom proceedings are instituted in any such Court under section 107, or under Chapter X, Chapter XI, Chapter XII or Chapter XXXVI, or under section 552, may offer himself as a witness in such proceedings.*

AMENDMENT.—This section is re-drafted. The expression "person accused" may be read as referring only to persons accused of any offence. Now any person against whom proceedings under the Code are instituted is entitled to be defended by a pleader. It is also enacted that persons against whom proceedings under Chapters X to XII, XXXVI or under S. 552 of the Code are pending do not labour under the ordinary disability of an accused person to be sworn, and they may be examined as witnesses in such proceedings.

SCOPE OF THE SECTION :—The section as amended extends to the case not only of a person accused of an offence but applies to the case of any one against whom proceedings are instituted under the Code. The section not only contemplates that the accused should be defended by a pleader at the time of the proceedings actually going on but also implies that he should have a reasonable opportunity, if in custody, of getting into communication with his pleader for preparing his defence. The same policy is shown in S. 40 of the Prisons Act X of 1894. No undue obstacle should be placed in the way of the accused in custody preparing his defence by preventing his pleader having access to him, 50 B. 741 at 746.

MAY OF RIGHT BE DEFENDED BY A PLEADER.—The word "pleader" used with reference to any proceeding in any Court means a pleader or a *mukhtar* authorized under any law for the time being in force to practise in such Court, and includes; (1) An Advocate, a Vakil and Attorney of the High Court. (2) Any other person appointed with the permission of the Court to act in such proceedings. The privilege under this section is not a question of indulgence but is a matter of right. The object of the Legislature in allowing parties to be represented at trials by a Counsel is that Counsel must be heard before a final opinion is formed by the Court and it is not necessary for the Counsel to ask the Court for an opportunity to be heard, 8 Bom. L.R. 885. An accused person should be given an opportunity to be defended by a pleader and when he asks for time the proper course is to examine the prosecution witnesses in chief and adjourn the case to enable him to engage and instruct a pleader to defend him, 47 A. 147. The Court is bound to exercise a discretion in each case as to permitting or not permitting the appearance of an unauthorized pleader, Weir II, 400. A general rule excluding any particular class from appearing as a pleader is illegal. An order excluding any particular individual in any particular case on grounds stated is within the discretion of a Court, Weir II, 401. Under S. 4 (1) (r) and this section an accused person may appoint a private vakil with the permission of the Court to act for the accused, and if the Magistrate refuses permission, the person has himself no real grievance and the proceedings of the Magistrate could not be revised at his instance. The discretion vested in the Magistrate to accord permission is a judicial discretion to be exercised without being fettered by any general order issued by the District Magistrate prohibiting such permission to an individual generally, 3 Cr. L. Rev. 131. It is the duty of the Court to afford to an accused person every opportunity of making his defence and a Magistrate should not interpose between the accused and his pleader engaged to defend him, 1 Bom. L.R. 856, followed in 50 B. 741 and all facilities should be afforded to an accused person to engage

a pleader, 1 B.H.C.R. (Cr.) 16, and the Court is bound to hear the pleader if one is engaged by the accused, 23 C. 493. It is an elementary principle of law that no order should be made to a man's prejudice without, especially in a criminal case, hearing him, 8 Bom. L.R. 665. If a pleader representing a party does not file a vakalat he shall be required to file a memo of appearance stating that he has been duly instructed to appear for the party and even that is not necessary where the party is present in person along with his pleader in Court, 5 M.L.T. 290-9 Cr. L.J. 305-1 Ind. Cas. 546. The right to be defended by a pleader applies to appeals also. A petition of appeal in a criminal case may be presented to the appellate Court by any person authorized by the appellant to present it, and the Code affords no authority for a contrary view, 1 M. 304. The Criminal Procedure Code unlike the Code of Civil Procedure nowhere prescribes the mode of appointment of pleaders and there is no authority for the proposition that in criminal cases a pleader must file an authority from his client in order to enable him to present an application or appeal on behalf of his client and to act for him in criminal cases. Art. 10 of Sch. II of the Court Fees Act prescribes a fee for vakalatnamas when presented to a criminal Court including a High Court. This merely means that when an authority is filed such authority should be stamped. It does not make it necessary that a vakalatnamah must be filed in Criminal Cases. [1926] Pat. 125-27 Cr. L.J. 665-95 Ind. Cas. 714.

SUB-SECTION (2) makes special reference to Chapter X, Public Nuisances; XI Temporary orders in urgent cases of nuisances or apprehended danger; XII. Disputes to immovable property; XXXVI. Of maintenance of wives and children. S. 552 deals with power to compel restoration of abducted females. Chapter VIII dealing with security for keeping the peace and for good behaviour is already provided for in sub section (1) by the addition "or against whom proceedings are instituted under this Code", see 23 C. 493; 21 A. 107; 27 C. 656; 25 A. 375 which held that a person ordered to give security for good behaviour is an accused person within this section before it was amended. The amendment is in accordance with the decision in 2 C.L.J. 149 where the decisions cited above were distinguished. See 50 C. 985.

341. If the accused, though not insane, cannot be made to understand the proceedings, the Court may proceed with the inquiry or trial; and, in the case of a Court other than a High Court, if such inquiry results in a commitment, or if such trial results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

Procedure where accused does not understand proceedings.

SCOPE OF THE SECTION.—This section deals with the procedure to be followed in cases where the accused does not understand the proceedings against him, i.e., to cases where the accused is deaf and dumb or is unable to understand or make himself understood from ignorance of the language of the place and does not apply to a person of unsound mind, 5 B. 262. "The law in England appears to be that though a great caution and diligence are necessary in the trial of a deaf and dumb person yet if it be shown that if such person had sufficient intelligence to understand the character of his criminal act he is liable to punishment. The decisions in 22 W.R. (Cr.) 33 and Ratanlal 696 are authorities to show that the same is the law and practice in India," 40 B. 598 and 599; 25 Bom. L.R. 43. Every presumption in favour of a deaf mute should be made as his infirmity would prevent him from putting forward any explanation, (1915) M.W.N. 321. Want of speech and hearing do not imply want of capacity in the understanding or memory but only a difficulty in the means of communicating knowledge. There may be mental deficiency at the same time but it is not necessarily involved in the deaf mute condition. The law does not provide for a sane deaf mute who has never been instructed, from being exempted from punishment and he cannot generally grow to a mature age without learning something of his duty towards the

person and property of his neighbours, 12 Cr. L.J. 386—11 Ind. Cas. 250. The procedure laid down in Chapter XXXIV of the Code is to be followed in the case of insane persons. This section is not applicable to a case where the accused could be made to understand the proceedings against him even though he is a deaf mute, and a conviction had without adopting means to communicate with him was held bad, 3 Bom. L.R. 371; 6 M.H.C.R. Appr. vii; Weir II; 402. When the Court is uncertain that the accused has understood the proceedings against him, no sentence ought to be passed, Weir II, 403. Where an accused was charged with theft and could not be made to understand the proceedings, the High Court directed his acquittal as it was impossible to say whether he had a dishonest intention, 4 Bom. L.R. 296. A deaf and dumb person was convicted of an attempt to commit suicide because his brother refused to effect a partition. The accused made certain signs to signify what took place but it did not appear how the questions were put to him at the trial were communicated to him. It was held that the justice of the case would be met by affirming the conviction and sentencing him to one day's simple imprisonment. It was not advisable in such a case to proceed under S. 562, *infra*, as it did not appear that the accused was capable of entering into a bond, 25 Bom. L.R. 43—25 Cr. L.J. 660—31 Ind. Cas. 148. Where a deaf mute charged with murder is unable to understand the proceedings he should be treated as a lunatic and the case should be reported for orders of the Local Government under S. 471, *infra*, 12 Cr. L.J. 813—12 Ind. Cas. 989.

MAY PROCEED WITH THE INQUIRY OR TRIAL.—The Court is to proceed with the inquiry or trial. It cannot make a report in the middle of the proceedings, 4 Bom. L.R. 325. If the inquiry or trial results in a conviction, then it should make a report without itself passing any sentence on the accused, Weir II, 403. Where a Magistrate on convicting an accused under S. 304A, I.P.C., also passed an order under S. 562, *infra*, it was held that he exceeded his jurisdiction, and he should have merely reported the case for the orders of the High Court leaving it to the High Court to pass final orders. The High Court set aside the order of the Magistrate and passed an order on the same terms under this section, 11 M. L.T. 404—13 Cr. L.J. 248—14 Ind. Cas. 600. In a case reported under this section the Legislature seems to have contemplated that there should be a finding by the Magistrate either by what is called a conviction or a commitment that *prima facie*, on the evidence for the prosecution, an offence has been committed and that the accused though not insane cannot be made to understand the proceedings and there have been reported cases in which sentence has been passed by the High Court in the absence of any defence for such reason, 27 C. 368 at 370; 25 Bom. L.R. 43.

HIGH COURT SHALL PASS SUCH ORDER AS IT THINKS FIT.—This section declares that if an inquiry by the Magistrate results, in a commitment to the Sessions Court, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit. The law evidently does not contemplate that the Sessions trial shall necessarily take place. It leaves it to the High Court to determine this. The High Court can in a case triable by a Magistrate pass sentence on what is termed a conviction though, strictly speaking, the accused cannot in such a case make a proper defence. The proceedings are anomalous and in all respects do not represent a complete trial. It is discretionary with the High Court on a commitment made, to order the sessions trial to be held, and the High Court must consider whether any benefit will be likely to result especially to the accused by such a trial, and when as a matter of fact the High Court found no such benefit will result, it was directed that the accused be kept in jail pending the order of the Local Government, 27 C. 368 at 369-370. The usual practice as held by the Lahore High Court is to refer the matter to Local Government, but where the offence is a minor one the Court may sentence the accused to a term of imprisonment or discharge him, 1 Lah. 260; 22 W.R. (Cr.) 35; 25 Bom. L.R. 43. In a case reported under this section to the High Court, it has full discretion to do whatever the circumstances of the case require. It has power to pass a sentence on the Magistrate's finding, 12 Cr. L.J. 388—11 Ind. Cas. 250; 27 C. 368. In a proper case the High Court may even direct the accused to be made over to the custody of his father,

7 N.W.P.H.C.R. 131. The High Court may order a retrial if it is found that the accused can be made to understand the proceedings, 4 Bom. L.R. 849. The High Court may acquit the accused if it is found that it was impossible to say that the accused knew the nature of his act or that he acted with any dishonest intent, 4 Bom. L.R. 298. The High Court may pass an order under S. 562, *infra*, releasing the accused on probation of good conduct as it did in the case reported in 11 M.L.T. 404 or now release on mere admonition. The Court being of opinion that an accused person owing to his infirmity, *vis.*, dumbness was unable to make an honest living and finding it to be useless either to discharge him with an admonition or sentence him for a period, directed, remarking that the case was not a fit one for special treatment in a home for incurables or by some organisation like the Salvation Army, that the accused be detained during the pleasure of Government in such place as they direct, 1 Cr. L. Rev. 318.

342. (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused.

SCOPE AND OBJECT OF THE SECTION.—The object of the section is to enable the accused to explain each and every circumstance appearing in evidence against him. A judge or Magistrate should note every point which he thinks he will have to put into the scale against the accused and then question him on each point. Otherwise it is impossible for the accused to know what is in the Court's mind. Several points may be made by the prosecution, some of these the Court considers good, others are regarded as practically worthless, but the accused is not afforded any reasonable opportunity of clearing up the case by such a question as, "what have you to say, regarding the statement of the complainant's witnesses?" The specific point or points which weigh against him must be mentioned; for, if this is not done he cannot reasonably be expected to be able to explain it or them, 1 Rang. 889. The main object being to ensure that the Court having heard one side, *i.e.*, the prosecution should proceed to hear the other side also. For this purpose the Court must interrogate the prisoner and call upon him to explain if he can the circumstances appearing in evidence against him. The right of interrogation is restricted, and there must be nothing in the nature of cross-examination. The prisoner is thus protected against inquisitorial questions and to make this protection absolute it is laid down that he cannot be compelled to answer or to give true answers and failure to answer or give true answers will not render him liable. There is no possible connection between S. 73, Indian Evidence Act and this section since the taking of finger impressions is an entirely different matter

from putting such questions. This section does not prohibit a direction to him to make finger impression any more than it prohibits a direction to him to face a witness in order that he may be identified, 1 Rang. 759 (F. B.); 50 C. 985 at 991. The object of the Legislature in enacting this section is quite clear and the provision of the statute must be strictly enforced and the question of prejudices ought not to come in. S. 537, *infra*, was certainly not inserted in the Code for being invoked on any and every occasion as a shield against irregularity perpetrated by a subordinate Criminal Court; the only way to secure proper observance of the law by subordinate Courts is for the High Court to interfere whenever any departure comes to its notice. So far as this section is concerned the matter is one of paramount importance and non-compliance with it cannot be passed over on the ground of technicality, 29 C.W.N. exvlii; 52 C. 522. What is necessary under this section is that accused should be brought face to face solemnly with an opportunity given to him to make a statement from his place in the dock so that the Court may have the advantage of hearing his defence, if he is willing to make one with his own lips, but not to cross-examine the accused, 28 Cr. L.J. 1510-99 Ind. Cas. 295. The object of the section is to give opportunity to the accused if he so desires to tender any explanation he likes of his part in the case that is presented against him. There is no provision in the Code for the accused being warned of the consequences of the statement he makes. The main consequence of course would be that the statement he makes must be given in evidence against him. It would be a salutary amendment of the Indian law, if it were not compulsory to put in evidence such a statement. If there were any danger of prosecutors unfairly keeping back a statement that help the accused, the judge is there to insist on its being put in. It is extremely desirable that some such form of caution as is prescribed in 11 and 12 Vict. Ch. 42, S. 18 should be introduced into the Code, 23 L.W. 381-27 Cr. L.J. 311-92 Ind. Cas. 695. The examination contemplated by this section is only after the commencement of any inquiry or trial. There is no justification for an examination of the accused before commencing an inquiry or trial and such examination is illegal, 2 C.W.N. 702 at 715. Proceedings under Ch. VIII are only inquiries and not trials and the person proceeded against under that Chapter is not an accused person and so the provisions of this section as to examination of accused in an inquiry under S. 117, *supra* cannot apply. 50 C. 986. In a summons-case, at the close of the evidence for all prosecution, the Court may, if it thinks fit, examine the accused (S. 245). In a warrant-case after all the evidence for the prosecution has been taken, the Court may make such examination, if any, as it thinks necessary (S. 253). In inquiries into cases triable by the Court of Session or High Court under S. 209, the accused may, if necessary, be examined for the purpose of enabling him to explain any circumstances appearing in evidence against him and in trials before the Sessions Court and High Court, the examination of the accused before the committing Magistrate shall be read as evidence (S. 287), and under S. 299 the Court may examine the accused. This section only gives a Magistrate the right to question the accused for the purpose of enabling him to explain any circumstances appearing in evidence against him. Where no evidence has been given implicating the accused the Magistrate has no right under the statute to put questions to the accused to invite him to make a statement. If a statement is made by the accused in such circumstances, it is not admissible in evidence against the accused on his subsequent trial, 39 M. 770. Under this section the accused has the right to refuse to say anything if he chooses, but the Court cannot but examine the accused even in a summary trial when the case which was being inquired into is a warrant-case, 41 C. 743 at 745. This section is applicable to a Special Bench constituted under Act XIV of 1908 and is competent to examine the accused under this section, 21 C.L.J. 396. The Court's power to examine the accused is restricted, but the Court cannot refuse to allow the accused at any time to make a statement, 10 C.L.R. 84. The practice of putting a written statement by the accused and refusing to answer questions put is not warranted by law, 19 C.W.N. 1043; see 50 C. 518. In a warrant-case the accused is permitted by law to file a written statement. S. 256 (2) provides that if the accused files a written statement it shall be filed with the record. The time of taking a written statement synchronises with the recording of the plea of the accused. After that is done witnesses already examined are re-called for cross-examination if the accused so desires and then the remaining witnesses for the prosecution all examined, cross-examined and re-examined. At

this stage the accused is called on to enter on his defence and produce his evidence. It is exactly at this stage the Court is bound to examine him under this section generally. It is difficult to imagine how the filing of a written statement can relieve a Court from performing its duty which under the law it is to do at an altogether different stage of the trial, *vis.*, after the trial has proceeded much further and the Court is in possession of the complete evidence of the prosecution, 29 C.W.N. cxviii. There is very great difference between a written statement presumably prepared and almost certainly revised by the defence pleader and a statement by the accused himself, 50 C. 518. In India the accused is not allowed to give evidence as a witness on his own behalf and so this section is of cardinal importance. There is all the difference in the world between a written statement presumably prepared by the lawyers appearing for the defence and a statement made by the accused himself so that the Magistrate can observe his demeanour and draw his conclusions as to the value of the statement. It often happens that a prisoner is tried in a language which he cannot follow and for that reason as well as other equally grave reasons the intention of the statute is that at a certain stage of the case, the Court itself shall put aside all counsel, all pleaders, all witnesses all representatives, and shall call upon an individual accused within the authority of the Court's own voice to take advantage of the opportunity which then arises to state in his own way what he may be desirous of stating, 50 C. 581 at 522; 52 C. 522. Where a case is remanded for additional evidence to be taken, it is not necessary to examine the accused under this section after examining the witnesses on remand, 4 Pat. 488; 26 Cr. L.J. 1288-89 Ind. Cas. 182; 3 Rang. 139; 26 Cr. L.J. 927-86 Ind. Cas. 991; 26 Cr. L.J. 1510-90 Ind. Cas. 294; 27 Cr. L.J.; 87-91 Ind. Cas. 391; 27 Cr. L.J. 181-91 Ind. Cas. 997. An accused person should not be examined under the section before any evidence for the prosecution has been recorded. For in that case there is no circumstance appearing in evidence which the accused can be called upon to explain, 6 Lah. 183. When the accused says he will file a written statement it is the duty of the Magistrate to take the written statement as an answer to his questions, *i.e.* the accused does not answer by word of mouth but prefers to put in a written statement, 48 M. 439 at 470 (F.B.). The practice of filing written statements on behalf of accused persons is highly improper, 20 C.W.N. 128-17 Cr. L.J. 9-32 Ind. Cas. 137. A statement made by the accused's pleader on his behalf is no sufficient compliance with law. The accused must have an opportunity of making a statement direct to the Court, 29 C.W.N. 939-26 Cr. L.J. 1032-87 Ind. Cas. 920. A promise by the accused to file a written statement, made at the time of the plea, in no way absolves the Court from the duty of examining the accused at a later stage as required by this section. The intention of the law is that at a certain stage of the case the Court itself shall call upon the accused to state in his own way anything he desires to say, 50 C. 518, but see 1926 Pat. 112. where it was held that the filing of written statement by an accused relieved the Magistrate from the necessity of examining the accused orally with reference to the matters elicited in cross-examination and re-examination. The word "examined in this section includes cross-examination and re-examination and the omission to examine the accused after cross-examination and re-examination of all the prosecution witnesses vitiates the trial and conviction, 51 C. 924; 49 C. 1075; 27 Cr. L.J. 336-92 Ind. Cas. 782; 50 C. 939; 51 C. 983; 26 Cr. L.J. 690-86 Ind. Cas. 86; 4 Rang. 261. See 4 Pat. 488; 26 Cr. L.J. 932-86 Ind. Cas. 986; 8 Pat. L.J. 147 and 644; 50 C. 518; 27 Cr. L.J. 719-84 Ind. Cas. 911; 27 Cr. L.J. 727-95 Ind. Cas. 58. 50 C. 985; 52 C. 822; 29 C.W.N. cxviii; 38 C.L.J. 175; 39 C.L.J. 31; 14 L.W. 416; 1924 Pat. 198; 3 Pat. L.J. 430; 26 Bcm. L.R. 109; 26 Cr. L.J. 15-83 Ind. Cas. 498; 25 Cr. L.J. 716 (2)-85 Ind. Cas. 159 (2); 26 Cr. L.J. 760-86 Ind. Cas. 348; 26 Cr. L.J. 927-86 Ind. Cas. 991; 26 Cr. L.J. 1510-90 Ind. Cas. 294; 3 Rang. 139. The obligation to ask the accused whether he wishes the prosecution witnesses to be ressumoned and further cross-examined under S. 256, *supra* is distinct from the obligation imposed by this section to examine the accused, 26 Cr. L.J. 690-86 Ind. Cas. 70. Cross-examination of the accused by putting questions to him to incriminate himself is a thing wholly unknown to law, 17 C.W.N. 354; 2 Lah. 129; 4 Lah. 55; 27 M. 238; 5 M.L.T. 216-11 Cr. L.J. 193-4 Ind. Cas. 4128; 15 Cr. L.J. 474-24 Ind. Cas. 562; S. 537 cannot cure an omission to comply with the express provision of law contained in this and S. 360, *infra*, 29 C.W.N. cxviii; 52 C. 522; 38 C.L.J. 281-28 C.W.N. 119;

see 4 Patna 488 where it was held that the test is whether the accused has been prejudiced by absence of judicial questions and whether S. 537 cures the defect. Omission to examine an accused person under this section is cured by S. 537, *infra* when the accused has not been prejudiced thereby, 27 Cr. L.J. 882-88 Ind. Cas. 932.

SUB-SECTION (1).—The examination is for the purpose of enabling the accused to explain the circumstances appearing against him and not to supplement the case for the prosecution and to show that he is guilty, 10 M. 295; 12 W. 431; 29 A. 685; 10 Cr. L.J. 509-4 Ind. Cas. 180. The law allows the Court and not the complainant to put the questions to the accused and such questions ought not to be put by the Court to convict the accused out of his own mouth, 10 M. 121. The object of the section is not to fill up gaps in the prosecution evidence but to enable the accused to offer any explanation, 3 Lah. 55; 27 M. 238; 26 C. 49; 27 Cr. L.J. 88-91 Ind. Cas. 252; 39 M. 770; 28 C. 689; 6 Pat. L.J. 241. Where a *prima facie* case is made out, an examination of the accused is imperative, 10 Bom. L.R. 201; 9 Bom. L.R. 356; 17 Bom. L.R. 892-16 Cr. L.J. 755-31 Ind. Cas. 335; Weir JJ, 405. The questions put must be confined strictly for the purpose of enabling the accused to explain circumstances appearing in evidence against him, 30 A. 650; 5 A. 253. Questions ought not to be put to elicit information in regard to statements made by a witness, 7 C.W. 345 or to know the nature of his defence, 14 A. 242. This section will not enable a Court to question the accused about his previous convictions, 28 C. 639; 28 B. 129. The proper method is to draw the attention of the accused to specific matters which appear in evidence against him and ask him to explain them; merely questioning the accused generally whether they had anything to say or anything to add to what they said before the committing Magistrate is not enough, 26 Cr. L.J. 572-85 Ind. Cas. 716. Under this section it is obligatory on the Magistrate to question the accused generally on the case after the close of the prosecution, *i.e.*, when all the prosecution witnesses have been examined-in-chief, cross-examined and re-examined although the accused has stated that he intends to file a written statement and he had done so. The examination of the accused after the charge and examination-in-chief of only some of the prosecution witnesses is not a compliance with law and examination after cross-examination of only some of such witnesses is not a compliance with law and the trial is bad even though the accused is not prejudiced on the merits. Where a Magistrate has after such examination transferred the case for trial to another Magistrate who completes the cross-examination of the remaining prosecution witnesses it is incumbent on the latter Magistrate to examine the accused again generally on the case and the omission to do so renders the trial bad in law, 50 C. 223 followed in 50 C. 318. Again in 50 C. 308 it was held that the examination of the accused, only after the examination-in-chief of the prosecution witnesses and before the close of their cross-examination and re-examination is not a sufficient compliance with law and the conviction was set aside. See also 50 B. 42 and 27 C.W.N. 28. The Madras High Court in 45 M. 820 took the same view, that examination after further cross-examination was necessary and the omission was an illegality not cured by S. 537 *infra* but that decision was *overruled* by a later Full Bench of five Judges in 45 M. 419. There it was held the examination of the accused is mandatory and failure to do so vitiates the trial, but in a warrant-case the accused after examination-in-chief of the prosecution witnesses did not avail himself of the opportunity to cross-examine, the accused was then questioned generally on the case and he did file a written statement and after framing of charge, the accused cross-examined the prosecution witnesses under S. 256, *supra* on a later date and the witnesses were re-examined and accused adduced his defence evidence, but the accused was not further questioned generally on the case after cross-examination and re-examination of the prosecution witnesses, there was sufficient compliance with the provisions of this section and the conviction was legal. Questioning the accused has to take place after the prosecution witnesses have been examined and before the accused is called on for his defence, "After the prosecution witnesses have been examined" means when the prosecution has finished calling evidence. Generally speaking, in most cases, the examination will include cross-examination and re-examination of prosecution witnesses if there be any. In Sessions cases this will always be the case, but the position is different in proceedings before Magistrates. In warrant-cases the prosecution witnesses are to be called and can then be cross-examined on behalf of the

25 Cr. L.J. 713=81 Ind. Cas. 201, 45 A, 124 followed in 27 Cr. L.J. 405=93 Ind. Cas. 69 but accused and, if necessary, re-examined. The prosecution witnesses called at this stage are generally the whole prosecution evidence and the prosecution case is closed. The Magistrate may then either dismiss the case on the ground that no case is made out, or after questioning the accused generally to enable him to explain any circumstances appearing against him from the evidence, formulate a charge under S. 254. The charge is then read over and explained to the accused under S. 255 and he is asked whether he is not guilty or has any defence to make. It may be that accused is not going to ask the prosecution witnesses to be recalled for cross-examination under S. 266 but proposes to call at once his evidence, or, it may be, that he is not going to call any, but to rely on his address to the Court. In either event he would have been called on for his defence and by the words of the statute, the questioning has to be after the re-examination of the prosecution evidence and before he is called on for the defence. Although under S. 256 he has not availed himself of the first opportunity of cross-examining, he can ask the witnesses to be recalled for that purpose. That does not make that cross-examination part of the examination of the prosecution witnesses within the meaning of S. 342 nor does re-examination generally amount to giving fresh evidence. If new and material matter in support of the prosecution case is elicited in cross-examination or in the re-examination, it is desirable that the accused should again be questioned on the case and asked generally to explain the circumstances, and indeed if fresh evidence on material matters in support of the prosecution case is elicited in re-examination it would probably be obligatory on the Court to question the accused on that. It is open to the prosecution to call fresh evidence after the formulation of the charge and if that is done, on the termination of that evidence, the accused must be questioned generally under S. 342 after this further examination of prosecution witnesses, 46 M. 449 at 456-487 (F.B.). An accused person should be examined after all the prosecution witnesses were examined and this is imperative even in a case where he has been examined at first. 50 B. 42. Under this section it is left to the discretion of the court after examining the accused generally on the case, whether specific questions on particular points in the evidence should be put to him, 26 Bom. L.R. 109=25 Cr. L.J. 1127=81 Ind. Cas. 981. The accused in a Sessions trial should be examined carefully by the Sessions Judge himself even though the committing Magistrate has done so with great care. It makes a considerable difference to listeners like the jury whether a statement is read over by the interpreter of the court or whether the accused is carefully examined by Sessions Judge in the presence of the jury and his answer and demeanour noted. Such examination will fully impress on the mind of the jury the defence of the accused and its hollowness when untenable, 26 Cr. L.J. 1578=90 Ind. Cas. 536; 9 Bom. L.R. 730=6 Cr. L.J. 741; 9 Bom. L.R. 356.

The *Madras High Court* has also held in another Full Bench in 46 M. 758 that the provisions of this section do not apply to summons-cases, *dissenting* from the view taken by the Bombay High Court in 46 B. 441; 45 B. 672. This view is also opposed to that taken by the *Patna and Allahabad High Courts* in 6 Pat. L.J. 174 and 27 Cr. L.J. 405=93 Ind. Cas. 69 respectively where it was held that the words "if any" occurring in S. 245, *supra* do not exclude the operation of this section; 26 Cr. L.J. 1884=90 Ind. Cas. 433. See 27 Cr. L.J. 832=94 Ind. Cas. 408 following 46 M. 758. The prisoner in summons-cases does not enter on his defence as in warrant-cases, and Chapter XX provides a complete procedure for the hearing of summons-cases, but in summons-cases there is no objection to a Magistrate questioning the accused generally to enable him to explain circumstances appearing in evidence against him, and when unrepresented, and in complicated cases it is a desirable course, but it is not obligatory. So also in summary trials in summons-cases under Chapter XXII, 46 M. 766 (F.B.). The *Madras High Court* has also held that failure to examine the accused a second time when the accused had filed an elaborate written statement will not vitiate the conviction. See 45 A. 124; 80 C. 223; 27 C.W.N. 389; 4 Lah. 61 and 65; 23 Cr. L.J. 697; 49 C. 1075; 23 Cr. L.J. 311=72 Ind. Cas. 71; 27 Cr. L.J. 405=93 Ind. Cas. 69.

SUB-SECTION (2).—This sub-section guarantees perfect immunity to the accused. Neither in the language of the section nor on principle is there any valid reason for extending this immunity to a statement made otherwise than in answer to questions put to him to explain any circumstances appearing in the evidence against him by the Court. There is no

law which confers upon an accused person immunity from prosecution in respect of a false affidavit in support of an application for transfer which can be made the subject of a charge for perjury. 6 Lah. 34 following 3 Lah. 46 dissenting from 28 A. 331, 19 A. 200. But the consistent view has been taken by other High Courts that an accused person cannot swear to an affidavit in support of such application. See notes under S. 526 (4), Statements of a defamatory nature made by an accused person in the course of his statement which he was asked to make is privileged, 5 M.L.T. 255. See 36 M. 216 (F.B.). The accused is not bound to answer. He has the right to refuse to answer the questions put to him, 41 C. 743 at 745. By his refusal to answer or by answering the questions falsely he does not render himself liable to any punishment, but the Court and the jury (if any) may draw such inference from such a refusal to answer, as it thinks just. See S. 114, Indian Evidence Act, Illustration (h). But this section does not protect the accused when he goes out of the way, and makes to the Court which is trying him a false charge against other persons. 23 Cr. L.J. 1194—82 Ind. Cas. 56. See also the Full Bench decision in 49 M. 723 which held against absolute privilege in Criminal Prosecutions.

SUB-SECTION (3).—The answers given by the accused may be taken into consideration at the trial and proper inference may be drawn therefrom and even in a subsequent trial for any other offence, they may still be used as evidence for or against the accused. From the answers given by the accused under this section explaining the evidence, all proper inferences may be drawn by the Court, 6 Pat. L.J. 241 at 243. The Code itself says in this subsection that the statement may be taken into consideration, a phrase also used in S. 80, Ind. Ev. Act with regard to confession of a co-accused and various decisions have held that the Court may take the confession into consideration to determine whether the issue of guilt is proved or not; to that extent it becomes practically on the same footing as other evidence although technically it is not evidence in the case according to the definition of the Ind. Ev. Act. Inference of guilt against the accused from his own conduct and his explanation to the same could be taken into consideration to decide the question of accused's guilt or otherwise. 49 B. 873 at 889-90. The accused's statement may be taken into consideration and shall be put in evidence for or against him. The expression "may be taken into consideration" means that the statement of the accused is not to have the force of sworn testimony and conviction based solely on it will be bad, (1900) A.W.N. 169. If in an examination by the committing Magistrate some objectionable questions are asked such questions and answers thereto should be omitted and not the whole statement. 9 C.L.J. 55—10 Cr. L.J. 325—31 Ind. Cas. 525.

SUB-SECTION (4).—The 'accused' herein means the accused under trial and under examination of the court, 3 Rang. 11. No oath can be administered to the accused when examined under this section, 25 C. 413; 10 C.W.N. 932; 12 M. 163; 14 B. 260. See S. 340 (2) newly added which permits a person against whom proceedings are instituted under Chapters X, XI, XII and XXXVI and S. 552 of the Code being examined on oath as witness, Oath can be administered to a person accused with others not jointly tried, 20 A. 426; 23 B. 213. None of the parties to a proceeding under S. 146, *supra*, can be called accused persons, and therefore the provisions of this section do not prevent their examination on oath. 26 Cr. L.J. 70—83 Ind. Cas. 630.

PROCEDURE WHEN PROVISIONS OF THE SECTION ARE NOT COMPLIED WITH:—When it is found that the provisions of this section have not been complied with the proper course for the appellate court to follow is, to set aside the conviction and remit the case to the trial Court in order to comply with its provisions. 27 C.W.N. 28—26 Cr. L.J. 524—77 Ind. Cas. 986; 26 Cr. L.J. 119—81 Ind. Cas. 976.

343. Except as provided in sections 337 and 338, no influence, by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge.

No influence to be used to induce disclosures.

EXCEPT AS PROVIDED BY SECTIONS 337 and 338.—This section provides that except by way of pardon, no influence by means of any promise or threat or otherwise shall be used to an accused person. This section is not applicable to a case in which the inducement is offered to a person, not as an accused but as a witness. There are no words in this section to show that the prohibition contemplated by this section refers to the Court and not to any other person, and that an accused person within the meaning of this section is the accused under examination and trial, 18 Bom. L.R. 266 at 281. The provisions of this section are not applicable to a person who is not an accused person but who has been discharged. The accused person referred to in this section is the same accused person as specified in S. 342, *supra*. 27 Cr. L.J. 807=95 Ind. Cas. 471 where 18 Bom. L.R. 266=17 Cr. L.J. 256=24 Ind. Cas. 276 is followed.

344. (1) If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing stating the reasons therefor, from time to time, 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 ;

Power to postpone or adjourn proceedings.

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

Remand.

(2) Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate.

Explanation.—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.

Reasonable cause for remand.

SCOPE OF THE SECTION.—This section occurs in Chapter XIV of the Code which deals with general provisions as to inquiries and trials and is applicable to cases even before the issue of process under S. 204, *supra*, and the Magistrate is entitled under this section, if there be a reasonable cause for doing so to postpone any inquiry or trial, and to postpone the issue of process under S. 204, *supra*, S. 209, *supra*, deals with inquiries after a Magistrate has taken cognizance of an offence on complaint and before he dismisses under S. 203, *supra*, or issues process under S. 204 and there is nothing in the law which prevents a Magistrate from postponing issue of process under S. 204 if there is reasonable cause for so doing, if the case be a warrant case. The power given to a Court to postpone the hearing is to be exercised when there is any reasonable cause for so doing and it is a matter of discretion and if the Magistrate does not exercise his discretion judicially in postponing the case, the High Court will interfere and set aside the order. But if the discretion is exercised in a sound and judicial manner, the High Court should not be interfering with the discretion. It is the policy of the law that Courts, should proceed to inquire into and try the cases as soon as they take cognizance of a complaint, and it is only when reasonable grounds exist for postponing the inquiry or trial, they should do so, as there is no provision of law preventing such postponement. 26 Cr. L.J. 1179=88 Ind. Cas. 603 where 28 C.W.N. 487 is referred to. This section

which relates to inquiries or trials has nothing to do with police investigations. Public policy and public safety demand that every criminal trial should be conducted as expeditiously as possible. The adjournment must be to a day fixed and only in exceptional cases criminal trials are to be adjourned *sine die*, e.g., on account of prevalence of plague in the locality and such similar causes. Once a Magistrate has taken cognizance of a case his powers of postponement and adjournment are governed by this section. 26 C.W.N. 487 and 490—26 Cr. L.J. 63—83 Ind. Cas. 628. It is highly undesirable that the same dispute should be allowed to be fought out both in the criminal and civil Courts simultaneously and under these sections the criminal proceedings may be stayed during the disposal of the civil disputes. 23 A.L.J. 955—26 Cr. L.J. 1485—89 Ind. Cas. 1088; 27 Cr. L.J. 1114—97 Ind. Cas. 428. This section contemplates a remand to jail and not to police custody contemplated by S. 167, *supra*. 23 B. 32 at 34. Under this section a Magistrate has jurisdiction to postpone *sine die* proceedings under S. 145, *supra*, but he must assign sufficient reasons for the same, 13 C.W.N. 801 at 803. This section is applicable where a Judge desires to stay the trial in a case pending an appeal in a connected case. The Public Prosecutor may, under S. 494, withdraw with the permission of the Court from the prosecution, 6 M.L.T. 80—2 Ind. Cas. 128. The intention of the Code is that a trial before a Court of Session should proceed and be dealt with continuously and adjournments when they become necessary should be granted only on strongest possible grounds and for shortest possible period, 35 A. 63.

ANY OTHER REASONABLE CAUSE.—It is impossible to lay down rules for the conduct of the Court. It must be left to the Court to decide in each case whether consistently with the rights of the parties and also with the interest of justice it would be proper to grant an adjournment when the liberty of the subject is at stake. Every precaution should be taken to see that no unfair means is resorted to by the parties to get adjournments for purposes which may not be justifiable in law. A trial once opened should be proceeded with throughout the day, and as far as possible, from day to day until completed. Piecemeal method of dealing with cases necessitates the preparation of unnecessary voluminous records by giving to parties and witnesses opportunity for consultation and for concoction and fabrication of evidence. The system must necessarily result in much waste of public time, entailing upon the parties intolerable inconveniences, loss of time and expense. 19 C.W.N. 373 at 382. Absence of a witness is specially mentioned in this section as a reason for postponement of the trial. A trial held without giving the accused a reasonable opportunity to adduce evidence is bad, 19 M. 375; 5 M.H.C.R. Appx. 27; 11 W.R. (Cr.) 15. The power conferred by this section is to be exercised only in cases which come really within the terms of this section and not arbitrarily. The Magistrate being busy with the executive work in the interior of the district is not a "reasonable cause," 9 B.L.R. 354. Whether there are reasonable grounds or not is a question which must be decided judicially, that is, there should be some tangible evidence on which the Court might come to the conclusion that, if unrebutted, the accused might be convicted, 36 C. 174 at 178. An important ceremony in which the party is obliged to take part, or the death of a nearest relation, may justify an adjournment. So also the fact that the accused's counsel had to fulfil a longstanding engagement in a criminal case at another place and the Magistrate will not be justified in taking the extreme step of deciding the case without hearing the defence about such an engagement. 12 Cr. L.J. 474. The explanation to this section shows what is a reasonable cause for a remand. Pendency of a civil litigation with regard to the same subject-matter may be a reasonable cause for a postponement of the inquiry or trial within this section, Weir II, 418; 1 M.H.C.R. 68; 32 Ind. Cas. 135; 27 Cr. L.J. 1114—97 Ind. Cas. 428. Where a charge in a criminal case is the defence in a civil suit it is better that criminal proceedings should be adjourned and stayed provided there is a probability of a speedy termination of the Civil suit. 15 Cr. L.J. 568—24 Ind. Cas. 976; See also 15 Cr. L.J. 488—24 Ind. Cas. 576; 24 Ind. Cas. 976. No hard and fast rule can be laid down that a criminal trial should of necessity be stayed simply because a civil suit has been instituted between the parties in which some or all the matters in issue would have to be determined until the civil litigation is finally decided. 13 C.W.N. 398—11 Cr.L.J. 4—4 Ind. Cas. 468 where 34 C. 838 is referred to Criminal Courts have no authority to order an accused person to pay the cost of an adjournment consequent on his failure to appear on the date fixed for hearing of the complaint against him, 29 A.L.J. 280; where an adjournment was granted to suit the convenience of the police

who were conducting the prosecution, a complainant cannot be ordered to pay costs of the accused, 25 Bom. L.R. 380. Even when the complainant has a reasonable cause, it is discretionary with the Court to postpone the hearing; when the Magistrate finds that the complainant was wasting the time and protracting the trial unnecessarily and therefore refuses to adjourn the case for examining further prosecution witnesses adjournment was rightly refused. 28 Cr. L.J. 958=87 Ind. Cas. 110.

COURT MAY IF IT THINKS FIT.—The words "*if it thinks fit*" have been added in the Code of 1898 and this gives the Court a wide discretion to postpone the inquiry or trial.

ORDER IN WRITING STATING REASONS THEREFOR.—The order of adjournment must be in writing and must state grounds for such adjournment, 28 C.W.N. 847.

ADJOURN ON SUCH TERMS AS IT THINKS FIT.—The expression "On such terms" means something more than a mere power to adjourn. It implies that a concession is granted to one side only on condition that the other side suffers in some manner. The power to award costs for granting an adjournment is vested in the Court under this section 9 Cr. L. Rev. 388 where 28 A. 207; 9 C.W.N. 18 and Cal.R.C. Nos. 435 and 436 of 1916 (M.H.C.) are followed. These words are wide enough to cover an order making payment of costs by one party to another, a condition of granting an adjournment, and the power can be exercised even in a case initiated by a police-report, 40 M. 1130. The Code does not make a special provision for costs, and under this section an order as to costs can only be made where the circumstances are exceptional and where for some reason or other the ordinary method of conducting criminal cases must be departed from. 42 B. 254. Where a Magistrate had to postpone a case owing to the failure of the complainant to take necessary steps to summon his witnesses the Magistrate has power to direct the complainant to pay costs to accused or his witnesses, 9 A.L.J. 170=13 Cr. L.J. 263=14 Ind. Cas. 652. This section dealing with proceedings in prosecutions expressly empowers the Court to postpone or adjourn an inquiry upon such terms as it thinks fit. This clearly entitles a Court to award costs to a party who has been put to unnecessary expense by the conduct of the other side. It would be greatly to be deplored if the Court has no such power. The Court has power to award costs, and in proper cases it is a power that the Court should exercise, and a judicious exercise of the power would have the effect of preventing many useless adjournments, 28 A. 207 at 208. An order requiring an accused to pay the costs of an adjournment is one which a Magistrate in his discretion may make under this section, and when such an order is found to be not unreasonable under the circumstances of the case, it was not disturbed by the High Court, 9 C.W.N. 18. But when a case had necessarily to be adjourned on account of the absence of the accused the Court will not be justified in awarding costs in addition to the issue of a warrant of arrest. The question of imposing terms for adjournment could not therefore possibly arise and it would be entirely opposed to the spirit of conducting criminal trials to impose such terms for adjournment. 4 Cr. L.J. 78; 12 Cr. L.J. 274=8 Ind. Cas. 851. A complainant ought not to be saddled with costs for an adjournment consequent on his failure to produce evidence when one of the accused also happens to be absent on that day, 27 Cr. L.J. 372=94 Ind. Cas. 140.

MAY BY A WARRANT REMAND ACCUSED TO CUSTODY.—The word "remand" connotes that the accused is brought up before the Court and recommitted to custody. Remand to Jail must be distinguished from police custody which can be done on non-completion of the evidence against the accused. To remand is to recommit to custody, and can be made only in the presence of the accused, Weir II. 409. This section contemplates a remand to jail and not to police custody, 23 B. 32 at 34. The section clearly shows that occasions for remand to Jail custody of undertrial prisoners should be as few as possible, 27 Cr. L.J. 1053 at 1059=27 Ind. Cas. 39. This section does not empower the Magistrate to remand an accused in the custody of the Magistrate to police custody for the purpose of obtaining information as to the commission of the alleged offence, 4 Bom. L.R. 878. When the offence is bailable the accused ought not to be remanded, but released on bail as the terms of S. 496 *intra* are imperative, 8 C.W.N. 779. A remand should not ordinarily be ordered under this section without first recording some evidence where such is already available to show that good ground exists for believing the accused to have committed a

non-bailable offence. The ordinary course is to examine a police-officer to ascertain the complicity of the accused. When after one remand the accused is again brought up, some direct evidence of his guilt should be required to justify a refusal of bail, and with such remand the necessity of producing such evidence increases, 18 Cr. L.J. 708—39 Ind. Cas. 993. Whether there are reasonable grounds for believing the accused guilty of the offence or not is a question which must be decided judicially, that is to say, there must be some tangible evidence on which a Court might come to the conclusion that, if unrebutted, the accused might be convicted. The detention of an accused under trial is not intended to be penal but its object is to secure attendance, 38 C. 174 at 178-179.

REVISION.—The High Court has power to revise an order under this section and to use the power freely, the wording of the section is purposely made wide, 40 M. 1131. But a reasonable order as to costs will not be interfered with by the High Court, 9 C.W.N. 18.

345. (1) The offences punishable under the sections of the Indian Penal Code *specified* in the first two columns of the table next following may be compounded by the persons mentioned in the third column of that table:—

Offence.	Sections of the Indian Penal Code applicable.	Persons by whom offence may be compounded.
Uttering words, etc., with deliberate intent to wound the religious feelings of any person.	298	The person whose religious feelings are intended to be wounded.
Causing hurt	323, 334	The person to whom the hurt is caused.
Wrongfully restraining or confining any person.	341, 342	The person restrained or confined.
Assault or use of criminal force ...	352, 355, 358	The person assaulted or to whom criminal force is used.
Unlawful compulsory labour ...	374	The person compelled to labour.
Mischief, when the only loss or damage caused is loss or damage to a private person.	426, 427	The person to whom the loss or damage is caused.
Criminal trespass	447	The person in possession of the property trespassed upon.
House trespass	448	Do.
Criminal breach of contract of service.	490, 491, 492	The person with whom the offender has contracted.
Adultery	497	The husband of the woman.
Enticing or taking away or detaining with criminal intent a married woman.	498	Do.
Defamation	500	The person defamed.
Printing or engraving matter, knowing it to be defamatory.	501	Do.
Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter.	502	Do.
Insult intended to provoke a breach of the peace.	504	The person insulted.
Criminal intimidation, except when the offence is punishable with imprisonment for seven years.	506	The person intimidated.
Act caused by making a person believe that he will be an object of divine displeasure.	508	The person against whom the offence was committed.

(2) The offences punishable under the sections of the Indian Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that table:—

Offence.	Sections of the Indian Penal Code applicable.	Persons by whom offence may be compounded.
Voluntarily causing hurt by dangerous weapons or means.	324	The person to whom hurt is caused.
Voluntarily causing grievous hurt...	325	Do.
Voluntarily causing grievous hurt on grave and sudden provocation.	335	Do.
Causing hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others.	337	Do.
Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others.	338	Do.
Wrongfully confining a person for three days or more.	343	The person confined.
Wrongfully confining a person in secret.	346	Do.
Assault or criminal force in attempting wrongfully to confine a person.	357	The person assaulted or to whom the force was used.
Dishonest misappropriation of property.	403	The owner of the property misappropriated.
Cheating ...	417	The person cheated.
Cheating a person whose interest the offender was bound, by law or by legal contract, to protect.	418	Do.
Cheating by personation ...	419	Do.
Cheating and dishonestly inducing delivery of property or the making, alteration or destruction of a valuable security.	420	Do.
Mischief by injury to work of irrigation by wrongfully diverting water when the only loss or damage caused is loss or damage to a private person	430	The person to whom the loss or damage is caused.
House trespass to commit an offence (other than theft) punishable with imprisonment.	451	The person in possession of the house trespassed upon.
Using a false trade or property mark.	482	The person to whom loss or injury is caused by such use.
Counterfeiting a trade or property mark used by another.	483	The person whose trade or property mark is counterfeited.
Knowingly selling, or exposing or possessing for sale or for trade or manufacturing purpose, goods marked with counterfeit trade or property mark.	486	Do.
Marrying again during the lifetime of a husband or wife.	494	The husband or wife of the person so marrying.
Uttering words or sounds or making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman.	509	The woman whom it is intended to insult or whose privacy is intruded upon.

(3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

(4) When the person who would otherwise be competent to compound an offence under this section is *under the age of eighteen years or is an idiot or a lunatic*, any person competent to contract on his behalf may *with the permission of the Court* compound such offence.

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard.

(5 A) *A High Court acting in the exercise of its powers of revision under section 439 may allow any person to compound any offence which he is competent to compound under this section.*

(6) The composition of an offence under this section shall have the effect of an acquittal of the accused *with whom the offence has been compounded*.

(7) No offence shall be compounded except as provided by this section.

AMENDMENT.—The offence under S. 508, I.P.O., has been added newly to the list of offences, under sub-section (1) and to sub-section (3) fifteen new offences, such as wrongful confinement, criminal misappropriation, cheating, mischief, house-trespass, using false trade-mark, bigamy, uttering words to outrage modesty of woman, etc., are now made compoundable with the permission of the Court. In sub-section (4) for the word "minor" the words "under the age of eighteen years" are substituted and the guardian or a curator can compound only with the permission of the Court. By the new sub-section (5 A) power is given to the High Court to permit the compounding of an offence and the addition of the words "with whom the offence has been compounded" in sub-section (6) makes it clear that the composition with one accused will not work a composition with the other accused in the case.

SCOPE OF THE SECTION.—The compounding of an offence does not mean that the offence has not been committed, but that it had been committed though the victim is willing either to forgive or to accept some form of *solatium* as sufficient compensation for what he has suffered, 16 M. 257, at 288 where 17 O.W.N. 948 is distinguished. The principle of law is that the composition of an offence is illegal if the offence is one which is of public concern, but if the offence is of a private nature and one for which the complainant might have recovered damages in a civil action the composition is lawful. The test for deciding whether the offence affects the individual rather than the State is the compoundability or non-compoundability of the offence charged as laid down by this section, and Courts of Law cannot go beyond that test and substitute for it one of their own, 28 B. 326 at 328; 14 Cr. L.J. 292—19 Ind. Cas. 948; 41 M. 685. The composition referred to in this section is in the nature of a contract, but does not require any consideration, 2 L.W. 1200—18 M.L.T. 602; 39 M. 948. This section is exhaustive of the circumstances and conditions under which a composition can be effected. No other meaning can be given to sub-section (7). This section makes provisions with regard to (a) the persons who may compound; (b) the nature of the offences that may be compounded; (c) the stage of the criminal proceeding at which composition is sought to be made; (d) it also provides that in regard to some offences which are specified, the mere consent of the injured person shall not suffice but the permission of the Court should be

obtained, 39 M. 604. The question whether a case is compoundable or not must be decided with reference to the state of the facts existing at the date of the application to compound and it is not possible for the court to see what the ultimate result of the case will be. Where a case is one under S. 325, I.P.C. which could not at the date of the application be compounded without the leave of the court and no orders were passed by the Court on the application when presented and the complainant withdrew her application after medical evidence was recorded and the petition was rejected by the Court and a charge under S. 323, I.P.C. was framed, and the accused ultimately convicted under S. 352, I.P.C., it was held that the accused was not entitled to an acquittal as the compromise petition was presented at a stage when the offence charged was not compoundable without the permission of the Court, and no petition was before the court when the charge was found to be a compoundable one. 25 Cr. L.J. 1428=89 Ind. Cas. 900 where 3 O.W.N. 322, is referred to. A petition of compromise agreeing to be bound by the award of certain arbitrators and the grant of an adjournment by the court for settlement of dispute without a valid award being passed and accepted by the parties, has not the effect of a compounding under this section, 25 Cr. L.J. 1584=90 Ind. Cas. 544. Compounding an offence is more than a mere promise to withdraw a prosecution. It supposes an arrangement by which the parties have settled their differences and in the more usual acceptance of the term implies that the prosecutor has received some consideration or gratification, for dropping the prosecution. Although the provisions of the Contract Act may not apply, the proof of the arrangement must be similar to that which the court requires for proof of any agreement which is in issue. 21 C. 103 at 115. Compounding signifies that the person injured has received some gratification not necessarily of a pecuniary character to act as an inducement for his deciding to abstain from a prosecution and the law provides that if the offence is compoundable a composition shall have the effect of an acquittal. 21 C. 103 at 112 followed in 49 M.L.J. 544=22 L.W. 390=25 Cr. L.J. 1594=90 Ind. Cas. 636. It is not incumbent on the court before allowing the case to be compounded and acquitting the accused to make an inquiry into the complainant's authority. The order of acquittal made without inquiring into such authority is a valid one made with jurisdiction and such order of acquittal operates as a bar to further proceedings. 22 A.L.J. 320. When an accused is charged under S. 147 and 325, I.P.C. and permission is granted by court to compound the offence under S. 325, I.P.C. this will not have the effect, of *ipso facto* operating as a compromise and acquittal of the offence under S. 147, I.P.C. S. 403 (2) and S. 235 (f) and illustration (g) to that section clearly show that the acquittal under S. 325, I.P.C. will not bar a subsequent trial for the offence under S. 147, I.P.C. If however circumstances seem to require that the accused should not be proceeded with, he may be discharged of the offence under S. 147, I.P.C. 25 Cr. L.J. 686=86 Ind. Cas. 62. The question whether an offence could be compounded before a complaint is actually filed in Court came for consideration in 41 M. 685, where it was held that in cases where no permission of the Court is needed for the compounding of an offence, there can be a valid composition before a complaint was actually filed in Court. An offence is complete when the acts constituting it have been committed, whether any complaint or charge has been laid before the Court or not. The allusion to "*the accused*" in this section only describes his character at the time of the trial, when the question of the effect of the composition is under consideration there is no apparent reason why the Legislature having permitted certain offences to be compounded by the parties themselves without any reference to the Court should insist that the composition should take place only after the accused has been brought before the Court. A Magistrate has no power to prevent the compounding of offences mentioned in the table given under sub section (1) even when cases are sent up by the police, 10 C. 551, and the permission of the Court is not required for such offences. Such permission will be required only with regard to offences specified in the table to sub-section (2). For distinction between withdrawal of a complaint under S. 248 and the compounding of an offence under this section, see notes under S. 248, *supra* at p. 359. When the parties compound the offence and produce a writing signed by them before the Court, the Court is bound to act on it and is not at liberty to call upon the parties to prove that the case has been compromised. 16 Bom. L.R. 939=16 Cr. L.J. 88=25 Ind. Cas. 1000, nor can the Court proceed with the case and convict the accused, 45 A. 145; 39 M. 916; 21 C. 103, where a petition to compound the offence is presented, the court should at once pass orders on it and

should not keep it pending for consideration at the close of the trial, 3 C.W.N. 548 and 322; Under this section a case may be compounded at any time before sentence is passed and therefore a Magistrate cannot refuse to accept a petition of compromise presented to him, while he is writing the judgment on the ground that it was presented at a very late stage. 35 C. 816. But after a conviction, composition is permissible only with the leave of the appellate court which is not bound to recognise and give effect to an agreement entered into after conviction. 11 L.W. 33; 11 A.L.J. 13. Where after a charge has been framed under S. 500, I.P.C. through certain mediators, the accused and the complainant signed a *muchilika* to arbitrate the dispute, but no arbitration took place and no award was made, and the Magistrate dismissed the complaint on the ground that the offence was compromised by the signing of the *muchilika* by both parties, it was held that the *muchilika* was only one step towards composition, which was not complete before an award, and till, then the *muchilika* was a mere agreement, a preliminary step towards composition and not composition itself, 49 M. L.J. 844-22 L.W. 390-(1925) M.W.N. 753-26 Cr. L.J. 1591-90 Ind. Cas. 666. The only sections of the Code which contemplate the termination of a criminal prosecution by private arrangement are S. 248 and this section. The former deals with trial of summons cases only and in a warrant case relating to a non-compoundable offence, it is not competent to a Magistrate, on a private complainant's offering to withdraw from prosecution to enter an order of acquittal. 37 B. 369. The general principle of law in England, that felonies and serious misdemeanours should not be compounded is embodied in this section and it is the duty of the court to decide on the evidence that a compoundable offence has been committed before allowing a compounding. Ratanlal 699. The composition is permissible only up to the time of the judgment and not after. After a conviction there can be no composition without leave of the Court and any appellate Court is not bound to recognise and to give effect to any agreement come to by the parties after conviction. 23 Ind. Cas. 832; 11 L.W. 33; 11 A. L. J. 13

SUB-SECTION (1).—The offences are described in the first two columns of the table and they are all offences under the Indian Penal Code. The offences punishable under other laws are only compoundable if punishable with imprisonment of not more than six months or with fine only with the permission of the court. See Schedule II for offences against other laws.

MAY BE COMPOUNDED BY PERSONS MENTIONED IN THIRD COLUMN.—Only the persons specified in the third column can lawfully compound. If the offence is compounded by any other, it will not be a valid compounding and the person so compounding may be held liable under S. 314, I.P.C. Compounding with one of the complainants will not work an acquittal so far as the other persons were concerned, 37 C.L.J. 254 and this is in accordance with the new amendment in sub-section (6). So, in a case of hurt, the person to whom the hurt is caused is alone entitled to compound, 31 A. 606. Where the widow complained of hurt caused to her husband in consequence of which he died, and subsequently compounded the offence and the Magistrate thereupon acquitted the accused, it was held that the composition was invalid and the acquittal was wrong. Weir II, 418. In a fight between two sets of persons when hurt is caused to a person who dies subsequently, the offence cannot be compounded by the other members of the party to which the deceased belonged, 31 A. 606; 15 A.L.J. 467. An agent prosecuting under powers granted under S. 199, *supra* for alleged abduction of another's wife, when he was in jail is not legally competent to compound the offence under this section on behalf of the husband and an acquittal passed on such a composition is bad, 23 Cr. L.J. 120-71 Ind. Cas. 248. The mere fact that the case has been sent up by the police cannot prevent the offence which is legally compoundable from being compounded. It is not the law that no magistrate under any circumstances has power to allow such a case to be withdrawn. 10 C. 551 at 553.

In cases of mischief the offence is compoundable only when loss or damage is caused to a private person. S. 425, I.P.C. which defines mischief includes also damage to the public and such an offence cannot be compounded, 22 B. 889. But now the aggravated form of mischief under S. 480, I.P.C. is compoundable with the permission of the Court. In cases of defamation under S. 500, I.P.C., S. 198 *infra* permits a complaint being preferred by the aggrieved party, say the husband. But if a husband prefers a complaint, the wife could com-

pound the offence without the consent of the husband and even against his wishes. This was pointed out in 25 B. 151.

SUB-SECTION (2).—The permission of the Court is compulsory and not a mere formality and the fact that the Magistrate would have allowed the party to compound does not make the slightest difference, 4 Ind. Cas. 909. The offences under Ss. 343, 346, 357, 403, 417 to 420, 430, 451 (first part), 482, 483, 486, 494, and 509, I.P.C. are newly added. The offences mentioned in this sub-section can be compounded only with the permission of the Court. The Court which has to grant permission is the court before which a prosecution of such offence is pending. The court has to exercise a judicial discretion for granting permission. It is the duty of the magistrate to decide in each case whether he will or will not permit a compounding. The responsibility rests entirely with him unless the offence is so serious that the punishment is absolutely necessary, the Magistrate would do well in his discretion in permitting a composition. Where without sufficient reason a composition was not permitted the High Court in revision set aside the order and enforced the composition, 24 Cr. L.J. 85-85 Ind. Cas. 437. The only Court which has power to grant permission is the Court before which a prosecution for such offence is pending and that court has to exercise a judicial discretion in granting permission. Where an accused convicted of a compoundable offence but on appeal the conviction set aside and a retrial ordered, it is open to the complainant to compound the offence with the leave of the court, 1908 A.W.N. 200. When an accused is convicted of a non-compoundable offence, but on appeal he is acquitted of that offence and found guilty of a compoundable offence, it is only fair that the accused should be given if possible permission to effect a composition before he is convicted by the appellate Court.

SUB SECTION (3).—The sub-section provides that abetments and attempts to commit the offences that may be compounded may also be compounded.

SUB-SECTION (4).—The change effected in this sub-section renders it necessary that the permission of the Court ought to be obtained to the compounding of an offence complained of on behalf of a person below eighteen years, idiot or lunatic, by a guardian or other person lawfully entitled to the care and custody of his person or property and thus safeguarding the interest of incapacitated persons.

SUB-SECTION (5).—This sub-section was newly introduced in the Code of 1938 and refers to cases where an accused has been committed for trial or when he has been convicted, and an appeal against such conviction is pending. 37 A. 127. In such cases, it is provided that a composition shall be allowed with the leave of the Court concerned. A compounding of the offence is permitted after conviction in the appellate Court and no reference was made in this section before the amendment to the High Court exercising its powers of revision under S. 439 to allow a composition. Now the new sub-section (5A) empowers the High Court in revision to allow a composition in the revision stage. This is in accordance with the decision in 32 A. 153; 37 C.L.J. 254; 15 Cr.L.J. 567.

SUB-SECTION (5 A) is newly added empowering the High Court to allow compounding in revision and the following decisions are no longer law:—37 A. 127; 43 C. 1143; 39 M 504; 23 Cr. L.J. 80. Under this sub-section the High Court acting in the exercise of its powers of revision under S. 439, *infra*, may allow any person to compound any offence which he is competent to compound under this section, 46 A. 91; See Cr. A. No. 838 of 1923 and also Cr. M.P. No. 467 of 1925 (M.H.C.) where an offence of grievous hurt was allowed to be compounded by the High Court.

SUB-SECTION (6).—The effect of the composition of a compoundable offence is immediate acquittal of the accused and once a composition has been arrived at the complainant cannot be permitted to withdraw from it. 23 Cr. L.J. 810-81 Ind. Cas. 346. Though the composition of an offence under this section has the effect of an acquittal of the person with whom the offence has been compounded yet it is not an acquittal within the meaning of S. 350 *supra* to enable the Magistrate to award compensation under that section. Ratanlal 957 & 700 when a withdrawal petition is presented the Magistrate is to apply his mind to the question of the disposal of that petition and should not refer it to the police thus allowing himself to be guided by what the police thought about the matter. This procedure is highly improper. The Magistrate

was sitting as a judicial officer charged with the duty of determining the matter judicially and it did not and ought not to have mattered to him the least what the police thought of the petition. Such a course will give rise to an impression that the Police have considerable influence with Magistrates as to the way in which cases are disposed of, and such an impression ought never to be allowed to exist, 27 Cr. L.J. 325-92 Ind. Cas. 1041. Similarly where an offence of hurt was compounded and a *vasinama* was presented to the court by complainant's pleader the court is not entitled to refuse to accept the composition and institute an inquiry whether the charge was not frivolous or vexatious under S. 250, *supra* and the Magistrate ought to have accepted the *vasinama* and acquitted the accused, 10 Bom. L.R. 1056. When a District Magistrate had made an order calling for the records in a case pending before a subordinate Magistrate with a view to transfer the case to another Magistrate the Subordinate Magistrate on receipt of the order calling for records cannot record a composition when the offences are compoundable and acquit the accused, as his jurisdiction was suspended, the case being no longer on his file, 49 B. 533. The provisions of this sub-section indicate that the composition has the same effect in a criminal trial as it would have in a civil suit. It operates as a complete bar to the prosecution as if the accused had been acquitted. There is no necessity to the composition to be effected in Court in a criminal trial any more than in the civil suit. The section does not imply any such necessity, at any rate in cases which can be compounded without the sanction of the Court. This was the view taken in 21 C. 103, where the accused, pleaded, a composition out of Court the Judges held that if that was proved, the Magistrate would have had no jurisdiction to go on with the trial. See 41 M. 685; 15 Cr. L.J. 292-49 Ind. Cas. 948; 39 M. 946; 16 Cr. L.J. 81-26 Ind. Cas. 993. Before the amendment there was a conflict as to the exact scope of this sub-section. It was held that the moment a composition is voluntarily effected under the section, it operates as an acquittal of all the accused irrespective of the fact that process had been issued to one of the accused only. The compounding relates to the offence charged and not to any of the accused's offences, 7 U.W.N. 176, followed in [1921] Patna 144. But this view was not accepted in 41 M. 323 where it was held that there was nothing in the language of the section to warrant the conclusion that the composition with one of several accused will effect an acquittal of the others. This decision was approved and followed in 1 Lah. 169, and the new amendment is in accordance with the decision in 41 M. 323; 45 B. 345 and 19 A.L.J. 374; 26 Cr. L.J. 238-34 Ind. Cas. 52; See also 7 Lah. 344. It is not necessary that any petition setting forth the compromise should be presented to the Court.

When a party to a compoundable offence alleges that the case had been compromised and the other denies the same, it is competent to the Court before which the case is pending to take evidence concerning the *factum* of the alleged compromise and decide whether a compromise had been arrived at, 2 L.W. 1200-18 M.L.T. 602-16 Cr. L.J. 803-31 Ind. Cas. 819. The onus is on the accused who disputes the jurisdiction of the Magistrate to prove that there was valid composition in law barring the trial, 21 C. 103. A composition under this section is not limited to any act done in Court nor to cases in which the parties continue to be of the same mind till the case comes on for further hearing before the Court; 2 L.W. 1200-18 M. L.T. 602-16 Cr. L.J. 803-31 Ind. Cas. 819, see also 41 M. 685. When a non-compoundable warrant case is dismissed the matter having been settled by the parties the dismissal is only a discharge and the composition will not prevent a revival of the prosecution, 1 B. 64; Ratanlal 330 & 391.

SUB-SECTION (7).—Before this sub-section was enacted in the 1882 Code considerable doubt existed as to what offences could be compounded. See 1 B. 147. It is now made clear the prohibition contained in this sub-section is a perfectly general one which governs the composition of offences whether any steps to prosecute the alleged offender have been taken or not, 36 Ind. Cas. 423. The words are "no offence shall be compounded except as provided for by this section." This sub-section clearly shows that this section is exhaustive of the circumstances and conditions under which a composition can be effected, 39 M. 604. A Magistrate has no authority to allow any other offence than those mentioned in this section to be compounded e.g. an offence under S. 148, I.P.C. and he usurps jurisdiction not vested in him by

law by allowing that offence to be compounded. The reason given by the Magistrate to allow a non-compoundable offence to be compounded, *vis.*, that it would be better for the complainant to do so and the accused also desired the composition and probably the case in the end may turn out to be a compoundable offence is faulty, and any order so made is without jurisdiction, 4 Bom. L.R. 718.

346. (1) If, in the course of an inquiry or a trial before a Magistrate in any district outside the presidency-towns, the evidence appears to him to warrant a presumption that the case is one which should be tried or committed for trial by some other Magistrate in such district, he shall stay proceedings and submit the case, with a brief report explaining its nature, to any Magistrate to whom he is subordinate, or to such other Magistrate, having jurisdiction, as the District 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, or commit the accused for trial.

It is a general principle of the Code that evidence taken by a Magistrate is not evidence in a trial before another Magistrate unless some provision of law expressly makes it so, Mere consent of parties will not do, 17 L.W. 247. This section applies only to Provincial Magistrates and to cases which they cannot dispose of. A Magistrate may be incompetent to try an accused due to some personal interest, S. 556, *infra*. It is only to such cases the section applies and not to a case in which a Magistrate is competent to make a valid committal to the Court of Session, 7 C.W.N. 487. A Magistrate when he finds he has no jurisdiction cannot discharge the accused but must proceed under this section, Weir II, 823. When during the course of the trial, aggravating circumstances are disclosed by the evidence, it is the duty of a Magistrate to act under this section, Weir II, 421; 13 B. 502. Where a Subordinate Magistrate after completing the trial is of opinion that he could not adequately punish the accused, send the case to the District Magistrate who after asking the accused, whether he wanted the witnesses to be re-called and re-heard, and the accused replying in the negative proceeded to give judgment convicting the accused, without trying the case afresh, it was held, that the procedure adopted was illegal and the consent of the accused cannot dispense with the provisions of the Code and such an illegality cannot be cured by consent, 2 Cr. L.J. 389. A Magistrate cannot intentionally ignore facts disclosing circumstances of aggravation which show an offence beyond his jurisdiction, 10 C. 85. When the accused is an old offender, the Magistrate may act properly under this section, 1894 A.W.N. 200. But a conviction had, ought not to be set aside merely because the facts disclosed a more serious offence. The proceedings of the original Magistrate are not void and a re-trial ought not to be ordered after setting aside the conviction unless the accused has been really prejudiced, 25 M.L.J. 484. When a case is submitted under this section to another Magistrate, he may try the case himself or refer the case to any Magistrate subordinate to him, or he may commit the accused to the Court of Session. Where evidence was recorded by a Magistrate who sent up the case he having no jurisdiction to try the case it cannot be said that the superior Magistrate was trying the case himself, 17 L.W. 247. It was held in 12 C.W.N. 136=6 Cr. L.J. 427 that the Magistrate when he commits may act on the evidence recorded by the Magistrate who submitted the case under this section and S. 532, *infra* did not apply to such a case. When a Sub-Magistrate submits a case to a Sub-divisional Magistrate under this section, the latter has no power to refer the case back to the former, but is bound to dispose of it in one of the ways prescribed by this section, 45 M. 836; Kantial 499 and 534. Where the superior Magistrate to whom a case has been sent up, was of opinion that the facts of the case disclose a more serious offence which the subordinate Magistrate was

not competent to try, he cannot remand the case for retrial, unless the accused was prejudiced or the sentence was inadequate where, the subordinate Magistrate had power to try the offences taken cognizance of by him. 2 Cr. L. Rev. 257 following 24 M. 678 ; 13 B. 502 ; 4 Cr. L. Rev. 383—14 Cr. L.J. 640—21 Ind. Cas. 688.

347. (1) If in any inquiry before a Magistrate, or in any trial before a Magistrate, before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall commit the accused under the provisions hereinbefore contained.

Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed.

(2) If such Magistrate is not empowered to commit for trial, he shall proceed under section 346.

The words " stop further proceedings and " have now been omitted.

SCOPE OF THE SECTION.—This section is couched in general terms and gives the Magistrate very wide powers. There is no suggestion that the only possible reason for a competent Magistrate to commit a case is that he will not be able to pass a sufficiently severe sentence and if that were the intention of the Legislature it is extraordinary that there should be no indication of this in this section, 3 Rang. 42. This section is not intended to deprive the accused of any of his rights conferred by Chapter XVIII of the Code, 15 Cr. L.J. 366—23 Ind. Cas. 735. The terms of this section are general and give a Magistrate, who is empowered to commit, a discretion in committing cases for trial which is not limited by S. 254, so as to make it obligatory on him to try every case which he can adequately punish. S. 254 makes it imperative on the Magistrate only to frame a charge and not to complete the trial to a conviction or acquittal; the wide words of this section should not be curtailed by reference to S. 254 while there is a specific section, *vis*, S. 349, which deals with circumstances referred to in S. 254, and the decision in 1 M. 289 (F.B.) seems to be conclusive on the point, which is to the effect that it is competent to a Magistrate to say whether from the gravity of the matter or for any other sufficient reason the Sessions Court is the proper tribunal for the disposal of the case, 42 M. 83. followed in 3 Rang. 42. This section is not governed by the provisions of S. 208, *supra*. This section empowers a Magistrate in any trial at any stage when he makes up his mind to commit, to stop further proceedings and commit the accused. The fact that some of the defence witnesses were summoned and some were examined before he made up his mind will not prevent him from stopping further proceedings, 23 M.L.J. 368—17 M.L.T. 83—13 Cr. L.J. 778—17 Ind. Cas. 410 where 36 C. 48 is not followed and 26 A. 177 and 20 A. 285 are followed. Where, after a Magistrate has made up his mind to commit a case to the Sessions but before the case for the prosecution has absolutely closed, one witness for the prosecution yet remaining to be examined, the defence applied for the cross examination of the witnesses, it was held they were entitled to this indulgence of cross examination, 18 C.L.J. 45—13 Cr. L.J. 688—16 Ind. Cas. 336 where 36 C. 48 is explained; see 51 C. 442.

BEFORE SIGNING JUDGMENT.—Signing the judgment takes place after pronouncing the same in open Court and it actually completes the trial which ends in an acquittal or conviction. Therefore action under this section, if desired should be taken before the signing of the judgment. The Magistrate has no discretion but is bound to allow the cross-examination, 51 C. 442.

WHICH OUGHT TO BE TRIED BY THE COURT OF SESSION :—The words " ought to be tried " occurring in this section must be read with S. 254, *supra*, and therefore a case which ought to be tried by a Court of Session is one which the Magistrate is not competent to try

or adequately punish, 4 Bom. L.R. 85 ; 21 C. 429. This section empowers a Magistrate, after a charge has been drawn up, to stop further proceedings and commit the accused for trial, 3 C. 498 ; but in that case the procedure laid down in Chapter XVIII must be followed, and such a course can be adopted only before signing the judgment. The words "stop further proceedings" have been omitted now to bring the section in conformity with S. 209, *supra*. This section merely extends the period when a commitment may be made to any time before pronouncing the judgment. It enables the Magistrate to commit after recording the defence evidence in whole or in part. But the concluding words of the section that the Magistrate "shall commit the accused under the provisions hereinbefore contained" clearly point to S. 213, *supra* and when applicable to S. 214, *supra*, and in the absence of any other provision except S. 215, *supra* for quashing the commitment, it appears clear that the commitment made under this section falls nevertheless within Ss. 213 and 214, *supra*, and where there is any question of quashing, under S. 215 *supra*, 28 Cr. L.J. 148=83 Ind. Cas. 708. When so committing the new charge which will have to be drawn up will have the effect of cancelling the previous charge. But this is only so in respect of the subject-matter of the charge and the previous proceeding before him must be regarded as preliminary to commitment, 28 Cr. L.J. 520=85 Ind. Cas. 380.

COMMIT THE ACCUSED.—This section confers a special power to commit the accused when it appears to the Magistrate that the case is one which ought to be tried by the Court of Session. See Ss. 207 and 254, *supra*. A case which ought to be tried by the Court of Session is one which the Magistrate is not competent to try or one which he could not adequately punish, 4 Bom. L.R. 85.

UNDER THE PROVISIONS HEREINBEFORE CONTAINED.—This section only authorises the Magistrate to commit the accused for trial by the Court of Session "under the provisions hereinbefore contained" which means after observing the procedure prescribed in Chapter XVIII. The section is not intended to enable the Magistrate to deprive the accused of any of the rights conferred by Chapter XVIII though when an order has been made under this section proceedings under Chapter XVIII need not necessarily be commenced *de novo*, 3 Cr. L. Rev. 314, where 13 Cr. L.J. 877=17 Ind. Cas. 813 is followed.

348. (1) Whoever, 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, shall *if the Magistrate before whom the case is pending is satisfied that there are sufficient grounds for committing the accused*, be committed to the Court of Session or High Court, as the case may be, 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 :*

Provided that, if any Magistrate *in the district* has been invested with powers under section 30, the case may be transferred to him instead of being committed to the Court of Session.

(2) *When any person is committed to the Court of Session or High Court under sub-section (1), any other person accused jointly with him in the same inquiry, or trial shall be similarly committed, unless the Magistrate discharges such other person under section 209.*

AMENDMENT.—In sub-section (1) the words "if the Magistrate before whom the case is pending, etc.," have been added. For the words "District Magistrate" the words "any Magistrate in the district" have been substituted. Sub-section (2) is new.

SCOPE OF THE SECTION.—This section does not permit a Magistrate to find the accused guilty and then commit him to the Sessions. The effect of the conviction would seem to bar a trial by the Court of Session under S. 403, *infra*. It is not easy to deal with cases under this section. The Magistrate is bound to commit if there has been a previous conviction of one of the offences described unless he can adequately punish; consequently he must either as a preliminary matter or at any rate before framing a charge determine whether there has been a previous conviction; having decided that, he will have to consider whether he could pass a sufficiently severe sentence. If he thinks he could, he may either commit the accused or try himself; if they do not so permit but the evidence does not warrant a discharge, he must frame a charge under S. 210, *supra*, and commit him for trial under Chapter XVIII, 88 M. 852 at 853.

IS AGAIN ACCUSED OF ANY OFFENCE, ETC.—Under this section if the Magistrate makes up his mind to commit, he should not record a finding as to the accused's guilt. Such a course is wrong and *ultra vires*, 17 Cr. L.J. 201—34 Ind. Cas. 313.

UNLESS THE MAGISTRATE IS COMPETENT TO TRY AND PASS ADEQUATE SENTENCE.—The addition of the words "competent to try the case" removes all doubt that existed before. If the Magistrate is competent to try the offence and he could adequately punish, he is not bound to commit. This is in accordance with the view expressed by the Bombay High Court. The last portion of the section and the proviso were added in the Code of 1898. The District Magistrate to whom a case has been transferred under the proviso to this section should himself record evidence. He cannot act on the evidence already recorded before the case was transferred to him under this section. A District Magistrate cannot be regarded as a Court of Session to whom cases should be committed, nor can a case be sent up to him under S. 349, *infra*, 7 C.W.N. 437. If the District Magistrate considers that the case ought to be committed he must himself do so and should not send back the case to the Magistrate with a direction to commit, 9 M. 377; 10 B. 196. See 45 M. 816.

SUB-SECTION (2).—This new sub-section provides that when any person is committed to the Court of Session or High Court under this section, another person accused jointly with him whom the Magistrate believes to be guilty, shall be similarly committed, thus according to all the accused identical treatment.

349. (1) Whenever a Magistrate of the second or third class, having jurisdiction, 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 such Magistrate is empowered to inflict, or that he 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 District Magistrate or Sub-divisional Magistrate to whom he is subordinate.

(1A) When more accused than one are being tried together and the Magistrate considers it necessary to proceed under sub-section (1) in regard to any of such accused, he shall forward all the accused who are in his opinion guilty to the District Magistrate or Sub-divisional Magistrate.

Procedure when Magistrate cannot pass sentence sufficiently severe.

(2) The Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law :

Provided that he shall not inflict a punishment more severe than he is empowered to inflict under sections 32 and 33.

AMENDMENT.—Sub-section (1A) has been newly added.

SCOPE OF THE SECTION.—It is a general rule that only an authority who has heard the evidence is competent to decide the guilt or innocence of an accused person. Any exception to this rule such as is contained in this section should be strictly construed, 24 Cr. L.J. 738—74 Ind. Cas. 66. Under this section Magistrates of the second or third class alone can act. A first class Magistrate cannot refer under this section as he has ample powers to dispose of the case himself, 7 A. 414 (F.B.). This section confers special powers, or, what may be called, a special jurisdiction and confers it only on District and Sub-divisional Magistrates. Every case which is referred to under this section must be disposed of by a Magistrate who has that special jurisdiction, 33 B. 719 at 724. The provisions of this section are subject to the express provisions of S. 348, *supra*, and the case of an old offender ought not to be referred to the superior Magistrate under this section, but ought to be committed to the Court of Session under S. 348, *supra*, Weir II, 423. It is in the discretion of a subordinate Magistrate trying a case to send up the case to the superior Magistrate under this section. The order of a superior Magistrate to a subordinate Magistrate to send up the case under this section is *ultra vires*, Weir II, 427, nor can a superior Magistrate to whom a case has been referred under this section return the case to the subordinate Magistrate directing him to commit the accused, but he should himself dispose of the case, 9 M. 377 ; 45 M. 846 ; 13 Cr. L.J. 18—13 Ind. Cas. 110. Nor can the superior Magistrate send the case to another Magistrate for disposal, 36 M. 470 ; 4 M. 283 ; Weir II, 424 ; 8 W.H.C.R. (Appx.) II.

SUB-SECTION (1).—A subordinate Magistrate having taken all the evidence in the case cannot send up the case to the District Magistrate under this section unless he is of opinion that the accused is guilty and ought to receive a punishment different in kind from, or more severe than he is empowered to inflict or that security ought to be taken from him, under S. 106, *supra*, and when a case is referred to the District Magistrate, not on the grounds referred to in this section, and the District Magistrate acting on the evidence recorded by the subordinate Magistrate passes a judgment, it was held that the conviction by the District Magistrate cannot stand as neither this section nor S. 350, *infra*, applied to the case. 12 A. 66. The referring Magistrate must record his opinion that the accused is guilty but he cannot convict the accused. A superior Magistrate is not precluded from acting on the evidence already recorded by the subordinate Magistrate or from adopting his opinion. Weir II, 428 and 429. A case cannot be referred under this section after conviction by the subordinate Magistrate for the purpose of taking security from the accused under S. 106, *supra*, 21 C. 622. The Magistrate is bound to refer the whole case to the superior Magistrate who is to pass such judgment or order as he thinks fit, 35 C. 1093 ; 11 Cr. L.J. 162—4 Ind. Cas. 1087 ; 21 C. 622. A superior Magistrate cannot direct a Subordinate Magistrate to send up a case under this section. It is a matter within the discretion of the Subordinate Magistrate whether he will send up a case or not, Weir II, 427. But a superior Magistrate can send back the case on the ground that there ought to have been no reference at all, or that the reference is not proper on account of defective inquiry by the subordinate Magistrate. When a case is sent up to a Sub-divisional Magistrate he cannot transfer it to a first class Magistrate and a committal by the first class Magistrate is illegal and without jurisdiction as this section confers such power on the District Magistrate and Sub-divisional Magistrate and no others, 33 B. 719. The procedure prescribed in this section is not suited to a case tried summarily. So a Bench of Magistrates is not authorised to refer a case under this section for enhanced punishment, 8 Cr. L.J. 475.

SUB-SECTION (1-A).—This was newly added to accord identical treatment to all the accused concerned. The Magistrate is not entitled now to submit the case of some of the accused only; he is to do so with regard to all the accused. See 26 Cr. L.J. 1363—89 Ind. Cas. 431. The amendment is in accordance with the suggestion made in Welw II. 428. Under this sub-section only the case of those accused who were in the opinion of the Magistrate, guilty could be forwarded to the superior Magistrate. If the Magistrate finds one of the accused only guilty he cannot send up the case of all the accused, 24 A.L.J. 80—26 Cr. L.J. 1630—30 Ind. Cas. 926.

SUB-SECTION (2).—It is optional with the superior Magistrate to examine the parties or their witnesses who had already been examined. Under this section the Magistrate is not bound to hold a trial *de novo* and the recent amendment to S. 350 (2) only makes the position clearer. 26 Cr. L.J. 1363—89 Ind. Cas. 431. He may call for and take any further evidence. It is not obligatory on the superior Magistrate to hear vakils at all and the section leaves it entirely in the discretion of the Magistrate to take further evidence or not. But the discretion both as regards argument, and taking further evidence should be exercised in a fair and impartial manner and when this is not done, the High Court will not hesitate to interfere in the interests of justice, 2 Cr. L. Rev. 185. When once a case has been referred to the superior Magistrate by the subordinate Magistrate, the superior Magistrate is bound to dispose of the case himself, and cannot send back the case to the subordinate Magistrate for disposal, 35 M. 335. The provision in this sub-section that the Magistrate to whom the case is referred may pass such order as he thinks fit means when taken in conjunction with the words immediately preceding it, *viz.*, "*judgment and sentence*" that he may pass such final order disposing of the case as he may think fit, 33 M. 470. A Magistrate to whom a case is submitted has no power to send it back. He must dispose of it himself by acquitting or convicting and sentencing the accused or committing him for trial. The order referred to in this sub-section is, as was held in 4 B. 240 *ejusdem generis* with the words "judgment" and "sentence" which precede it and does not include an order returning the case, 23 A. 344 at 345; 45 M. 846; 38 B. 719; 9 M. 377. Under this section the superior Magistrate should find the accused guilty or not and write a judgment as required by S. 367, *infra*, 11 L.W. 308—(1920) M.W.N. 120—21 Cr. L.J. 82—31 Ind. Cas. 404. The Magistrate to whom the case is submitted may commit the accused to the Court of Session, 1 M. 289 (F.B.); 4 B. 240 (F.B.) Ratanlal 948. The accused is entitled to be present before the District Magistrate or Sub-divisional Magistrate when he passes his final order in the case, 7 B.H.C.R. (Or Ca.) 31 and this is why sub-section (1) says that the accused is to be forwarded to the superior Magistrate. Reference under this section by a Magistrate not empowered to deal with the case does not give jurisdiction to a superior Magistrate to try the accused for the offence disclosed by the facts, but the superior Magistrate should treat the whole proceeding as void under S. 530, *infra*. See 1 Bom. L.R. 37 where it was held that a conviction of the accused by the District Magistrate, for an offence under S. 409, I.P.C., was bad when the second class Magistrate found the accused guilty of an offence under S. 460, I.P.C., when submitting the case to him. But if the offence is one which the inferior Magistrate could have committed to the Court of Session, the superior Magistrate may, if he thinks fit, commit the case to the Court of Session, 13 C. 305. The Superior Magistrate cannot return the case to the inferior Magistrate with a direction to commit the accused, 10 B. 196.

350. (1) Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly

Conviction or commitment on evidence partly recorded by one Magistrate and partly by another.	and partly recorded by one Magistrate and partly by another.
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recorded by himself; or he may re-summon the witnesses and re-commence the inquiry or trial :

Provided as follows :—

(a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard ;

(b) the High Court or, in cases tried by Magistrates subordinate to the District Magistrate, the District Magistrate may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was held, if such Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial.

(2) Nothing in this section applies to cases in which proceedings have been stayed under section 346 or in which proceedings have been submitted to a superior Magistrate under section 349.

(3) When a case is transferred under the provisions of this Code from one Magistrate to another, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter within the meaning of sub-section (1).

AMENDMENT.—In sub-section (2) the words “ or in which proceedings have been submitted to a superior Magistrate under S. 349 ” have been newly added. Sub-section (3) has been newly added to remove difference of opinion as to the position when cases are transferred from one Magistrate to another, by providing that the Magistrate from whose file the case is transferred shall be deemed to cease to exercise jurisdiction and to be succeeded by the new Magistrate within the meaning of sub-section (1).

SCOPE OF THE SECTION.—The principle of law clearly is that the Judicial Officer who hears the evidence shall pronounce judgment as to the innocence or guilt of the accused. Owing to certain circumstances in this country, this is often found to be impossible to carry out. Hence the necessity for this section. Once the principle is departed from, it does not matter how often you depart from it, 25 Cr. L. J. 886=81 Ind. Cas. 55 ; 19 Cr. L. J. 657=45 Ind. Cas. 993. This section confers a right on the accused to demand rehearing and does not cast a duty on the succeeding Magistrate to ask the accused if the witnesses examined by the first Magistrate should be re-summoned and reheard, 2 Cr. L. Rev. 20. This section appears to be perfectly clear as to what the duties of a Magistrate are to whom a case which has been heard in part by another Magistrate has been transferred. Under sub-section (1) the Magistrate is given a discretion to re-summon the witnesses and to re-commence the inquiry or trial. If however he does not do so *suo motu* he is bound to do so if the accused asks for it under proviso (a) to this section. Therefore whether the second Magistrate acts *suo motu* or whether the accused demands a *de novo* trial it is clear that the second Magistrate has to re-summon the witnesses and to re-hear them. The word “ re-hear ” is not equivalent to “ hear further,” 26 Cr. L. J. 332=92 Ind. Cas. 748. The privilege under this section is that of the accused person and not that of the complainant, 27 Cr. L. J. 659=93 Ind. Cas. 707. The object of the section seems to be to leave it to the discretion of the Magistrate to either act on the evidence recorded by his predecessor or to hear it over again himself provided the accused does not claim a *de novo* trial, 38 M. 585. The general rule is that guilt or innocence of the accused must be decided by the Judge who has heard all the evidence, 23 C. 194 ; 20

W.R. (Cr.) 59; 3 Lah. 115. But this section introduces an exception to the general rule which should not receive a more extended interpretation than its actual words clearly justify, 19 Cr. L.J. 657-45 Ind. Cas. 993. Both the letter and the spirit of the law require that all criminal cases should be decided by Magistrates who heard the evidence and the only exception to the rule being that contained in this section, 20 Cr. L.J. 336-50 Ind. Cas. 872. A liberal construction should be placed on the provisions of this section, 39 C. 781; 40 A. 307; 19 Cr. L.J. 705. This section is applicable only to *Magistrates*. A Sessions Judge is not competent to try a case partly on the evidence recorded by his predecessor by virtue of this section, 25 B. 50; 3 M. 112; 8 C.L.J. 59 (F.B.); 35 A. 63. This section is applicable to a case which has been transferred from the file of one Magistrate to another and is not restricted to cases in which the Magistrates succeed each other in their offices, 20 Cr. L.J. 31-48 Ind. Cas. 681, where 39 C. 781; 40 A. 307; 32 M. 218; 35 C. 457 are referred to. This section does not apply to a Bench of Magistrates, 2 Lah. 287; 33 C. 194; 18 M. 394; 21 M. 346; 20 C. 870; 41 A. 116; 44 B. 400; 18 C.W.N. 394. The provisions of this section are applicable to security proceedings under Chapter VIII, of the Code, 43 M. 511; 27 Cr. L.J. 736-95 Ind. Cas. 63; 5 C.L.R. 452 and also to proceedings under Chapter XII, "Disputes as regards Immoveable Property," 37 C. 812; 4 C.W.N. 430. This section applies to summons cases also, 25 Cr. L.J. 1280-83 Ind. Cas. 340. This section is intended to provide for a case where an inquiry or trial has been commenced before one incumbent of a particular magisterial post, and that officer ceases to exercise jurisdiction in that post and is succeeded by another officer, 12 A. 66 at 68. Where one Magistrate heard the prosecution evidence, a second heard the defence evidence and a third went through the evidence and delivered judgment it was held that this section was not confined to two Magistrates and the judgment delivered by the third Magistrate was legal, as the section applied every time a succeeding Magistrate begins to exercise jurisdiction, i.e., every time another Magistrate takes cognizance of the matter which has been begun or continued by his predecessor, 45 M.L.J. 803-18 L.W. 949-(1923) M.W.N. 815. Where on the transfer of a Magistrate a case pending before him was taken up by another Magistrate the trial being started *de novo*, and subsequently the first Magistrate who originally started the trial was re-transferred it was held, that this section gave no jurisdiction to such Magistrate on retransfer to proceed with the trial from the point where he had left it, 53 Ind. Cas. 820; 20 Cr. L.J. 638-52 Ind. Cas. 398 followed recently by the Madras High Court in 47 M.L.J. 928-26 Cr. L.J. 510-85 Ind. Cas. 254. Similarly where after a transfer of a Magistrate who had heard and recorded the evidence in the case, the succeeding Magistrate takes cognizance and commences a *de novo* inquiry, it is not competent to the District Magistrate to transfer the case to the file of the first Magistrate to enable him to continue the case from the point when he left it prior to his transfer, 24 L.W. 840. Where one Magistrate records a statement from an accused person under S. 842, *supra*, in an inquiry which results in a commitment by his successor, such statement is admissible at the Sessions trial, 7 Lah. 70 where 31 M. 40 is followed.

SUB-SECTION (1).—This sub-section cannot give a Magistrate jurisdiction to deliver a judgment written by his predecessor, 59 C. 664; 27 Cr. L.J. 408-93 Ind. Cas. 70; but in 40 M. 108, it was held that when a Magistrate who tried a case wrote a judgment dated and signed the same and fixed a date for pronouncing judgment, was transferred meanwhile and is succeeded by another Magistrate, the latter is not bound to deliver his predecessor's written judgment. He has a discretion to proceed *de novo* and when no new trial is demanded he may in his discretion pronounce the predecessor's judgment. This sub-section leaves it to the discretion of the Magistrate either to act on the evidence recorded by his predecessor or to hear it over again for himself, 25 Cr. L.J. 1075-81 Ind. Cas. 899. The discretion is somewhat restricted by proviso (a). Proviso (b) gives the Superior Courts special powers of interference. Subject to the proviso, the discretion is absolute. It is not clear why this should involve a cancellation of the charge or the transformation of the proceedings from "trial back into an inquiry." Where proceedings are recommenced from the inquiry stage, they are recommenced as an inquiry, and if they had already developed into a trial stage before the change of Magistrates, they are commenced as a trial, i.e., proceeding in which a charge has been framed. The second Magistrate cannot ignore

the charge already framed by his predecessor, and his position is practically the same as that of his predecessor would have been, if after framing a charge he had heard further cross-examination of the prosecution witnesses and on a consideration thereof become satisfied that the charge was not well-founded. It has been held that a recommencement of the inquiry under this section did not cover a reference to the police under S. 202, *infra*. A discharge under the circumstances is to be viewed as an acquittal and no further inquiry could be had under S. 436, *infra*, 38 M. 585. See also, 2 L.W. 1244. A *de novo* trial means a new trial from the very beginning of the case and not merely recalling the prosecution witnesses and giving leave to the accused's vakil to cross-examine those witnesses. The object of granting a *de novo* trial is to enable the Magistrate who hears the case to see the way in which the witnesses give evidence before him, to mark their demeanour and thereby to be in a position to judge of their credibility. The object is lost if the witnesses are not examined again but are only allowed to be cross-examined by the accused. Such a course is not in accordance with the provisions of this section. Even if no objection is taken, the Calcutta High Court has held that the trial is still vitiated, 49 M.L.J. 423 at 424; (1925) M.W.N. 682=26 Cr. L.J. 1895=90 Ind. Cas. 688. See also 27 Cr. L.J. 659=94 Ind. Cas. 707. This sub-section provides for re-summoning and re-hearing witnesses, and recommencement of the inquiry or trial by the Magistrate who succeeds after his predecessor had already heard the evidence. The section is silent on the question whether or not on such rehearing any charge that may have already been framed after the first hearing must subsist. If it is considered that the charge already framed is wiped out, this assumption involves that the Legislature has also overlooked the point that the succeeding Magistrate ought in that case to be empowered to frame a fresh charge or to adopt the charge already framed, 38 M. 585 at 588, 7 Cr. L. Rev. 384. This section enables the succeeding Magistrate to draw up an order of the committal of the accused upon the evidence recorded by his predecessor. In such cases no fresh evidence need be recorded nor is he bound to take the statement of the accused, 31 M. 40. Proceedings in a warrant-case before a charge is framed are merely an *inquiry* and *not a trial* and at that stage the Magistrate is not bound to adopt the procedure laid down by this sub-section, 17 L.W. 412=32 M.L.T. 217. The word "trial" governs the whole of the proceedings in a warrant case. 3 Lah. 115; 27 Cr. L.J. 735=95 Ind. Cas. 63

PROVISO (a).—The provisions herein contained apply to a case which is remanded for taking further evidence to a trial court and the Magistrate who had originally tried the case had been transferred and a new Magistrate had taken his place. The new Magistrate is bound to accede to the demand of the accused, to have a *de novo* trial even in a case where it is sent back not for calling further prosecution evidence but simply for calling further evidence for the defence. 27 Cr. L.J. 1125=97 Ind. Cas. 613 following 25 C. 863. This proviso applies only to trials. An inquiry under Chapter XVIII of the Code, a register case or a preliminary inquiry is not a trial within the meaning of this proviso, 32 M. 218 at 219. The demand must be made at the commencement of the trial which commences when the accused appears or is brought before the Court, 25 C. 863. When a Magistrate refuses to re-summon and re-hear the witnesses, he acts in contravention of this proviso and S. 537, *infra* cannot cure such an express violation of the provision of law. It is of the utmost importance that the first Court that has to try the case should have an opportunity of observing the manner and demeanour of the witnesses, to form a correct estimate of their evidence and the trial held by a Magistrate upon evidence not recorded by him and upon evidence given by witnesses whose manner and demeanour he had no advantage of observing must be considered to be a trial held not according to law, 25 C. 863 at 868. The Magistrate is not bound to ask the accused whether he wishes to have the witnesses re-summoned and re-heard. It is for the accused to demand that the witnesses be re-summoned and re-heard. The fact that the accused at the time the charge was framed by the first Magistrate did not ask the witnesses to be recalled and re-heard, does not preclude him from ever exercising his right subsequently under this section. 2 Cr. L. Rev. 20; 14 Cr. L.J. 175=19 Ind. Cas. 175; 39 C. 781. Under this proviso the right given to the accused is that of demanding that the prosecution witnesses or any of them be re-summoned and re-heard and it rests with the accused to say who shall be re-summoned and re-heard. The complainant however has no such right, the provision being

entirely in the interests of the accused person. Fresh evidence might be concocted and blunders in the previous evidence might be explained away by allowing such a right to the complainant. When the accused is exercising his right under this proviso, the complainant cannot claim that he must have a *de novo* trial from the very beginning. The right which the accused exercises at one time of having certain witnesses re-summoned and re-heard can be waived by him afterwards and the complainant cannot object to this. 20 L.W. 916—23 Cr. L.J. 828—85 Ind. Cas. 386 where 20 Cr. L.J. 638—82 Ind. Cas. 398 ; 20 Cr. L.J. 620—83 Ind. Cas. 820 ; 3 Lah. 118 are referred to.

PROVISO (b).—This proviso enables superior Courts to interfere with convictions had before the Magistrate. Under the special powers conferred on a District Magistrate by this proviso, he may set aside a conviction by a first-class Magistrate even though an appeal from the conviction lies to the Sessions Court, 9 B. 100.

SUB-SECTION (3).—This sub-section is new and the purpose for which it is enacted is already noted above. A Magistrate to whom a case is transferred is now entitled to proceed on the evidence already recorded, subject to the right of the accused to demand a re-summoning and re-hearing of the witnesses, which right the accused may waive if he likes. The Magistrate need not now proceed to record evidence *de novo* as was held in a number of decisions. See 35 C. 457 ; 39 C. 781 ; 13 C.W.N. 420 ; 32 M. 218 ; 36 A. 815 ; 40 A. 307 ; A *de novo* trial does not imply the cancellation of the charge previously framed against the accused and consequently an order subsequently passed letting off the accused is an acquittal and not one of discharge. 2 L.W. 1244 following 38 M. 585.

350A. *No order or judgment 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 order or judgment is passed is duly constituted under sections 15 and 16, and the Magistrates constituting the same have been present on the Bench throughout the proceedings.*

Changes in constitution of Benches.

SCOPE OF THE SECTION :—This section is new and is enacted to deal with the case of the absence from a Bench of Magistrates of one member who was sitting at the previous hearing of the case. If the Bench is duly constituted and the Magistrates constituting the same have been present throughout the proceedings, the order or judgment passed cannot be vacated simply because a member or members are absent. This is in accordance with the decision in 38 M. 797 ; the principle is that the Magistrates who passed order or judgment must have been present throughout and have heard all the evidence recorded. See 38 M. 304 ; 21 M. 248 ; Weir II, 18 18 M. 394 ; 10 L.W. 388 ; 20 C. 870 ; 23 C. 194 ; 15 A.L.J. 468 ; 16 A.L.J. 885. Where the hearing of a case commenced with three Magistrates constituting a Bench but only one of the Magistrates was present at all the hearings, sitting sometimes with one Magistrate and sometimes with the other and sometimes with both, the trial was held bad as it contravened the provisions of this section even though the quorum of the Bench consisted of two. 27 Cr. L.J. 468—93 Ind. Cas. 255.

351. (1) Any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance, and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned.

Detention of offenders attending Court.

(2) When the detention takes place in the course of an inquiry under Chapter XVIII or after a trial has been begun, the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard.

The expression 'any person' is very comprehensive and will include a witness or a mere spectator attending Court.

This section is self-contained and complete in itself and is independent of the provisions of Ss. 190 and 191, *supra*.

SUB-SECTION (1).—A Magistrate proceeding under this section against any person who may appear upon the evidence taken by him to be concerned in the offence under investigation cannot be regarded as taking cognizance of the case upon information received or upon his own knowledge or suspicion within S. 190 (1) (c), *supra*, so as to enable the accused to object to the Magistrate proceeding further with the case, 10 Cr. L.J. 303=13 Ind. Cas. 533 where 1 C.W.N. 405 is *not followed* and 3 C.W.N. cclxxix is *followed*. An accused person against whom action is taken under this section has full information as to the materials on which action is taken against him and he is under no disability to combat the suspicion lurking in the mind of the Magistrate and influencing his judgment as in a case where action is taken under S. 190 (1) (c): A Magistrate may under this section join as a co-accused any person attending his Court who seems to him to be implicated in the case under trial, 12 Cr. L.J. 399=11 Ind. Cas. 883. But if the person is not in attendance in Court he cannot proceed under this section, 12 Cr. L.J. 92=9 Ind. Cas. 492; see also 10 Cr. L.J. 303=3 Ind. Cas. 868; 24 Cr. L.J. 519=78 Ind. Cas. 85.

SUB-SECTION (2).—The necessity for this sub-section has been aptly put in 14 W.R. (Cr.) 20. A Magistrate is not justified in taking a person without any previous notice or summons from among the audience or attendant witnesses in open Court and place him in the dock to be immediately tried upon a charge which had already been commenced against other prisoners and on which evidence had already been let in. Such a case is not justified and is not covered by the provisions of this section. Injustice of this kind might be done by a proceeding of this kind by practically depriving a person of the opportunities of preparing his defence to which he is rightly entitled under the provisions of the Code and subjects him to be tried on evidence which was taken before he was put in the dock.

352. The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them:

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

At Common Law a trial on indictment or criminal information must be in a public Court, with doors open. In dealing with certain classes of criminal trials the presiding Judges, not infrequently order women and young persons to leave the Court and there is undoubted power to exclude or eject persons who disturb the proceedings. All proceedings under the *Punishment of Incest Act, 1908* must be held *in camera* and S. 114 of the *Children Act, 1908*, in addition to and without prejudice to any power which the Court may possess, to hear proceedings *in camera* the Court may, where a person who, in the opinion of the Court is under sixteen, is called as a witness, in relation to an offence against or any conduct contrary to decency or morality, direct the exclusion from Court of all persons other than members or officers of court or parties in the case, their counsel, solicitors, or persons otherwise

directly concerned in the case and other *bona fide* representatives of newspaper or paper agency and S. 115, provided that children under fourteen other than infants in arms are prohibited from being present in Court during the trial of other persons except so long as their presence is required as a witness or otherwise for the purpose of Justice. *Arch. Cr. Pl. and Pr.*, pp. 192—93 (25th Ed.)

This section gives power to the Court of ordering that any particular person shall not remain in the room used by the Court. It makes no exception to the case of a police officer. The Magistrate has not merely to think of the help, any police officer may be able to give him or the prosecution, but has also to consider the susceptibilities of the accused and the effect which the presence of the police officer is likely to produce in the minds of the accused and the witnesses. When the accused so objects, the Magistrate has to decide whether his fear of prejudices to his case is reasonable considering the intelligence and susceptibilities of the class to which he belongs. In the case of a prosecuting officer, the Court may put it to him whether under the circumstances he will withdraw. In any case it is not advisable that a police officer interested in the case before a Magistrate should receive exceptional treatment as a seat on the dais which will surely breed suspicion in the mind of the accused as to the independence of the Magistrate, 26 Cr. L.J., 1180 (1)—88 Ind. Cas. 362. A Court is entitled to ask an investing police officer not to remain in Court. 1885 A.W.N., 221.

CHAPTER XXV.

OF THE MODE OF TAKING AND RECORDING EVIDENCE IN INQUIRIES AND TRIALS.

The general object of this Chapter is to ensure the accuracy of the record and to enable the accused to know and understand what the evidence given against him is and the reading over of the depositions of witnesses is so essential to the framing of an accurate record that the provisions of S. 360, *infra* must be regarded as imperative and not merely directory. The criminal Courts must therefore comply with its clear provisions, 52 C. 159, 137, 170, 199, 268, and 721; 28 C.W.N. 119 and 268; 42 C.L.J., 885; 29 C.W.N. 526; 49 M.L.J. 423.

353. Except as otherwise expressly provided, all evidence taken under Chapters XVIII, XX, XXI, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

Evidence to be taken in presence of accused.

ALL EVIDENCE, *i. e.*, evidence for the prosecution as well as the defence, and when defence evidence is recorded in the absence of the accused it was held that S. 537, *infra*, will not cure such a defect, 14 Cr. L.J. 287—19 Ind. Cas. 719.

Chapter XVIII refers to inquiries into cases triable by the Court of Session or High Court. Chapter XX deals with summons cases, and Chapter XXI with warrant-cases, Chapter XXII summary trials and Chapter XXIII deals with trials before the Sessions Court and the High Court.

SHALL BE TAKEN IN THE PRESENCE OF ACCUSED.—The wording of the section laying down that all evidence shall be taken in the presence of the accused includes the evidence for the defence as well as the prosecution. When an accused who was tried with the others under S. 323, I.P.C., absconded after the close of the prosecution evidence but before the defence witnesses were named by him and examined it was held that the recording of the defence evidence in the absence of the accused was not an irregularity cured by S. 537, *infra*, and the conviction was set aside, 14 Cr. L.J. 287—19 Ind. Cas. 719. All depositions of witnesses in criminal cases should be taken and attested by the Magistrate in the presence of the accused, but there is no provision of law which makes it obligatory that the attestation of the Magistrate should be in the presence of the accused, 10 A. 174; where witnesses are not examined in the presence of the accused, the conviction is bad, 2 N.W.P.H.C.R. 49. The evidence.

so recorded cannot give the look or manner of a witness, his hesitation, his doubts, his variation of language or his precipitancy, his calmness or consideration. It is the dead body of evidence without its spirit which is supplied when given openly and orally by the ear and eye of those who receive it, 8 B.L.R. (App. Cr.) 20 at 21-12 W.R. (Cr.) 2. See S. 511, *infra* which permits evidence to be recorded in the absence of the accused when the accused is *absconding* and there is no immediate prospect of arresting him or when the *offender is unknown* and an offence punishable with death or transportation is made out. S. 428 (3) gives a discretion to the appellate Court when directing additional evidence to be taken to have it recorded in the absence of the accused or his pleader, and under Chapter XL of the Code evidence of witnesses may be taken on commission. In a criminal trial it is clearly illegal to read out the deposition made by witnesses on a previous occasion, to put a few additional questions to them and then tender them for cross-examination. Such a procedure is illegal and it cannot be cured by S. 537, *infra*, 23 Cr. L.J. 377-77 Ind. Cas. 423. See also Ss. 509 and 510, *infra* which make an exception as to medical evidence. The attendance of an accused person during his trial before the High Court Criminal Sessions may be dispensed with under this section on the ground of ill-health of the accused, 14 Bom. L.R. 235-13 Cr. L.J. 464 = 15 Ind. Cas. 96.

WHEN PERSONAL ATTENDANCE IS DISPENSED WITH, IN THE PRESENCE OF PLEADER.—See S. 205, *supra* which enables a Magistrate issuing a summons, in his discretion, to dispense with the personal attendance of the accused. S. 116, *supra* also gives similar power in cases under the security chapter. Under S. 145, (1) a Magistrate may require the parties concerned to attend in person or by pleader. It was held in 14 Bom. L.R. 235-13 Cr. L.J. 464-16 Ind. Cas. 96 that the High Court has power under this section to dispense with the attendance of an accused during his trial before the sessions on the ground of ill-health. When S. 205, *supra* empowers a Magistrate to dispense with personal attendance of an accused it could not have been the policy of the Legislature that the High Court should not have similar powers in all proper cases. Such power may properly be exercised in favour of *pardanishin* ladies at least until they are convicted, 43 M. 359; 17 C.W.N. 1243. See S. 503 *infra* which authorises taking of evidence on commission.

354. In inquiries and trials (other than summary trial) under this

Code by or before a Magistrate (other than a Presidency Magistrate) or Sessions Judge, the evidence of the witnesses shall be recorded in the following manner.

Manner of recording evidence outside presidency-towns.

Ss. 260, and 261, make special provisions for summary trials and S. 362, *infra* prescribes the mode of recording evidence by Presidency Magistrates.

355. (1) In summons-cases tried before a Magistrate other than a Presidency Magistrate, and in cases of the offences mentioned in sub-section (1) of section 260, clauses (b) to (m), both inclusive, when tried by a Magistrate of the first or second class, and in all proceedings under section 514 (if not in the course of a trial), the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds.

Record in summons cases and in trials of certain offences by first and second class Magistrates.

(2) Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record.

(3) If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same, and such memorandum shall form part of the record.

SCOPE OF THE SECTION.—This section does not apply to summary trials. See S. 354 *infra*. This must be read along with, S. 263 *supra*. The rule as to recording of evidence is contained herein and is obligatory, while S. 263, *supra* lays down as an exception that in cases where no appeal lies evidence need not be recorded, 48 C. 280. The substance of the evidence alone is to be recorded and not the form in which the witness deposes, 23 Cr. L.J. 120—65 Ind. Cas. 882. The provisions of this section are obligatory and failure to comply with them may amount to an illegality and not a mere irregularity, 23 Cr. L.J. 114—65 Ind. Cas. 516. "We are not aware of any provision of law which renders it illegal for a native second-class Magistrate to record the memorandum referred to in this section in English any more than it is illegal for an English Magistrate to do so." 19 M. 269 at 270. Evidence in maintenance cases under Chapter XXXVI should not be recorded as in summary trials but in the manner provided by this section, 20 C. 351 at 352. An order awarding maintenance under S. 488 *infra* cannot be passed simply on the wife's verified application on oath, of the truth and correctness of the allegations made in her applications for maintenance without examining her or her witnesses, if any, on oath. The application for maintenance cannot take the place of her examination on oath in the presence of the husband, and consequently, there is no legal evidence as against him for passing the order for maintenance. 25 Cr. L.J. 302—76 Ind. Cas. 975. In a summons-case the reading over of the recorded deposition is not prescribed by law and its omission cannot therefore *per se* be regarded as a defect fatal to a conviction. Weir II, 433. Where evidence is illegally recorded in the form of a memorandum when the Magistrate is not entitled to do so the conviction was set aside as illegal, Weir II, 432; 21 Cr. L.J. 28—64 Ind. Cas. 172. When the substance of the evidence taken down by the Magistrate in a warrant-case tried summarily is not signed by the Magistrate, the procedure was held to be illegal and trial bad, 23 Cr. L.J. 114—65 Ind. Cas. 516. Though this section does not expressly refer to warrant cases it refers to all cases other than summons cases and cases mentioned in sub-section (1) (b) to (m) of S. 260. The Code does not prescribe the manner for recording evidence applicable to all warrant cases. This section must be held to prescribe the manner in which evidence should be recorded in warrant cases. 52 C. 632; 26 Cr. L.J. 1240—68 Ind. Cas. 866.

OFFENCES MENTIONED IN S. 260 (1) (b) to (m).—These clauses (b) to (m) relate to offences punishable under the Indian Penal Code, but clause (a) refers to offences punishable under other laws also and this section has no application to that clause.

IN ALL PROCEEDINGS UNDER S. 514.—S. 514 deals with procedure on forfeiture of bonds taken under the provisions of the Code.

SHALL MAKE A MEMORANDUM.—This section does not require a Magistrate to record the evidence of the witnesses but only to make a memorandum of the substance of the evidence of each witness as it proceeds. S. 357, *infra* carefully prescribes the language in which the evidence of witnesses in the trials and inquiries referred to in S. 356 shall be taken down, but the Code is silent as to the language in which a memorandum of the substance of the evidence in the less important case enumerated in this section is to be recorded.

AS THE EXAMINATION OF WITNESSES PROCEEDS.—The memorandum must be made as the examination of the witnesses proceeds and not after it is concluded, and from the recorded deposition of the witnesses; 1 B. H. C. R. 91. The object is to make the Magistrate to give pointed attention to what the witnesses say and thus ensure accuracy. A defective memorandum under this section may perhaps be taken to be an illegality and not merely an irregularity as unlike S. 356, *infra* the defective memorandum will be the only record available for evidence. See 23 Cr. L.J. 114—65 Ind. Cas. 516.

356. (1) In all other trials before Courts of Session and Magistrates (other than Presidency Magistrates) and in all inquiries under Chapters XII and XVIII, the evidence of each witness shall be taken down in writing in the language of the Court, by the Magistrate or Sessions Judge, or in his presence and hearing and under his personal direction and superintendence, and shall be signed by the Magistrate or Sessions Judge.

Record in other cases outside Presidency-towns.

(2) When the evidence of such witness is given in English, the Magistrate or Sessions Judge may take it down in that language with his own hand, and, unless the accused is familiar with English, or the language of the Court is English, an authenticated translation of such evidence in the language of the Court shall form part of the record.

Evidence given in English.

(2A) *When the evidence of such witness is given in any other language, not being English, than the language of the Court, the Magistrate or Sessions Judge may take it down in that language with his own hand, or cause it to be taken down in that language in his presence and hearing and under his personal direction and superintendence, and an authenticated translation of such evidence in the language of the Court or in English shall form part of the record.*

(3) In cases in which the evidence is not taken down in writing by the Magistrate or Sessions Judge, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall form part of the record.

Memorandum when evidence not taken down by the Magistrate or Judge himself.

(4) If the Magistrate or Sessions Judge is prevented from making a memorandum as above required, he shall record the reason of his inability to make it.

AMENDMENT.—Sub-section (2A) is new.

OTHER THAN PRESIDENCY MAGISTRATES.—See S. 362 *infra* which deals with the mode of recording evidence in appealable cases by Presidency Magistrates. There is no provision in law requiring Presidency Magistrates to record evidence in cases other than those dealt with in S. 362 *infra*. In non-appealable cases it is left to the discretion of the Magistrate to do so or not, and the High Court would not interfere with such discretion, 31 C. 983; 33 C. 1036.

IN ALL INQUIRIES UNDER CHAPTERS XII AND XVII.—It is remarkable that a distinction is drawn in S. 355 and this section between summons-cases and inquiries under Chapter XII; S. 355 directs that in summons-cases the Magistrate shall make a memorandum of the substance of the evidence of each witness, whereas this section directs that in inquiries under Chapter XII the evidence of each witness shall be taken down in writing in the language of the Court by the Magistrate or in his presence or hearing or under his personal supervision and superintendence, and shall be signed by the Magistrate, 31 C. 503 at 514. Where

a Magistrate holding an inquiry under Chapter XII only makes a memorandum of evidence purporting to act under sub-section (3) of this section, the proceedings were quashed as he had violated the imperative provisions of sub-section (1) of this section, 42 C. 381. Though this section does not expressly refer to warrant cases it refers to all cases other than summons cases and cases mentioned in sub-section (1) (b) to (m) of S. 260. The Code does not prescribe the manner of recording evidence applicable to all warrant cases, 52 C. 632.

SHALL BE TAKEN IN WRITING IN THE LANGUAGE OF COURT BY MAGISTRATE, ETC.—Under the provisions of this section there is no exception whatever made in favour of cases in which no appeal lies. An omission to record the evidence in the mode prescribed by this section is so material an error that the High Court is bound to quash the proceedings as being founded on no evidence, 30 W.R. (Cr.) 14. In every sessions trial, no matter how often the case has been before the Court, the witnesses must be examined *de novo* in the same manner as if the case was entirely new and the witness had not been examined before, W.R. (Gap.) 1 and 13 and a memorandum by the Judge that the witnesses had deposed the same as former witnesses is not in accordance with the requirements of this section, W.R. (Gap.) 18 ; 1 B.H.C.R. 91.

SUB-SECTION (2) :—This sub-section requires a record to be prepared in the language of the Court in addition to what is taken down by the Magistrate or Judge in English, and sub-section (3) requires that in addition to what is taken in the language of the Court in the presence and hearing and personal direction of the Magistrate or Judge and signed by him, the Magistrate or Judge must make a memorandum of the substance of what each witness deposes with his own hand and shall sign the same. This memorandum is something different from that made under S. 355, *supra*. A defective memorandum under S. 355 may amount to an illegality whereas under this sub-section any such defect will be considered only as an irregularity since there is another record in proper form.

SUB-SECTION (2A).—This sub-section is new and supplies a real defect which existed in the Code before. Where evidence is given in any other language not being English which is dealt with in sub-section (2), than the language of the Court, the Magistrate or Judge is empowered to take the evidence in that language or cause it to be taken down in that language in his presence and under his direction and an authenticated translation in the language of the Court or in English is to form part of the record.

SUB-SECTION (3).—This sub-section is intended to secure accuracy. When the Magistrate is unable to record the evidence himself he must carefully attend to the examination of the witness and exercise control over the clerk who takes down the evidence. Failure on the part of the Magistrate to comply with the provisions of this sub-section will entail a retrial, 1891 A.W.N. 143 ; 19 C.W.N. 124, see also 19 M. 289.

357. (1) The Local Government may direct that in any district or part of a district, or in proceedings before any Court of Session, or before any Magistrate or class of Magistrates, the evidence of each witness shall, in the cases referred to in section 356, be taken down by the Sessions Judge or Magistrate with his own hand and in his mother-tongue, unless he is prevented by any sufficient reason from taking down the evidence of any witness, in which case he shall record the reason of his inability to do so, and shall cause the evidence to be taken down in writing from his dictation in open Court.

(2) The evidence so taken down shall be signed by the Sessions Judge or Magistrate, and shall form part of the record :

Provided that the Local Government may direct the Sessions Judge or Magistrate to take down the evidence in the English language, or in the language of the Court, although such language is not his mother-tongue.

This section prescribes carefully unlike S. 355, *supra* the language in which the evidence of witnesses in trials and inquiries referred to in S. 356, *supra* shall be taken down, 19 M. 289 at 270. The authority conferred by this section is personal to the officer and remains in force only so long as he remains in the district in which it has been conferred, 3 M.H.C.R. Appx. 9. Where a Magistrate not empowered to record evidence in his own hand in English did so, and committed the accused, it was held that the procedure of the Magistrate was only an irregularity cured by S. 537, *infra*, especially when there was nothing to show that the accused was prejudiced, Weir II, 434. The language in which the plea of the accused is to be recorded is the language in which it is conveyed by the interpreter to the Court, 3 C. 825. See 23 Cr. L. J. 625=68 Ind. Cas. 945.

358. In cases of the kind mentioned in section 355, the Magistrate may, if he thinks fit, take down the evidence of any witness in the manner provided in S. 356, or, if within the local limits of the jurisdiction of such Magistrate the Local Government has made the order referred to in section 357, in the manner provided in the same section.

IF HE THINKS FIT.—For example where a judge is of opinion that a witness is giving false evidence and he thinks that proceedings against him may be necessary in the interests of justice.

359. (1) Evidence taken under section 356 or section 357 shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative.

(2) The Magistrate or Sessions Judge may, in his discretion, take down, or cause to be taken down, any particular question and answer.

The ordinary, proper and convenient way of recording evidence is to take it down in the first person exactly as spoken by the witness, 3 B.L.R. Appx. 21=16 W.R. (Cr.) 86. See S. 165, Ind. Ev. Act, as to the power of a court to question the witness and take down the question and answer.

360. (1) As the evidence of each witness taken under section 356 or section 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall if necessary, be corrected.

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

(3) If the evidence is taken down in a language different from that in which it has been given, and the witness does not understand the language in which it is taken down, the evidence so taken down shall be interpreted to him in the language in which it was given, or in a language which he understands.

SCOPE OF THE SECTION.—The object of the section is to ensure the accuracy of the record and also that the accused should know and understand what evidence is given at the trial. The reading over of the evidence to the witness is so essential to the framing of an accurate record that the direction in this section is imperative and not directory, 28 C.W.N. 968. This wholesome provision of law is enacted not only for the benefit of the witness but also of the accused. But it is almost universally ignored. The result has been to set up a wholly erroneous practice in Courts in direct contravention of the law on the subject, 29 C.W.N. vii. Non-compliance with the provisions of this section deprives the accused of the valuable right of checking the correctness of the depositions. He is virtually interested in the due compliance with the provisions of this section, 52 C. 159 and 721; 42 C.L.J. 585—27 Cr. L.J. 375—92 Ind. Cas. 887. It is fair both to the witness as to the Magistrate who takes down the deposition as well as to the accused to have the deposition read over as soon as the examination of the witness is over. It would avoid a conflict between any recollection of the accused's pleader, the recollection of the prosecuting counsel and the recollection of the Court as well as the recollection of the witness seeing these four different persons to be considered in this connection the provisions of these sections are not only a salutary provision, but a provision intended for the furtherance of justice. It is not fair to an honest witness not to have his deposition read over soon after he made it, for, if the Magistrate incorrectly recorded it and if it is read over to him some hours after, the question, would arise whether the witness is correct in saying that he did not make a particular statement and whether the correction should be accepted or not, 49 M. 71. This section is mandatory. Omission to read over the deposition of a witness to him in the presence of the accused or his pleader, if he appears by pleader, is an illegality vitiating the trial and S. 587 *infra* has no application, 4 Pat. 231. The test for determining whether mandatory enactments are directory only or obligatory with an implied nullification for disobedience depends on the subject-matter, the importance of the provision disregarded and its relation to the general object of the statute 52 C. 159 following 51 C. 1; see 52 C. 721; 42 C.L.J. 585; 49 M. 71; 28 Cr. L.J. 932—85 Ind. Cas. 996. The evidence of each witness should be read over to him after it is completed before that of another witness commences. Reading over the deposition of all witnesses examined in one day at the close of the day does not satisfy the mandatory requirements of law, 42 C.L.J. 585—27 Cr. L.J. 375—92 Ind. Cas. 887; see 53 C. 129. The proper order to make when a committal order is made without complying with the provisions of this section is to send it back to the committal Court and have the defect in procedure cured by recalling the witnesses whose evidence was not read over to them in the presence of the accused. 28 C.W.N. 968. The section applies to proceedings where a person is called upon to show cause why he should not furnish security for good behaviour and the omission to comply with its provisions vitiates such proceedings. 52 C. 633 where 52 C. 470 is followed. But the provisions of this section do not apply to proceedings under S. 107, *supra*, and it is not necessary to read over the depositions to the witnesses in the presence of the person called on to furnish security, S. 117 (2) says that such inquiry shall be made in the manner prescribed for summons cases and S. 355, *supra* applies to trial of summons cases and so this section is not applicable. 51 C. 868. This section applies to proceedings under Ch. XII of the Code. 52 C. 437 where 52 C. 159 is followed. But see 52 C. 721, which took a very restricted view, that as the parties to these proceedings were not "accused" their attendance at the reading over of the evidence to the witnesses was not necessary. Again it was held in 29 C.W.N. 475—41 C.L.J. 357—28 Cr. L. J. 915—85 Ind. Cas. 979, that this section has no application to Ch. XII as such proceedings are summary proceeding of a quasi-civil nature for preventing breaches of the peace and no right or title is decided and no one's life or liberty is in question. Reading over the deposition

of the witness while other witnesses are being actually examined is not a sufficient compliance with the section as its object is that the accused may have the opportunity of ascertaining that the evidence has been correctly recorded. This is all the more important in an inquiry with a view to commit since in certain circumstances the evidence so taken may be used as evidence against him at the trial. When such an objection is taken in the Sessions Court before the accused was called on to plead the commitment was quashed and the case sent back again to be inquired into by the committing Magistrate. 26 Cr. L.J. 1267=88 Ind. Cas. 1043; 26 Cr. L.J. 927=86 Ind. Cas. 911; 82 C. 499. But the *Rangoon High Court* in 27 Cr. L.J. 669=84 Ind. Cas. 717 has differed from the view taken in 82 C. 499 and 499 and held that failure to comply with the provisions of this section, unless it has resulted in any inaccuracy in the deposition of the witnesses prejudicing the accused or occasioning a failure of justice, is only a mere irregularity cured by S. 537, *infra* and each case should be decided on its own merits. See also 27 Cr. L.J. 837=95 Ind. Cas. 937 where 27 Cr. L.J. 669=84 Ind. Cas. 717 is followed. Reading over the deposition after completion by the clerk while the Court is examining other witnesses is not warranted by law and vitiates the trial, 26 Cr. L.J. 1016 (1)=87 Ind. Cas. 840 (1). This section is enacted for the protection of witnesses and the irregularity in procedure as to reading over the evidence to the witness will not afford any ground for the accused to have his conviction set aside, 7 C.L.R. 393; 12 W.R. (Cr.) 44. It was sought to amend this section by providing that a witness reading over his deposition himself and also reading out the deposition in the presence of the accused only if the accused so desired, were sufficient compliance with law; but the amendment fell through and the marked conflict of judicial opinion with regard to the effect of failure to observe strictly the provisions of this section still remains. The mere reading of the deposition by the witness himself and his admitting the same to be correct is not a sufficient compliance with law, 82 C. 431; 26 Cr. L.J. 927=86 Ind. Cas. 991; 26 Cr. L.J. 851=87 Ind. Cas. 103.

SUB-SECTION (1).—In 38 C. 955 at 989 *Jenkins, C.J.*, condemned the practice prevailing in Courts in not reading the deposition of witnesses in the presence of the accused or his pleader as a departure from the terms of the section which are mandatory and not merely directory, and a custom to the contrary cannot alter the plain words of the Act. See also 22 Cr. L.J. 568=62 Ind. Cas. 584 and 18 Ind. Cas. 938. This condemnation of the practice of not complying with the provisions of this section has been approved in 28 C.W.N. 968. Again in 42 C. 240 it was held that where the deposition of a witness after being recorded was handed over to a witness to be read by him and signed in the presence of the accused, it was not a sufficient compliance with law and the deposition was inadmissible in evidence. It is clear from the wording of this section that if the accused is in attendance the evidence must be read over in his presence and it is only when he appears by pleader that the reading of the evidence in the presence of his pleader is sufficient; but on this ground alone further inquiry is not to be ordered unless it is demanded in the interests of justice. 30 C.W.N. 336=27 Cr. L.J. 809=93 Ind. Cas. 973; See also 82 C. 431. This section is enacted not only for the benefit of the witness but also of the accused. It is a mandatory provision and failure to comply with it deprives the accused of the very valuable right of checking the depositions of witnesses. 28 C.W.N. 968 where 42 C. 240; 38 C. 955 and 28 C.W.N. 119 are approved; See also 82 C. 499; 42 C.L.J. 888=27 Cr. L.J. 888=88 Ind. Cas. 1032; 49 M. 71. In 28 M. 308 followed in 12 C.W.N. 848 a similar view was taken and it was held that where the witness was taken aside by the clerk and evidence read over to him in a place where neither the Judge nor the vakils were present, the deposition was taken not in accordance with law and therefore inadmissible in evidence. But in 34 M. 141, it was held that a deposition irregularly recorded without complying with this section is not a nullity for all purposes even as against the person who made it and who had admitted it to be correct and in 21 M.L.J. 411 an objection taken to the admissibility of a deposition as not complying with the provisions of this section was overruled. See also 2 Cr. L. Rev. 45. In the later cases, 28 M. 308 was distinguished and a conviction for perjury of a witness was held to be sustainable even though the deposition did not comply with the provisions of this section. It is a sufficient compliance with the provisions of this section if the deposition of the witness is read over to him in the presence of a pleader for one of the several accused. A deposition so read

over is admissible against the witness on his subsequent trial for perjury, 26 C. 808 at 815. There is no provision of law which makes the attestation of the deposition by the Court in the presence of the accused obligatory, 10 A. 174. Where evidence is not read over in accordance with the provisions of this section it cannot be held to be an irregularity to support the proposition that the Magistrate has decided the case on no evidence at all, 25 Cr. L.J. 89—76 Ind. Cas. 28. There is abundant authority to support the proposition that the accused is virtually interested in the due compliance with the provisions of this section and a failure in that respect amounts to a material irregularity which ordinarily must be taken as causing him prejudice, 23 C.W.N. 968 at 974. The word "accused" has been used in this sub-section in its wider significance as meaning a person over whom a criminal court is exercising jurisdiction, 52 C. 437 at 439. In proceedings under S. 145; *supra* the provisions of this section do apply to the extent at least that the evidence of each witness, when completed must be read over to him. But the parties to the proceedings are not "accused" and their attendance at the reading over the evidence of the witnesses is not necessary, 52 C. 721; 29 C.W.N. 701 (F.B.)—41 C.L.J. 479—28 Cr. L.J. 1194—88 Ind. Cas. 714. The provisions of this section do not apply to proceedings under S. 107, *supra* and the depositions of witnesses need not be read over to them in the presence of the persons called on to furnish security. S. 117 (2) says that such inquiry, shall be conducted as in summons cases to which S. 355, *supra* applies, and so this section is not applicable. 52 C. 668.

SUB-SECTION (2).—A witness honestly desiring to correct an error in his evidence should not be deterred from doing so by the risk of a criminal charge. 10 C. 937 at 941 and if a Court instead of allowing the correction to be made proceeds to make a memorandum under this sub-section, such memorandum must be appended to the deposition itself, and care should be taken that the practice and form prescribed by law are strictly adhered to, 13 W.R. (Cr.) 17.

SUB-SECTION (3).—The fact that the evidence recorded and read over to a witness in a language not understood by the witness is no ground for setting aside the conviction of the accused in a case where the accused understood the language in which such evidence is recorded and read over to the witness, 7 C.L.R. 393.

361. (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

(2) If he appears by pleader, and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.

(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

This section relates to the oral evidence of witnesses only. 15 W.R. (Cr.) 25. As to documentary evidence though a prisoner has a right to have all or any part of any documents used in his trial translated or interpreted to him, yet documents such as *Gazette of India* or *Calcutta Gazette* merely proving a proclamation by the Government, need not necessarily be interpreted and will not come within this section, 7 B.L.R. 83 at 71.

See S. 543 *infra* which relates to the service of interpreters in Criminal Courts.

362. (1) In every case *tried by a Presidency Magistrate in which an appeal lies, such Magistrate shall either take down the evidence of the witnesses with his own hand, or cause it to be taken down in writing from his dictation, in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record.*

(2) Evidence so taken down shall ordinarily be recorded in the form of a narrative, but the Magistrate may, in his discretion, take down, or cause to be taken down, any particular question or answer.

(2A) *In every case referred to in sub-section (1), the Magistrate shall make a memorandum of the substance of the examination of the accused. Such memorandum shall be signed by the Magistrate with his own hand, and shall form part of the record.*

(3) Sentences *unless they are sentences of imprisonment ordered to run concurrently* passed under section 35 on the same occasion shall, for the purposes of this section, be considered as one sentence.

(4) *In cases other than those specified in sub-section (1), it shall not be necessary for a Presidency Magistrate to record the evidence or frame a charge.*

AMENDMENT.—Sub-sections (2A) and (4) are new as also the words in italics in sub-sections (1) and (3). The change is intended to remove the uncertainty which at present exists regarding the duties of a Presidency Magistrate in recording evidence and framing a charge in petty cases. It is also provided that when sentences in excess of the one, are passed, which are ordered to run concurrently, it is the heaviest sentence which determines the applicability of this section.—*Statement of Objects and Reasons.*

SCOPE OF THE SECTION.—This section is not meant for a Presidency Magistrate to act arbitrarily and record nothing by way of evidence. The section gives him a discretion to take down the evidence or not and the discretion should be exercised judicially in a reasonable spirit and not arbitrarily, 10 Bom. L.R. 201—7 Cr. L.J. 197.

SUB-SECTION (1).—The wording of this section is evidently faulty, as it is not quite reasonable to suppose that the Magistrate should make up his mind as to the sentence he would pass before the evidence is recorded. The section, however, lays down by implication that the Magistrate may record evidence, when he intends, if he convicts the accused to impose a fine not exceeding rupees two hundred or to pass a sentence of imprisonment for a term not exceeding six months. Reading this and S. 411, *infra*, it may be inferred that a Presidency Magistrate need not record evidence in a case which under S. 411 is not appealable. But it does not necessarily follow from these sections that the framers of the Code intended that a Presidency Magistrate was not bound to record evidence or notes of evidence in any case in which an appeal does not lie, and this section and S. 411 do not in themselves warrant such a conclusion, 33 C. 1036 at 1038. Where a Magistrate fails to comply with the provisions of this sub-section, the irregularity obviously prejudices the accused and the High Court will not be in a position to know exactly the allegations made in the evidence or the exact reasons on which the Magistrate based his conviction and this occasions a failure of justice which prevents the irregularity being cured by S. 537, *infra*, 26 Cr. L.J. 457—85 Ind. Cas. 137.

IN WHICH AN APPEAL LIES, i.e., imprisonment exceeding six months or fine exceeding rupees two hundred; the imprisonment must be a substantive sentence of six months and not imprisonment in default of payment of fine imposed, 33 C. 1036 at 1039.

SUB-SECTION (2A) is new and refers to appealable cases. It is the duty of the Magistrate to take a note of all the material facts stated by a witness whether in examination-in-chief or in cross-examination, 48 C. 411.

SUB-SECTION (3) is newly added to remove doubt as to recording evidence and framing charge in petty cases. There is no obligation in law requiring a Presidency Magistrate to record evidence in cases other than those dealt with in this section. In non-appealable cases it is left to his discretion to do so or not, and the High Court would not interfere with the exercise of such a discretion, 31 C. 983. At the same time it is desirable that a Presidency Magistrate should keep some record of the statements made by the witnesses or that the judgment should indicate what these statements are, so that the High Court as a Court of Revision may judge of the propriety or legality of the orders passed, 33 C. 1036 at 1039; 13 C.W.N. 318—9 C.L.J. 439—10 Cr. L.J. 122—2 Ind. Cas. 681. See also S. 441, *infra* which enables Presidency Magistrate to supplement the grounds of their decision when records are called for by the High Court in revision under S. 495, *infra*. This section does not mean that Presidency Magistrates can act arbitrarily and record nothing by way of evidence in non-appealable cases. In such cases the section merely gives them a discretion to take the evidence or not, and the discretion should be exercised judicially in a reasonable spirit and not arbitrarily. When a respectable person is charged with an offence reflecting on his character and serious allegations are levelled against him there ought to be some record of evidence to enable him in case of conviction to move the High Court in revision. 10 Bom. L.R. 201—7 Cr. L.J. 195. Failure to record evidence in the direct narration is only an irregularity and S. 537 will apply, unless a failure of justice had occasioned thereby, 19 M. 269; 18 Cr.L.J. 336—28 Ind. Cas. 448. The discretion which is allowed to a Presidency Magistrate not to record any evidence should be exercised reasonably, 26 Cr.L.J. 384—85 Ind.Cas. 134.

363. When a Sessions Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

Remarks respecting demeanour of witness.

The object of this section is to assist the appellate Court in estimating the value to be attached to the evidence of witnesses recorded by the inferior Court. The appellate Court will have no opportunity to observe the look or manner of a witness, his hesitation, his doubts, his variations of language or his precipitancy, his calmness or consideration, 3 B.L.R. (Ap. Cr.) 20 at 24; 18 Cr. L.J. 203. The Magistrate's remarks on the record of the deposition of a witness is *prima facie* of the facts stated therein, 12 W.R. (Cr.) 51. The Magistrate no doubt is entitled to make such remarks as he thinks fit respecting the demeanour of the witness whilst under examination but his remarks "the witness falters and from his demeanour it appears he has not told the truth" would afford a good ground for transfer as the Magistrate has already specified that he has altogether disbelieved the witness, 29 C.W.N. 318—26 Cr. L.J. 852 (1)—86 Ind. Cas. 708 (1). A Magistrate is not entitled to take into consideration the appearance and the manner of speech of an accused person in arriving at his guilt. 23 Cr. L.J. 161—65 Ind. Cas. 625; see 39 B. 388; 21 C. 279. There is no law by which an accused person can either by words or gestures or exposing himself to certain physical treatment be made to implicate himself in the crime of which he is accused. Such an idea is highly repugnant to the proper administration of justice, 1 Pat. 242.

364. (1) Whenever the accused is examined by any Magistrate, or by any Court other than a High Court established by Royal Charter the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the

Examination of accused how recorded.

language of the Court or in English : and such record shall be shown or read to him, 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.

(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge or such Court, and such Magistrate or Judge 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.

(3) In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound, as the examination proceeds, to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language ; and such memorandum shall be written and signed by the Magistrate or Judge with own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

(4) Nothing in this section shall be deemed to apply to the examination of an accused person under section 263 *or in the course of a trial held by a Presidency Magistrate.*

AMENDMENT.—In sub-section (3) the words "*unless he is a Presidency Magistrate*" have been omitted and in sub-section (4) the words "*or in the course of a trial held by a Presidency Magistrate*" have been added by Act XXXVII of 1923 to remove certain anomalies and to make it clear that in cases where an appeal lies the Presidency Magistrate shall take down a memorandum of the examination of the accused as provided by sub-section (2A) and in non-appealable cases no record of the examination of the accused need be made.

SCOPE OF THE SECTION.—The provisions of this section are mandatory and omission to comply with its provisions vitiates the trial, 26 Cr. L.J. 1032=87 Ind. Cas. 920 ; 52 Cr. 403 ; 24 Cr. L.J. 497=72 Ind. Cas. 981. This section does not empower a Court to examine an accused person. It merely lays down the mode of recording the examination of the accused empowered by the other provisions of the Code. The examination referred to in this section is subject to the purpose mentioned in S. 342 *supra*, *vis.*, to enable the accused to explain any circumstances appearing in evidence against him, 10 M. 298 ; 4 Bom. L.R. 461=14 A. 242 ; 15 C.L.J. 323=13 Cr. L.J. 283=14 Ind. Cas. 667. A record of the examination of the accused under the provisions of this section is obligatory and where the absence of it causes serious prejudice to the accused the trial is vitiated and must be set aside, 52 C. 436. The rules laid down in this section as to the mode of recording statements are applicable to confessions taken before inquiry or trial under S. 164, *supra*, and to examination of accused under S. 342, *supra*, 1883 A.W.N. 243. This section applies only to inquiries and trials and does not apply to investigations, 10 B.H.C.R. 166. The examination may take place either before the commencement of the inquiry resulting in the commitment of the accused or during inquiry when the accused is questioned under S. 209 and S. 342, *supra*, 21 B. 498 at 498 ; but such examination cannot be had before the stage at which the examination of the accused is authorised, 2 C.W.N. 702. This section does not apply to proceedings under S. 202, *supra*, as the person examined was not in the position of an accused who was being tried for any offence, 52 C. 1035.

SUB-SECTION (1) : ANY COURT OTHER THAN A HIGH COURT.—No special provision is made for recording the examination of the accused by the High Courts. S. 365, *infra* only deals with the manner of taking down evidence.

EVERY QUESTION PUT AND EVERY ANSWER GIVEN MUST BE RECORDED IN FULL.—To understand correctly the statement of the accused it is provided that every question put to him and every answer given by him must be recorded in full, but questions should not be put in the nature of cross-examination. Nor should they be put in such a way as to elicit incriminating answers from him, 6 C.L.R. 431 ; 13 A. 319, but the mere absence of questions in the accused's statement would not make it inadmissible in evidence, 12 C.L.R. 120. Confessions under S. 164, *supra*, are to be recorded in the manner provided by this section, and S. 533 will not render a confession admissible when no attempt at all has been made to conform to the provisions of this section, 9 M. 225, but when it is not obligatory on a Magistrate holding an inquiry to record a statement in writing, such statement or confession may be proved by the oral testimony of the Magistrate, 45 M. 330.

IN THE LANGUAGE IN WHICH HE IS EXAMINED.—When the statement was made in one language and communicated in another language to the Magistrate through a sworn interpreter and again translated by the Magistrate into English and so recorded, the High Court in 21 C. 642 at 660 observed—"The law requires ordinarily that such a statement should be recorded in the language of the person making it, the object being to represent the very words and expressions used as to ensure accuracy, and prevent misrepresentation or misconstruction of what was said. If such a record is not practicable the law directs that the statement be recorded in the language of the Court or in English. If, however, as in this case, a second translation be made, and the statement be recorded as so understood, the accuracy which the law contemplates is made more remote." If an interpreter is employed, the examination should be recorded in the language in which it is communicated to the Court by the interpreter, 5 C. 823. If the answers to the questions put to the accused were not taken down in accordance with the provisions of this section, it is doubtful whether such a defect could be cured by S. 533, *infra*, 15 C. 595 (F.B.)

IN THE LANGUAGE OF THE COURT.—The language of the Court is to be determined by the Local Government under S. 568, *infra*.

SHALL BE SHOWN OR READ TO HIM.—The examination of the accused after it is recorded in full is to be shown or read to him and not merely read over to him as contemplated by S. 360, *supra*. See 24 Cr. L.J. 497 = 72 Ind. Cas. 981.

THE RECORD SHALL BE SIGNED BY THE ACCUSED.—The recorded statement when not signed by the accused is inadmissible in evidence until the defect is remedied as provided by S. 533, *infra*, 1883 A.W.N. 243 ; 1896 A.W.N. 161 ; want of signature of the accused to the recorded statement will not vitiate the conviction if the record is admitted and used in evidence without objection, 11 B.H.C.R. 237. The omission to obtain the signature or mark of the accused to a confession was a defect which did not affect the defence on the merits and the defect was cured by S. 533, *infra*, and though the record of the confession is inadmissible, oral evidence could be given as to the terms of the confession and used against the accused, 23 B. 221 ; 4 Bom. L.R. 783, and objection to the admission in evidence of such unsigned statement may be waived and could not be taken as a ground in appeal, 11 Bom. L.R. 237. But when no record whatever was made of such a confession, S. 533, *infra* has no application, for that section only provides for cases where a confession recorded did not strictly comply with the provisions of this section, 35 A. 260. When the accused cannot sign his name, his mark is sufficient for the requirements of this section, Weir II, 427. A thumb impression affixed to a confession by an accused who is able to write his name is not a signature under clause (52) of S. 8 of the General Clauses Act. Even a mark is to be considered a signature only in the case of a person unable to write his name, 32 C. 350. Refusal of the accused to sign the statement is an offence punishable under S. 180, I.P.C., 39 A. 329 ; 4 Cr. L.J. 208.

MAGISTRATE OR JUDGE SHALL CERTIFY WITH HIS OWN HAND.—The certificate need not be written by the presiding officer of the Court. It is sufficient if it is signed by him, 1900 A.W.N. 203; 3 W.R. (Cr.) 55. Unlike S. 164, *supra* this section does not prescribe any particular form for the certificate. Omission to certify the confession in the manner provided by this section is not such a material error as will justify the High Court in setting aside the conviction, Welr II, 436. A certificate which contained the words "taken by me," but did not mention that the statement was taken in his hearing, was treated as substantial compliance with this section, 3 C. 958, and the defect in the certificate could be cured by examining the Magistrate, 22 M. 15; 23 B. 221; 3 C.W.N. 387; 3 C.W.N. 22.

SUB-SECTION (3).—The memorandum mentioned in this sub-section must be wholly written and signed by the Magistrate himself with his own hand and shall be annexed to the record, but it is not necessary that an English memorandum referred to them should be made in respect of confessions recorded under S. 164, *supra* as the manner of recording such confessions is fully set out in sub-sections (1) and (2) of this section, 14 C. 539; this attestation is unnecessary when the confession is made to the trying Magistrate as such confession amounts to any admission of the accused on which the Magistrate may convict him without any further record, 3 C. 756.

SUB-SECTION (4).—S. 263 deals with the preparation of record in cases where there is no appeal in summary trials.

365. Every High Court established by Royal Charter *shall*, from time to time, by general rule, prescribe the manner in which evidence shall be taken down in cases coming before the Court, *and the evidence shall be taken down in accordance with such rule.*

Record of evidence
in High Court.

AMENDMENT.—The word "*may*" has been altered into "*shall*" and this makes it obligatory on the High Courts to prescribe the manner in which evidence should be taken down in cases coming before them, and for the words "and the Judges of such Court shall take down the evidence or the substance thereof in accordance with the rule (if any) so prescribed" the words "the evidence shall be taken down in accordance with such rule" have been substituted. Under this section a judge is not bound to record evidence in his own hand. All that the section requires is that there should be a record of the evidence. None of the High Courts have yet framed any rules under this section.

CHAPTER XXVI.

OF THE JUDGMENT.

366. (1) The judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced, or the substance of such judgment shall be explained,—

Mode of delivering
judgment.

(a) in open Court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders, and

(b) in the language of the Court, or in some other language which the accused or his pleader understands;

Provided that the whole judgment shall be read out by the presiding Judge, if he is requested so to do either by the prosecution or the defence.

(2) The accused shall, if in custody, be brought up, or, if not in custody, be required by the Court to attend to hear judgment delivered, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted, in either of which cases it may be delivered in the presence of his pleader.

(3) 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.

(4) Nothing in this section shall be construed to limit in any way the extent of the provisions of section 537.

JUDGMENT.—The word "judgment" is not defined in the Code, 31 M. 543 at 545. It means the expression of the opinion of the Judge or Magistrate arrived at after due consideration of the evidence and of the arguments, 21 C. 121 at 127. It is sufficiently clear from this and S. 367, *infra*, that it is intended to indicate the final order in a trial terminating in either the conviction or acquittal of the accused, but an order of discharge under S. 253, *supra* is not a judgment, 31 M. 543 at 545 ; 28 C. 852 ; 29 C. 726. This section and S. 367 apply only to judgments in trials.

IN EVERY TRIAL.—The word 'trial' is not defined in the Code. 'Inquiry' includes every inquiry other than a trial, S. 4 (1) (k), *supra*. Trial appears from various provisions of the Code to mean proceedings in a criminal prosecution after the accused has been called upon to plead to the charge. So an order dismissing a complaint or one discharging the accused will not come within the section. Moreover S. 203, *supra*, provides that when dismissing a complaint a Magistrate should record his reasons, a provision quite unnecessary if this section applied to such an order. As regards an order of discharge it is not a judgment, 29 C. 726 ; 4 Cr. L.J. 284.

SHALL BE PRONOUNCED IN OPEN COURT.—No expression of opinion by a Judge becomes a judgment under this section until it has been pronounced in open Court, 1892 A.W.N. 167 ; 21 C. 121. This section and S. 367, *infra*, read together require that a judgment shall be written, signed, dated and pronounced in open Court ; the latter three requisites must take place at the same time. Till all these formalities have been gone through the judgment is not delivered, and there is nothing to prevent the officer who writes it from tearing it up and writing another. In this sense it is incomplete. The fact that the first Magistrate went so far as to sign and date the judgment he had written is immaterial, seeing that he did not pronounce it, but see 18 M.L.J. 197, where it was held that it was not necessary that the presiding officer of the Court who wrote the judgment should be the same person as the presiding officer who is required to date, sign, and pronounce it. S. 367 requires the dating and signing in open Court at the time of pronouncing the judgment. S. 350, *supra*, no doubt authorises a Magistrate to try a case on evidence recorded by his predecessor but there is no authority for the proposition that a Magistrate who succeeds another, can deliver a judgment which had been written out by his predecessor without considering the evidence on record and without hearing the arguments if any, on behalf of the accused. Such a procedure cannot stand to reason, because the Magistrate who makes himself responsible for the judgment must always be the Magistrate who before delivery of the judgment had considered the evidence on record fairly and impartially and had also listened to the arguments if any on behalf of the accused. Such a trial on the whole is extremely unsatisfactory and the requirements of justice demand that the conviction and sentence should be set aside and a retrial ordered, 27 Cr. L.J. 406—93 Ind. Cas. 70, where 40 C. 684 is followed. But see 40 M. 108 where it was held that a succeeding Magistrate may, if he thinks fit, pronounce a judgment, written, signed and dated by his predecessor

but he is not bound to deliver his predecessor's judgment when the accused claims a *de novo* trial. This section only imposes the condition that the judgment should be pronounced in open Court and imposes a few other conditions, but such conditions do not include the condition that the records should not have been lost or that if a portion of the judgment (that relating to the conviction and sentence) is pronounced the conviction is illegal. The proper course for a Court when its judgment is lost, is to re-write the same from memory and from the materials before it and place it on record, 38 M. 498; 3 C.L.J. 321; 11 C. L.J. 248 at 248. S. 537 (a) cures all defects in proceedings and the omission to pronounce the judgment before convicting and sentencing the accused is cured by S. 537, although it may be different if no judgment had been written, 38 M. 498; Wair II, 711; 1 Bom. L.R. 117 and 160. It is a violation of this and S. 367, *intra* to convict and pass sentence on the accused before writing a judgment, 14 A. 242, and a conviction had, was set aside and a re-trial ordered by the High Court, 27 M. 287; 19 M.L.J. (sh. n.) 9. Want of a complete judgment at the time of pronouncing sentence will not invalidate the conviction as sub-section (4) cures such a defect. Where a Judge after writing his judgment dies or leaves the Court before delivering the same in open Court his written judgment is not to be considered as a judgment but merely as an opinion, 13 W.R. 209; 11 A.L.J. 745—14 Cr. L.J. 562—21 Ind. Cas. 162, and no expression of opinion by a Judge becomes a judgment till it is pronounced in open Court. 1892 A.W.N. 137. A Court is at perfect liberty to change its opinion before the judgment is pronounced in open Court although it is written and even signed, 11 A.L.J. 745—14 Cr.L.J. 562—21 Ind. Cas. 162. As to what is meant by open-Court see S. 353 *supra*. Where a Sessions Judge at the end of a trial wrote a judgment setting forth the finding of the assessors and adding his own finding agreeing with the assessors that the accused were not guilty, and acquitted them, and on a later date prefixed to it a more detailed judgment giving full reasons, it was held that the error in procedure was a mere irregularity cured by S. 537, 45 M. 913 (F.B.). See 23 C. 802. When a Presidency Magistrate at the conclusion of the case passed a sentence orally and wrote his judgment afterwards, it was held that this is only an irregularity and not an illegality. The legality or illegality of a judgment in consequence of its delivery after sentence is a question which can only be answered in the light of circumstances of each case, 13 Bom. L.R. 635—12 Cr. L.J. 457. A Magistrate should not pronounce judgment in the absence of the accused. Where an accused person present throughout a trial when evidence was taken, absconded, and on his re-arrest the Magistrate re-pronounced his judgment which he had pronounced during his absence, it was held that S. 537 applied to the case, Ratanlal 325, but when pronouncing a judgment of acquittal, it is unnecessary to have the attendance of the accused. A judgment is not considered as delivered as required by this section unless and until it is written, signed, dated and pronounced in open Court. The last three requisites must take place on the same occasion. 17 Cr. L.J. 166—23 Ind. Cas. 646.

367. (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court or from the dictation of such presiding officer in the language of the Court, or in English; and shall contain the point or points for determination, the decision thereon, and the reasons for the decision; and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it and where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him.

(2) It 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.

Judgment in alternative.

(3) 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.

(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty.

(5) If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed :

Provided that, in trials by jury, the Court need not write a judgment, but the Court of Session shall record the heads of the charge to the jury.

(6) For the purposes of this section, an order under section 118 or section 123, sub-section (3), shall be deemed to be a judgment.

AMENDMENT.—The italicised words in sub-section (1) and sub-section (6) are new.

PARTICULARS WHICH A JUDGMENT SHOULD CONTAIN.—(1) Name of accused, (2) offence charged ; (3) finding on all charges ; (4) punishment ; (5) list of witnesses, material objects and exhibits ; (6) opinion of assessors in assessor cases or verdict of jury ; (7) signature and jurisdiction of the presiding officer.

JUDGMENT SHALL BE WRITTEN BY A PRESIDING OFFICER IN THE LANGUAGE OF COURT OR IN ENGLISH.—By the amendment made in sub-section (1) introducing the words "or from the dictation of such presiding officer," dictating judgments orally to a shorthand writer is permitted. But by a further amendment it is made imperative that each page of the judgment transcribed from dictation should be signed by the presiding officer. Even before this amendment it was held that where the judgment was not in the handwriting of the Magistrate, but was actually dictated and signed by him, it was a mere irregularity cured under S. 537, 4 C.L.J. 411. The judgment must be written in the language of the Court or in English and if this is not strictly complied with, it is only an irregularity cured by S. 537, *infra*, 4 C.L.J. 232—4 Cr. L.J. 162.

SHALL CONTAIN THE POINT OR POINTS FOR DETERMINATION.—A judgment should fulfil the conditions in this section and shall contain the points for determination, the decision thereon, and the reason for the decision, and the omission to write a proper judgment is not an irregularity cured by S. 537, *infra*. 37 C. 194 ; 17 Bom. L.R. 1088 ; 27 Cr. L.J. 343—92 Ind. Cas. 855. Similarly an appellate Magistrate after hearing the parties passed the order " appeal dismissed under S. 423, Cr. P.C." it was held that it did not fulfil the conditions of this section, and S. 537, *infra*, cannot cure such a defect as it was not a case of omission or irregularity in a judgment, but the absence of a judgment, 17 Bom. L.R. 881. A recital of facts preceding the offence without a discussion of the evidence and the consideration of the essential points as to the ownership of the thing stolen, the possibility of the accused having acted in good faith, do not satisfy the requirements of this section, (1912) M.W.N. 881 ; —12 M.L.T. 338—13 Cr. L.J. 712—16 Ind. Cas. 520 ; 2 A. 101 at 103 ; 2 L.W. 958. To pass a sentence before recording reasons is an irregularity, and the High Court will not interfere in revision unless failure of justice has been occasioned, 12 Ind. Cas. 986. The judgment of the appellate Court should show on the face of it that the case of each accused has been taken into consideration and reasons should be given as far as may be necessary to indicate that the Court had directed judicial attention to the case of each accused, 35 C. 136 ; 25 Cr. L.J. 113—76 Ind. Cas. 477 ; 28 Cr. L.J. 216—78 Ind. Cas. 710. A Court is not bound

to write a judgment when rejecting an appeal under S. 421 *infra*, in accordance with this section though it is desirable however that reasons for the rejection should be recorded in view of the order being challenged by an application for revision, 28 A. 496 ; 20 B. 540 ; 32 C. 178 ; 25 M. 531 ; 21 C. 92. When the judgment omits to state the points for decision and reasons therefor, the case should be returned for re-hearing, 22 Cr. L.J. 840 = 63 Ind. Cas. 338. 2 Lab. 308 followed in 27 Cr. L.J. 114 = 31 Ind. Cas. 690 ; 12 Cr. L.J. 43 = 9 Ind. Cas. 261 ; 18 Cr. L.J. 559 = 15 Ind. Cas. 975 ; 12 Cr. L.J. 610 = 12 Ind. Cas. 986 ; 13 Cr. L.J. 48 = 13 Ind. Cas. 288. S. 537, *infra* cannot cure defects in a judgment which is clearly opposed to the directions contained in this and S. 424, *infra*, and which materially prejudices the accused in the trial of the appeal, 10 A.L.J. 435 = 13 Cr. L.J. 839 = 17 Ind. Cas. 793. A humorous judgment is not necessarily bad, 11 Ind. Cas. 1000. The judgment of a trying Magistrate should contain a finding as to the intention with which an *entry* for conviction for criminal trespass was made or the intention with which the accused removed a fencing or out bamboos for convicting for the offence of mischief, 38 C.L.J. 7. In proceedings under S. 145, *supra*, the High Court is entitled to require from the trying Magistrate a statement of the reasons for his decision sufficient to enable the High Court to determine whether he has or has not complied with the provisions of sub-section (4) of S. 145, *supra*, and whether he has directed his mind to the consideration of the effect of the evidence adduced, 39 C.L.J. 386 ; 34 C.L.J. 125. The judgment of an appellate Court ought to contain particulars so as to satisfy the revision Court that the case has been examined from every aspect. In simple cases where the facts are clear no further reason than that the evidence is accepted by the Judge, may be strictly required. But in complicated cases especially where there are more questions than one both of law and fact arising, a mere statement of the kind will have to be accepted with difficulty as amounting to a reason for the dismissal of the appeal, 24 A.L.J. 318 = 27 Cr. L.J. 449 = 23 Ind. Cas. 241, where 10 A.L.J. 435 = 13 Cr. L.J. 869 = 17 Ind. Cas. 793 and 19 A. 506 (F.B.) are referred to.

SHALL BE DATED AND SIGNED BY THE PRESIDING OFFICER IN OPEN COURT AT THE TIME OF PRONOUNCING IT.—S. 366 and this section read together require that a judgment shall be *written, signed, dated, and pronounced* in open Court—the latter three must take place on the same occasion. Till all these formalities have been gone through the judgment is not delivered and there is nothing to prevent the officer who wrote it from tearing it up and writing another. In this sense it is incomplete, but it was held in 18 M. L.J. 497 that it was not necessary that the presiding officer of the Court who wrote the judgment should be the same person as the officer who is required to date, sign and pronounce it in open Court. A succeeding Magistrate may pronounce a judgment written and signed by his predecessor who had heard all the evidence but there is nothing obligatory on him to do so when the accused claims a trial *de novo*, 30 M. 108. A judgment though written and signed is inoperative until it is pronounced in Court and until that is done, it is only an expression of opinion and so the Court can change its opinion before pronouncing it, 11 A L J. 745 = 14 Cr. L.J. 562 = 21 Ind. Cas. 162. When a judgment is entirely in the handwriting of the Magistrate who tried the case, the mere fact that it was not signed by him, is only an irregularity cured by S. 537, *infra*, 47 A. 284. The Code makes no provision for delivery of judgment written by the Magistrate who heard the case, after his transfer from the district and ceasing to exercise jurisdiction in the District. A Magistrate who heard the evidence in one local area in one District cannot after he has ceased to possess jurisdiction therein by reason of an order of transfer to another district, complete the trial by delivering judgment before departure or by forwarding a written judgment from the new district to the Magistrate of the former local area for delivery and the latter Magistrate has no authority under the Code to deliver the same, 30 C. 664, 38 C L J. 201 but see 23 Cr. L.J. 173 = 71 Ind. Cas. 525, where it was held that the procedure of the Magistrate who was incapacitated, had his judgment written and signed by him read out in open Court by another Magistrate was cured by S. 537, *infra*.

SUB-SECTION (2).—This sub-section says down that the offence of which the accused is convicted must be specified, as also the punishment to which he is sentenced. See 35 C. 718. In estimating the sentence to be passed, a Magistrate is not entitled to consider the

defence put forward by the accused as a matter of aggravation, 1883 A.W.N. 170. On a charge under S. 143, I.P.C., judgment should contain as one of the points for determination a statement as to the existence of the elements constituting unlawful assembly in the particular case and the decision thereon, bearing in mind the provisions of S. 141, I.P.C. On a charge of theft under S. 379, I.P.C., the judgment should contain as one of the points the question as to the dishonest intention, and a finding on it, especially when the taking of the property is admitted, but a *bona fide* claim of right is set up by the accused, 87 C. 194.

SUB-SECTION (3).—This sub-section provides for the passing of a judgment in the alternative. This should be resorted to only in extreme cases, 12 W.R. (Cr.) 11. Where the judgment in the alternative did not state in express terms that the Court was in doubt as to the question under which of the two sections the offence fell, it was held that it was at the most an irregularity which did not vitiate the judgment, Weir II, 440.

SUB-SECTION (4).—When a judgment of acquittal pronounced immediately at the conclusion of a trial did not give full reasons for acquitting the accused but they were given in detail at a later date in a written judgment it was held that it was at the most an irregularity cured by S. 537, *infra*, 45 M. 913. (F.B.)

SUB-SECTION (5).—This sub-section provides for reasons being recorded when conviction is for an offence punishable with death but no death-sentence was passed, 8 M L.T. 81—11 Cr. L. J. 481—7 Ind. Cas. 397; 23 W. R. (Cr.) 32. The fact that the accused is a woman is no ground for not passing a death-sentence, 1883 A. W. N. 134. The law gives a discretion to the trial Court as to which penalty should be imposed in a case of murder. But this sub-section enacts that where an accused person is convicted of an offence punishable with death and the Court sentences him to any other punishment the Court shall state reasons why the sentence of death was not passed. The reasons justifying the infliction of the lesser penalty must, be such as are in accord with the established legal principles. Intoxication furnishes no ground for mitigating the punishment. Voluntary drunkenness does not take away responsibility of any kind unless drunkenness amounts to unsoundness of mind so as to enable insanity to be pleaded by way of defence, or the degree of drunkenness is such as to establish incapacity in the accused to form the intent necessary to constitute the crime; drunkenness is neither a defence nor mitigation, 27 Cr. L. J. 764—95 Ind. Cas. 284 where 1920 A. C. 479 and 13 Cr. L. J. 864—17 Ind. Cas. 300; 18 Cr. L. J. 888—41 Ind. Cas. 980 are followed. Even where the accused is a pregnant woman, capital sentence should be passed but the execution of the sentence shall be postponed till after delivery, 15 W.R. (Cr.) 66. See S. 862, *infra*. The fact that the dead body of the murdered person has not been found should not influence the Court from refraining to pass a capital sentence, 3 A. 383.

PROVISO.—The object of the heads of charge to the jury is to inform the High Court, should occasion arise, of what direction the Judge gave in law to the jury and the nature of his summing up of the evidence not only for the prosecution, but also for the defence, 1 Pat. L. J. 317; 34 C. 698; 36 C. 281; 39 A. 348; 26 C. W. N. 986; 43 C. L. J. 537. In trials by jury, the Court of Session is bound to record the heads of the charge to the jury and need not write a separate judgment. The heads of charge to the jury should include such a statement as will enable an appellate Court to decide whether the evidence has been properly laid before the jury or whether there has been any misdirection, 1903 A. W. N. 232. The Judge should give sufficient indication in his charge to the jury that he has complied with the law; 25 C. 736 and 581. It is not necessary that the heads of charge to the jury should be reduced to writing before delivery of the charge, but they ought to be written as far as possible thereafter and when the facts are fresh in the Judge's mind, they should represent with absolute accuracy the substance of the charge, and be such as to enable the High Court on appeal to see distinctly whether the case was fairly and properly placed before the jury, 36 C. 281; 10 Bom. L. R. 565. The proviso does not require that the heads of charge to the jury should be a *verbatim* reproduction of the Judge's observations. This is negatived by the language of the proviso itself. Where it is expressly stated that the judgment need not be written but merely the heads of charge and it is not feasible to have a *verbatim* report of the

Sessions Judge's charge if he delivered it extemporarily as there is no staff of stenographers, as a rule available for such a purpose. Nor is it necessary that the charge must be written out, beforehand although many Sessions Judges do prepare their charges by writing out prior to the delivery. Such a practice would surprise most experienced Judges of Assize and would and must be a matter at times of considerable delay and inconvenience and not in the spirit of S. 297 of the Code which contemplates the Judge charging the jury soon after the defence case and the prosecutor's reply, if any, are concluded, or S. 296 which touches on the undesirability of the separation of the jury prior to the charge. But whether the heads of charge are written out before delivery or not, or taken down *verbatim* they should be placed on record by the Judge as soon as it is possible for him to do so and whilst what he said is fresh in his recollection. The record need not be meticulous or lengthy but it must give accurately the substance of what the Judge said to the jury so that the High Court may, if occasion arises be able to ascertain from this record, whether the law and the facts relating to the case were fairly and properly put to the jurors, which can only be decided by looking at the charge itself in the light of the circumstances of each case, 4 Pat. 628 following 1 Pat. L. J. 317. Where the case was tried partly by jury and partly with aid of assessors a reference to the heads of charge to the jury is not a sufficient compliance with the requirements of this section, but a judgment containing the particulars specified in this section, however brief, should be written with regard to the charge tried with aid of assessors, Ratanlal 426. It is very difficult to lay down any hard and fast rule as to what amount of judgment a Judge should write in any particular case and particularly where he and the jury are in fact performing two separate functions at the same time. A mere reference to the charge to the jury on assessor charges without complying with the provisions of this section as to a judgment is defective, 27 Cr. L. J. 1164-97 Ind. Cas. 786 following Ratanlal 426; see also Cr. A. No. 637 of 1924; R. T. No. 17 of 1925 (M. H. C.). It is neither convenient nor commendable for a Judge to embody his summing up to assessors in his judgment, but his doing so does not render the judgment illegal or invalid, 9 C. L. J. 53-10 Cr. L. J. 325-3 Ind. Cas. 625.

SUB-SECTION (6) is new and it makes it clear that judgments in security proceedings should conform to the provisions of the section. See 85 C. 133 in this connection.

368. (1) When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.

(2) No sentence of transportation shall specify the place to which the person sentenced is to be transported.

SENTENCE OF DEATH.—Sentence of death passed by Sessions Judges are subject to confirmation by the High Court to which the proceedings are referred (S. 374). Ss. 375 to 379 lay down the procedure to be followed by the High Court and Ss. 381 and 382 declared how sentences of death when confirmed by the High Court are to be executed.

SENTENCE OF TRANSPORTATION.—This form of sentence is to be abolished shortly and a Bill has already been introduced in the Assembly to do away with this mode of sentence. The Governor General in Council is empowered to specify places in British India in which persons sentenced to transportation are to be confined and the Local Government is to make arrangements under the Prisoners' Act for the removal of such convicts.

369. *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 a Royal Charter, by the Letters Patent of such High Court, no Court, when*

Court not to alter judgment,

it has signed its judgment, shall alter or review the same, except to correct a clerical error.

AMENDMENT.—The opening words of the section in italics are new.

SCOPE OF THE SECTION.—The Code has been amended a number of times and the Legislature has not chosen to give power of review to any Court in a Criminal case, 46 M. 382 at 403. In criminal matters the High Court has no power to review or alter its judgment once completed and passed; (1912) M.W.N. 987; 38 A. 134; 45 C. 60; 15 C. 42 (F.B.); 19 B. 732; 39 A. 134; 7 A. 672; 20 Cr. L.J. 447-51 Ind. Cas. 271; 46 M. 382; 47 M. 428 at 430; 10 B. 176 (F.B.); 50 M.L.J. 51-23 L.W. 56-27 Cr. L.J. 184-91 Ind. Cas. 1000; 26 Cr. L.J. 370; 10 Cr. L.J. 514-3 Ind. Cas. 880; 14 Cr. L.J. 605-21 Ind. Cas. 477; 9 Cr. L.J. 305-1 Ind. Cas. 508, even though the original order was passed without hearing the petitioner, (1912) M.W.N. 982; 6 Cr. L. Rev. 283. Where a case is disposed of for default of appearance or where an order is passed to the prejudice of an accused person and by mistake or inadvertence no opportunity has been given to him to be heard in his defence such an order is not one to which the Full Bench ruling in 14 C. 42, is applicable, 46 C. 60 at 63; 47 M. 428 at 431; 50 M.L.J. 51-23 L.W. 56-27 Cr. L.J. 184-91 Ind. Cas. 1000. But so long as the order is *not signed* it can be altered, 38 C. 228; 45 M. 382. So also if the judgment is *not sealed* as required it is not final, and it is open to the Judge who passed the order to alter it, 38 A. 134 following 21 A. 477 and 27 A. 92; 50 M.L.J. 51-23 L.W. 56. The proper course for the High Court in the case of an erroneous decision when once it has signed its judgment is to report the case to the Local Government under S. 401, *infra*. But it was held in 18 C. 60 that when a case is disposed of merely for default of appearance or where an order is passed by mistake or by inadvertence without hearing the accused in his defence and to his prejudice the order of the High Court in such a case may be reviewed. See 19 C. L.J. 80-10 Cr. L.J. 287-3 Ind. Cas. 393; neither this section nor S. 499 empowers the High Court to review the judgment of one or more of its Judges in a criminal appeal or revision, 46 M. 382.

JUDGMENT.—The word "judgment" is not defined in the Code. In the absence of any definition to indicate anything to the contrary it must be taken to mean and refer to the judicial act of the Court in finally disposing of the case and must, therefore indicate only the order of the Court when it is read out and signed by the Judge and cannot be meant to refer to the formal order on the judgment to be subsequently drawn up and issued merely as a clerical act by the ministerial officers of the Court, 50 M.L.J. 51 at 53-23 L.W. 56-(1926) M.W.N. 147-27 Cr. L.J. 184-91 Ind. Cas. 1000; 26 Cr. L.J. 543-85 Ind. Cas. 383. An order of dismissal under S. 203 or S. 253, *supra* is not a judgment. It is sufficiently clear from Ss. 866 and 867, *supra* that it is intended to indicate the final order in a *trial* terminating in either the conviction or acquittal of the accused, 31 M. 543; 39 M. 426 (F.B.); 29 C. 726; 28 C. 682 (F.B.); 46 M. 382 at 402. A judgment is a decision which decides a case finally so far as the Court trying the case is concerned, but the order of discharge is not a final order, 9 Bom. L.R. 260. An order under S. 421, *infra*, summarily rejecting an appeal is a judgment, 19 B 732.

SAVE AS OTHERWISE PROVIDED BY THIS CODE.—See S. 395 and S. 484, *infra*; S. 395 refers to whipping which cannot be carried out, in which case the sentence can be revised. S. 484 contemplates remitting sentences and discharging the accused punished for contempt on his tendering an apology.

BY LETTERS PATENT OF SUCH COURT.—The exception contained in this section is with reference to cases decided by a Judge of the High Court presiding over the Sessions when points are reserved for consideration by the Full Bench or on the certificate of the Advocate General, 46 M. 382 at 404.

SHALL ALTER OR REVIEW ITS JUDGMENT.—An order under S. 421 *infra* is a judgment and being final, it cannot be reviewed, 19 B. 732. So also orders passed in miscellaneous proceedings cannot be altered or reviewed, 19 Cr. L.J. 225; 39 C. 350; 21 C.W.N. 814; 16 Cr. L.J. 584-30 Ind. Cas. 135; 22 B. 949. A Magistrate has no jurisdiction to

review a final order passed by him under S. 145, *supra*, 35 C. 350. Nor can a District Magistrate review his previous order refusing further inquiry into a case of discharge under S. 436, *infra*, 13 Cr. L.J. 201=14 Ind. Cas. 765. Alteration or review of judgment is not allowed by a Magistrate after it is signed and delivered even where the error is patent on the face of the judgment. The only course left open to him is to make a reference to the High Court under S. 438, *infra* through the Sessions Court; 5 Bom. L.R. 360; 22 B. 939; 10 C. W.N. 1082. Omission to proceed with a charge under S. 75, I.P.C. cannot be reviewed after passing sentence on the main charge having regard to the provisions of this section, 42 B. 202. Where a judge added a note to his judgment throwing doubts on the conclusions arrived at by him in the judgment, it was held that the procedure adopted was most unwarranted, 2 A. 33 but where a judge on appeal set aside the conviction but failed to order a retrial, it was held that he was not precluded from making an order of retrial subsequently, 3 M. 48. An accidental omission to pass an order as to restoration of property under S. 520, *infra* can be corrected under this section, 24 Cr. L.J. 159=71 Ind. Cas. 511; making of an order as to costs when the original order passed did not contain any provision as to costs is not an alteration of the previous order, 47 C. 975.

370. Instead of recording a judgment in manner hereinbefore provided, a Presidency Magistrate shall record the following particulars;—

Presidency Magistrate's judgment.

- (a) the serial number of the case;
- (b) the date of the commission of the offence;
- (c) the name of the complainant (if any);
- (d) the name of the accused person, and (except in the case of an European British subject) his parentage and residence;
- (e) the offence complained of or proved;
- (f) the plea of the accused and his examination (if any);
- (g) the final order;
- (h) the date of such order; and
- (i) in all cases in which the Magistrate inflicts imprisonment, or fine exceeding two hundred rupees, or both, a brief statement of the reasons for the conviction.

SCOPE OF THE SECTION.—This section deals with judgments of Presidency Magistrates. A Presidency Magistrate should record the statement of the accused under S. 942 and this section. Clause (f) of this section says that the plea of the accused and his examination if any, are to be recorded. It is the duty of the Magistrate to record the substance of the examination and the plea of the accused, 27 Cr. L.J. 110=31 Ind. Cas. 642. This section does not however require that a Presidency Magistrate should write a judgment. All it requires is that he should record certain particulars and in the case of a conviction and sentence of imprisonment or fine exceeding rupees two hundred, a brief statement of the reasons for the conviction. He need not comply with the provisions of S. 367, *supra*, 27 Cr. L.J. 1131=97 Ind. Cas. 651. It requires that in cases where a Presidency Magistrate records a conviction he shall record a brief statement of the reasons which induced the Magistrate to believe the evidence for the prosecution. A judgment to the effect "I convict the accused, I believe evidence of the complainant and his witnesses" does not satisfy the requirements of this section, 17 Bom. L.R. 898=7 Cr. L. Rev. 2=16 Cr. L.J. 771=31 Ind. Cas. 371. It is not sufficient for him to record "that the offence is proved," 27 C. 461. The Magistrate should record his reasons for the conviction in such a manner that the High Court in revision may judge whether there were sufficient

materials before the Magistrate to support a conviction, and failure to do so is a grave irregularity, which in most cases would be sufficient for interference, 46 M. 253. The law does not demand a full and complete statement of reasons, 31 C. 983; 27 C. 361; 13 C. 272, and in petty cases of fine, the decision may be recorded shortly, 14 C. 175. Although the section requires only a brief statement of the reasons for conviction instead of a judgment, this must be done, in such a way that the High Court in revision may be in a position to judge whether there were sufficient materials before the lower Court to support the conviction, 8 C.W.N. 537; see also 46 M. 233; 23 Cr. L.J. 602—68 Ind. Cas. 826; 21 Cr. L.J. 656; 16 Cr. L.J. 771—31 Ind. Cas. 371; 27 C. 361; 13 C. 272; 17 Bom. L.R. 890 and the omission to record some of the particulars required by this section is only an irregularity, 27 Cr. L.J. 1131—97 Ind. Cas. 651. Under S. 441, *infra* a Presidency Magistrate when submitting the records of any proceedings called for by the High Court in the exercise of its revisional jurisdiction may submit with the records a statement setting forth the grounds of his decision, practically a new judgment setting forth any facts which he thinks material after perusing the grounds set forth in the memorandum of revision filed in the High Court, and the High Court is bound to consider such statement before setting aside the decision or order sought to be revised.

PREVIOUS CONVICTION.—This should be set out justifying the sentence imposed, 8 C.W.N. 537. The provisions of the section do not apply to cases under Workmen's Breach of Contract Act XIII of 1859, 27 C. 181; 20 M. 233; 11 A. 292; 16 B. 368; 6 Bom. L.R. 235.

371. (1) On the application of the accused a 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 any case other than a summons-case, be given free of cost.

Copy of judgment, etc., to be given to accused on application.

(2) In trials by jury in a Court of Session, a copy of the heads of the charge to the jury shall, on the application of the accused, be given to him without delay and free of cost.

(3) When the accused is sentenced to death by a Sessions Judge, such Judge shall further inform him of the period within which, if he wishes to appeal, his appeal should be preferred.

Case of person sentenced to death.

See S. 548, *infra*, which enacts that copies of proceedings ought to be furnished to the persons affected thereby. Court-fee payable on a copy or translation of judgment in a case other than a summons case, a copy of the heads of charge to the jury, and a copy or translation of the judgment in a summons-case when the accused is in jail is remitted in the exercise of the powers conferred by S. 85 of the Court Fees Act by the Governor-General in Council. Similarly a copy of the charge framed under S. 210, *supra*, is exempted.

SUB-SECTION (3).—Limitation for appeals to the High Court in cases of persons sentenced to death is 7 days under Sch. II, Art. 150 of the Limitation Act, IX of 1908. But in practice this is of very little importance, for in *Referred trials* the High Court is bound to go into the whole evidence to satisfy itself whether the conviction and sentence could be sustained and it makes no difference whether the accused has preferred an appeal or not.

372. The original judgment shall be filed with the record of proceedings, and, where the original is recorded in a different language from that of the Court and the accused so requires, a translation thereof into the language of the Court shall be added to such record.

Judgment when to be translated.

Court of Session to send copy of finding and sentence to District Magistrate.

373. In cases tried by the Court of Session, the Court shall forward a copy of its finding and sentence (if any) to the District Magistrate within the local limits of whose jurisdiction the trial was held.

The concluding words of the section are important. If there is more than one District Magistrate in any Sessions division consisting of two or more districts as contemplated by S. 7 *supra* a copy of the finding and sentence should be sent only to the District Magistrate within the local limits of whose jurisdiction the trial was held.

CHAPTER XXVII.

OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION.

374. When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court.

Sentence of death to be submitted by Court of Session.

SCOPE OF THE SECTION.—The provisions of this section do not require the convictions but only sentences of death to be submitted for confirmation by the High Court, 17 Bom. L.R. 1072 at 1074; 5 N.W.P.H.C.R. 130. The heading of the Chapter is 'of submission of sentences for confirmation, see also Ss. 378 and 381, *infra*. No considered case is cited in which it was held that upon argument that the evidence in support of the facts found by the jury is laid upon by the mere submission to the unrestricted judgment of the confirming Court, 17 Bom. L.R. 1072 at 1073—16 Cr. L.J. 818—31 Ind. Cas. 994; 2 C.W.N. 49; Ratanlal 710. Even in cases where the trial is by a jury, the High Court must go into the facts before confirming the conviction, 2 C.W.N. 49 at 50; 19 W.R. (Cr.) 57; 30 C.W.N. 166—27 Cr. L.J. 378—92 Ind. Cas. 890.

For warrant of commitment under sentence of death and warrant of execution of a sentence of death see Form Nos. XXXIV and XXXV of Sch. V of the Code. Even where a sentence of death is passed on the unanimous verdict of a jury the whole case is re-opened before the High Court both on matters of fact and on matters of law, 17 Bom. L.R. 1072, Ratanlal 710. See S. 418 (2). The High Court when dealing with the case as a Court of Reference is entitled to rely on evidence rejected by the Sessions judge, 25 B. 168.

375. (1) If when such proceedings are submitted, the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

Power to direct further inquiry to be made or additional evidence to be taken.

(2) Such inquiry shall not be made nor shall such evidence be taken in the presence of jurors or assessors, and, unless the High

Court otherwise directs, the presence of the convicted person may be dispensed with when the same is made or taken.

(3) When the inquiry and the evidence (if any) are not made and taken by the High Court, the result of such inquiry and the evidence shall be certified to such Court.

Under this section the High Court may itself record further evidence and the presence of the accused is not necessary, 24 M. 523, or it may admit evidence rejected by the Sessions Court, 23 B. 168, or it may order a new trial on the ground that the evidence was incomplete and further evidence was required, 6 C.W.N. 921; 19 C.W.N. 588. In 12 Cr. L.J. 412 the Chief Court of Punjab made a local inspection of the scene of crime.

Power of High Court to confirm sentence or annul conviction.

376. In any case submitted under section 374, whether tried with the aid of assessors or by jury, the High Court—

(a) may confirm the sentence, or pass any other sentence warranted by law, or

(b) may annul the conviction, and convict the accused of any offence of which the Sessions Court might have convicted him, or order a new trial on the same or an amended charge, or

(c) may acquit the accused person :

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

There has been a practice long established and well recognised that when an accused appears before the judge on a capital charge, the judge is accustomed to request a member of the bar who practices before him to undertake the defence of the accused. That obligation has always been recognised by the profession who always have willingly undertaken the defence of the accused so charged. Where a judge did not appoint, or request any member of the profession to conduct the defence and the case was practically tried *ex parte* and the difficulties which appear in the evidence have not been cleared up in the course of the cross examination either by the accused himself or the Judge, the High Court finding it unable to confirm the conviction on the evidence as it stood under sub-section (b) of this section ordered a new trial asking the Judge to see that some gentleman of the bar represented the accused before him, 19 C.W.N. 555. Under this section the High Court is entitled to go into the fact even when the conviction is by a Judge assisted by a jury although the trial was by a jury. S. 375, *supra* and this section go clearly to show that the High Court must deal with the case upon the facts as well as with reference to any questions of law arising in it and that its powers are not limited in the way they are in an appeal from a conviction had in a trial by jury, 2 C.W.N. 49 at 50; 19 W.R. (Cr.) 57; 23 Cr. L.J. 33—34 Ind. Cas. 657. In 17 Bom. L.R. 1072 at 1073—16 Cr. L.J. 818—31 Ind. Cas. 994, it is stated thus "It appears to be the practice of this Court that where a prisoner has been sentenced to death even though the conviction was had on the unanimous verdict of a Jury, the whole case is re-opened before the High Court both on matters of fact as well as on matters of law. I desire however to reserve my opinion as to the correctness of the practice to which I have alluded should the question of its correctness even arise for judicial decision". But it was held before the

amendment that this will not apply to the case of a co-accused not sentenced to death, and an accused on whom a sentence of transportation for life is passed may be in a worse position than a co-accused sentenced to death, 2 C.W.N. 49; 11 B.L.R. 14, but now see the new sub-section (2) to S. 418, *infra* which renders obsolete the above decisions, and enacts that in a case tried by a jury when any person is sentenced to death, any other person convicted with him and given a lesser sentence may appeal on a matter of fact as well as on a matter of law.

PROVISO.—It is significant that under this proviso it is only after the disposal of any appeal which could be on a matter of law where the trial is by jury under S. 418, *infra* the power of confirmation or otherwise of the sentence of death can be exercised by the High Court, 17 Bom. L.R. 1072 at 1074.

377. In every case so submitted, the confirmation of the sentence or any new sentence or order passed by the High Court, shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them.

Confirmation or new sentence to be signed by two Judges.

378. When any such case is heard before a Bench of Judges and such Judges are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge, and such Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Procedure in case of difference of opinion.

SCOPE OF THE SECTION.—This section lays down the procedure to be followed in cases where there arises a difference of opinion between the Judges hearing a case submitted for confirmation of sentence, when such Judges are equally divided. The case with their opinions shall be laid before a third Judge and the judgment or order shall follow the opinion of the third Judge. A deliberate opinion of one Judge in favour of acquittal upon a grave question of the weight of evidence in a case heard by a Bench of two Judges should *ipso facto* constitute in most cases sufficient reason for creating such serious doubt that the benefit of that doubt should be given to the prisoner. 1886 A.W.N. 278. This view of *Mahmood, J.* was dissented from by a Bench in the decision reported in 1887 A.W.N. 128 on the ground that *Mahmood, J.* omitted to give any weight to the fact that in such a case as he was putting the Judge who actually heard the witness give evidence and saw their demeanour at the trial and had found the guilt of the prisoner established. The case of *Ramaswami Gounden* reported in 27 M. 271 is a typical case under this section. There the Sessions Judge of Coimbatore sentenced the accused to death subject to the confirmation of the High Court. In hearing the *Referred Trial Sir Subramania Ayyar, Offg. C.J.* and *Boddam, J.* differed in their opinion, *Boddam, J.* was for setting aside the conviction, while the *Offg. C.J.* was for confirming the conviction but for commuting the sentence of death to one of transportation for life. The case was referred to third Judge, *Sir Bhashyam Ayyangar, J.*, under the section, and that learned Judge while confirming the conviction sentenced the accused to death as he found no sufficient grounds for commuting the sentence to one of transportation for life. See for a converse case, 17 C.W.N. 1213=14 Cr. L.J. 642=21 Ind. Cas. 882, where the third Judge before whom the case was laid passed a sentence of transportation for life. See also 1887 A.W.N. 125. It was proposed to amend this state of the law, especially as to what occurred in 27 M 271, where the third Judge differing from the two learned Judges passed a sentence of death, to have the case heard before three Judges or by another Judge sitting along with the two Judges who differed, but the amendment was not accepted, and the law now remains the same as before.

AFTER SUCH HEARING AS HE THINKS FIT.—The third Judge is not bound to hear the parties. It is left to his discretion to hear or not, but as a matter of practice the third Judge hears the case fully since a question of life and death is involved.

JUDGMENT OR ORDER SHALL FOLLOW HIS OPINION.—Under this section the third Judge is entitled to order a retrial of the accused. See 14 L.W. 318.

379. In cases submitted by the Court of Session to the High Court for the confirmation of a sentence of death, the proper officer of the High Court shall, without delay after the order of confirmation or other order has been made by the High Court, send a copy of the order under the seal of the High Court, and attested with his official signature, to the Court of Session.

Procedure in cases submitted to High Court for confirmation.

This section deals with the procedure to be adopted by the High Court on the confirmation of the sentence of death in cases submitted to it. The Registrar is to send without delay a copy of the High Court's order under the seal of the High Court with his signature.

380. Where proceedings are submitted to a Magistrate of the first class or Sub-divisional Magistrate as provided by section 562, 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.

Procedure in cases submitted by Magistrate not empowered to act under S. 562.

This section was introduced in the Code of 1898. It deals with the procedure to be followed in cases which are submitted to a Magistrate of the first class or Sub-divisional Magistrate, by a Magistrate who is not empowered to act under S. 562, *infra*. A District Magistrate to whom a case is sent up by a second class Magistrate has no power to send back the case for passing sentence on the ground that the provisions of S. 562 *infra* were inapplicable. He is bound by this section to pass such sentence or order as he may have passed or made if the case had been originally heard by him, 7 Cr. L.J. 449. When a first class Magistrate convicts the accused and passes a sentence under this section, an appeal from such a conviction lies to the Sessions Court and not to the District Magistrate, as the proceedings of the first class Magistrate amounted to a trial giving a right of appeal to the Sessions Court under S. 408, *infra*, 17 Bom. L.R. 895—7 Cr. L. Rev. 129—16 Cr. L.J. 789—31 Ind. Cas. 338.

MAY PASS SUCH SENTENCE OR ORDER, ETC.—The point whether a Magistrate to whom the case is sent up could pass any other order than an order for release of the accused on probation of good conduct under S. 562, *infra*, has not been decided. See 7 Cr. L.J. 449; 8 Cr. L.J. 476. In the case reported in 17 Bom. L.R. 895—7 Cr. L. Rev. 129—16 Cr. L.J. 789—31 Ind. Cas. 338, the first class Magistrate to whom the case was submitted for an order under S. 562 *infra* instead of passing the order under S. 562, *infra* sentenced the accused to imprisonment and fine and there it was held that the conviction was legal and an appeal from such conviction lay under S. 408, *infra*, to the Sessions Court. Can he pass an order demanding security from the accused for keeping the peace. The words "may make such order as he might have passed or made if the case had originally been tried by him" seem to suggest that he could pass an order demanding security.

CHAPTER XXVIII.

OF EXECUTION.

381. When a sentence of death passed by a Court of Session is submitted to the High Court for confirmation such Court of Session shall, on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary.

Execution of order passed under S. 376.

In India the sentence of death is carried into effect by hanging the condemned prisoner by the neck till he is dead but in America a prisoner is executed by passing through his body a current of electricity which causes instantaneous death.

For form of warrant to be issued under this section see Sch. V, No. XXXV, *infra*, and after a commutation, Form No. XXXVI.

382. If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to transportation for life.

Postponement of capital sentence on pregnant woman.

WOMAN SENTENCED TO DEATH IS FOUND TO BE PREGNANT.—When the prisoner is quick with child such a state is always held to be a bar to eventual capital punishment, 3 W.R. (Cr.) 18.

THE HIGH COURT SHALL ORDER, ETC.—The High Court is the only tribunal empowered to postpone the execution of a sentence of death passed and confirmed on a woman who is found to be pregnant, Welr II, 441. The High Court if it thinks fit is also empowered to commute the sentence to one of transportation for life under S. 369, *supra*. This is an instance where the High Court after signing and pronouncing judgment may alter the judgment. In England where a woman is sentenced to death, the clerk of the court after sentence is to ask whether the woman has anything to say in stay of execution of the sentence. If she then alleges or the Court then or later on has reason to suppose that she is pregnant, a jury of twelve matrons should be empanelled and sworn to try whether or not she is quick with child. The jury may be empanelled forthwith, the judge first ordering that all the doors be shut and no one must be allowed to leave the Court. If the matrons desire the assistance of a medical man a medical man is requested by the Court to retire and examine the prisoner. When his examination is concluded the jury of matrons is recalled into Court and his evidence is given in their presence and that of the prisoner. If the jury finds that the prisoner is quick with child the Court stays execution of the capital sentence until she has been delivered of a child or it is no longer possible in the course of nature that she should be so delivered. *Arch. Cr. Pl. & Pr.*, p. 221 (25th Ed.)

For form of warrant as to commutation of sentence see Sch. V form No. XXXVI *infra*.

383. Where the accused is sentenced to transportation or imprisonment in cases other than those provided for by section 381, the Court passing the sentence shall forthwith forward a warrant to the jail in which he is, or is to be confined, and unless the accused is already confined in such jail, shall forward him to such jail, with the warrant.

Execution of sentences of transportation or imprisonment in other cases.

An order sentencing an accused person to undergo imprisonment in a police lockup which is not a jail under this section is illegal, 15 Cr. L.J. 10—22 Ind. Cas. 154. Ordinarily a

sentence of imprisonment ought to commence from the time the sentence is passed unless there is some lawful reason for ordering it to commence at some future time, 3 B.L.R. (Ap. Cr.) 50 ; 7 C.L.R. 393 ; 12 W.R. Cr. 47 ; 5 Cr. L.J. 217. The exceptions are to be found in Ss. 35, 396, 397, 398 and 426. A Magistrate is not entitled to suspend the commencement of the sentence even of a short sentence, so as to enable an accused person to prefer an appeal.

SHALL FORWARD HIM TO SUCH JAIL WITH THE WARRANT.—The High Court when hearing a reference under S. 307, *supra*, does not exercise its ordinary original criminal jurisdiction but only the powers of a Court of reference in a criminal matter and when it convicts and sentences the accused, it has power to send the accused outside the presidency-town with its warrant to the jail in which he is to be confined, 29 C. 286.

384. Every warrant for the execution of a sentence of imprisonment shall be directed to the officer in charge of the jail, or other place in which the prisoner is, or is to be confined.

Direction of warrant for execution.

A separate warrant should be issued in the case of each prisoner stating the period of imprisonment, 29 C. 286 (F.B.).

385. When the prisoner is to be confined in a jail, the warrant shall be lodged with the jailor.

Warrant with whom to be lodged.

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 levy of fine.

(a) issue a warrant for the levy of the amount by attachment and sale of any moveable property belonging to the offender ;

(b) issue a warrant to the Collector of the District authorising him to realize the amount by execution according to civil process against the moveable 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.

(2) *The Local Government may make rules regulating the manner in which warrants under sub-section (1), clause (a), are to be executed, and for the summary determination 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 Courts issue a warrant to the Collector under sub-section (1), clause (b), such warrant shall be deemed to be a decree, and the Collector to be the decree-holder, within the meaning of the Code of*

Civil Procedure, 1908, and the nearest Civil Court by which any decree for a like amount could be executed shall, for the purposes of the said Code, be deemed to be the Court which passed the decree, and all the provisions of that Code as to execution of decrees shall apply accordingly :

Provided that no such warrant shall be executed by the arrest or detention in prison of the offender.

AMENDMENT.—This section has been redrafted.

SCOPE OF THE SECTION.—This section does not contemplate any sort of inquiry or order. It is as a matter of fact merely an action by the Court itself consequent on some previous orders, *e.g.*, a person convicted and fined or ordered to be imprisoned in default of payment of the fine when payment of fine is refused the Court will then send the recalcitrant person to prison and then take action under this section. An order passed by a Magistrate directing a warrant to issue is merely a consequential and ancillary order and is not an order which an accused will have to attack in appeal or revision. There is no provision made in the Code for attacking such ancillary orders although there are weapons in the armoury of the Courts to prevent or punish an attempt say by the Port Trust to illegally assess damages on an application made under the Port Trust Act which is not a judicial order but only an executive one which cannot be revised by the High Court. 26 Cr. L.J. 1283—88 Ind. Cas. 1007.

SUB-SECTION (1).—This section prescribes that a fine, if not paid, may be recovered by attachment and sale of any moveable property belonging to the offender. Whether by the words "moveable property belonging to the offender" it was meant property belonging exclusively to the offender or whether it will include joint family property also, in which the offender has an interest, and therefore can be proceeded against under this section was left undecided in 49 B. 906. But the section is silent with regard to the power to award imprisonment in default of payment of fine in the case of an offence which is provided for in S. 64, I.P.C., 21 C. 979 at 985. Surplus sale proceeds in the hands of a mortgagee for payment to the mortgagor is not a debt, but any money held in trust for the mortgagor and is liable to attachment under this section and the Crown is entitled to priority over any private individual to realise the fine imposed on the mortgagor, 40 M. 767. See also 28 M. 487. Growing crops are not moveable property under this section, Weir II, 444. But now under cl. (b) the Court may issue a warrant to the Collector of the District authorising him to realise the amount by execution according to civil process by attachment and sale of the growing crops of the defaulter. No revision lies to the High Court against an order for attachment under this section, 6 Cr. L. Rev. 116.

PROVISO.—Before the amendment, liability to fine did not cease even after the full term of imprisonment in default has been undergone by the offender. Because it was held that the imprisonment in default of payment of fine was intended as a punishment for non-payment and not as a satisfaction and discharge of the amount due. Now if the offender has undergone the whole of such imprisonment in default, no Court shall issue a warrant unless for special reasons to be recorded in writing, it considers it necessary to do so. See S. 70, I.P.C., which provides that a fine may be levied within six years after the passing of the sentence.

SUB-SECTION (2).—There was no provision in the Code before the amendment for the determination of claims. The remedy of the aggrieved party was only by a civil suit. Power is expressly given now for the summary determination of claims preferred by third parties in respect of property attached, in execution of a warrant and thus it provides a machinery by which inquiries can be made into claims and objections in a manner similar to claims and objections under S. 88 *supra*, 49 B. 906. The following decisions are therefore of no authority :—20 M. 86 ; 22 C. 935 ; Weir II, 445 ; Ratanlal 976 ; 1898 A.W.M. 173.

SUB-SECTION (3).—This sub-section makes the Collector of the District a decree-holder as understood in the Civil Procedure Code, the fine to be recovered being a Crown debt, and he could execute the decrees in accordance with the provisions of the Civil Procedure Code as to the execution of the decrees with the restriction that the judgment-debtor, *vis.*, the offender, shall not be arrested and detained in prison in execution of the decrees.

The amendment made in this section makes immovable property as well as moveable property liable for sale as it is not thought reasonable that immovable property should be allowed to escape; and at the same time power is given to the Local Government to make rules regarding the execution of warrants and the determination of claims. The cases reported in 20 C. 478, 20 M. 88 and 22 C. 938 are no longer law as immovable property too could now be attached and provision is made for determining claims to such property.

387. *A warrant issued under section 386, sub-section (1), clause (a) by any Court may be executed within the local limits of the jurisdiction of such Court, and it shall authorise the attachment and sale of any such property without such limits when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.*

Effect of such warrant.

AMENDMENT.—For the word "distress" the word "attachment" has been newly substituted. For the words "such warrant" "a warrant issued under Section 386, sub-section (1) clause (a) by any Court" have been substituted.

For form of attachment warrant under this section see Sch. V, form No. XXXVII. The warrant cannot be executed outside British India and no property of an accused can be attached under a warrant in any foreign state. See Welr II, 444.

388. (1) When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine, *and the fine is not paid forthwith,* the Court may—

Suspension of execution of sentence of imprisonment.

(a) *order that the fine shall be payable either in full on or before a date not more than thirty days from the date of the order, or in two or three instalments, of which the first shall be payable on or before a date not more than thirty days from the date of the order and the other or others at an interval or at intervals, as the case may be, of not more than thirty days, and*

(b) *suspend the execution of the sentence of imprisonment and release the offender, on the execution by the offender of a bond, with or without sureties, as the Court thinks fit, conditioned for his appearance before the Court on the date or dates on or before which payment of the fine or the instalments thereof, as the case may be, is to be made; and, if the amount of the fine or of any instalment, as the case may be, is not realised on or before the latest date on which it is payable under the order, the Court may direct the sentence of imprisonment to be carried into execution at once.*

(2) *The provisions of sub-section (1) shall be applicable also in any case in which an order for the payment of money has been made on non-recovery of which imprisonment may be awarded and the money is not paid forthwith ; and, if the person against whom the order has been made, on being required to enter into a bond such as is referred to in that sub-section, fails to do so, the Court may at once pass sentence of imprisonment.*

AMENDMENT.—This section has been re-drafted and re-modelled by Act XXXVII of 1923 to give effect to the recommendations of the Indian Jails Committee.

SCOPE OF THE SECTION :—This section authorises the Court to suspend the execution of a sentence of imprisonment, and release the accused on his executing a bond with or without sureties to appear on a date fixed when the accused is sentenced to a fine only and imprisonment in default of payment of fine. The words "the Court issues a warrant under S. 386" have been omitted now, and this omission allows time to be given for payment of fine without the issue of a warrant; and the Court has now power to order the fine to be paid by two or three instalments commencing from a date not more than thirty days from the date of order and in case of default to carry out the sentence into execution. Sub-section (2) applies to all orders for payment of money by way of fine or compensation and enables the Court to pass a sentence of imprisonment if the person ordered to pay fails to do so. See 26 M. 127.

389. Every warrant for the execution of any sentence may be issued either by the Judge or Magistrate who passed the sentence, or by his successor in office.

Who may issue warrant.

In 9 W.R. (Gr.) 50 it was held that the successor in office of the Judge or Magistrate may levy a fine imposed by his predecessor, but the Court which levies the fine must be the same as the Court which imposed it.

390. When the accused is sentenced to whipping only, the sentence shall, *subject to the provisions of section 391* be executed at such place and time as the Court may direct.

Execution of sentence of whipping only.

AMENDMENT.—The words "subject to the provisions of section 391" have been newly added by Act XII of 1923.

The Code before the amendment made no provision whereby a Magistrate imposing a sentence of whipping only can suspend its execution, nor did it provide for the detention of a person so sentenced, to allow of his appealing, nor for his re-arrest to undergo whipping if the sentence is confirmed on appeal; under S. 413, *infra*, as it stood before the amendment there was no appeal from a sentence of whipping only, the words 'or of whipping only' have now been removed from the amended S. 413 *infra*, thus making a sentence of whipping appealable.

391. (1) When the accused (a) *is sentenced to whipping only and furnishes bail to the satisfaction of the Court for his appearance at such time and place as the Court may direct, or (b) is sentenced to whipping in addition to imprisonment,* the whipping shall not be inflicted until fifteen days from the date of sentence, or, if an appeal is made within that time, until the sentence is confirmed by the Appellate

Execution of sentence of whipping in addition to imprisonment.

Court, but the whipping shall be inflicted as soon as practicable after the expiry of the fifteen days, or, in case of an appeal, as soon as practicable after the receipt of the order of the Appellate Court confirming the sentence.

(2) The whipping shall be inflicted in the presence of the officer in charge of the jail, unless the Judge or Magistrate orders it to be inflicted in his own presence.

(3) No accused person shall be sentenced to whipping in addition to imprisonment, when the term of imprisonment to which he is sentenced is less than three months.

AMENDMENT.—The italicised words in sub-section (1) are new.

SUB-SECTION (1) (a).—Provision is now newly made whereby a Magistrate passing a sentence of whipping only can suspend its execution on the accused furnishing bail for his appearance in Court at a specified time and place. The decision in 28 M. 468 is no longer law and the hardship referred to therein has been removed by the Whipping Act of 1909 depriving second-class Magistrates of the power to pass a sentence of whipping.

SUB-SECTION (1) (b).—This sub-section deals with cases in which a sentence of whipping is passed in addition to imprisonment which cannot be for less than three months under sub-section (3). The sentence of whipping can be postponed now in appealable and non-appealable cases. There is no provision of law under which an accused who has undergone his sentence and released at the expiry of the same could be called back to undergo the sentence of whipping passed on him. A sentence of fine cannot be substituted for a sentence of whipping which could not be carried out, *Weir II, 449*. The words "as soon as practicable" occurring in sub-section (1) is very important. The law lays down that the sentence of whipping shall be executed at such time and place as the Court may direct but it is clear that such a sentence should be inflicted as quickly as possible after the conviction and the order directing that the sentence of whipping be inflicted after the expiry of the six months' imprisonment was set aside. See S. 391 *infra*, which says that such sentence of whipping shall not be inflicted until after fifteen days from the date of sentence, etc., 1 Cr. L. Rev. 335.

SUB SECTION (3) was newly added in the Code of 1898. By this sub-section it is enacted that the term of imprisonment to which an accused shall be sentenced so that he may be liable to receive the additional sentence of whipping should not be less than three months. See 2 Bom. L.R. 54. When a sentence of whipping is illegally passed, the term of imprisonment being less than three months, the High Court has power under S. 499, *infra* to set aside the illegal sentence of whipping in revision although there was a right of appeal and no appeal was preferred, *Weir II, 447*.

392. (1) In the case of a person of or over sixteen years of age, whipping shall be inflicted with a light rattan not less than half an inch in diameter, in such mode, and on such part of the person, as the Local Government directs; and, in the case of a person under sixteen years of age, it shall be inflicted in such mode, and on such part of the person, and with such instruments, as the Local Government directs.

Mode of inflicting punishment.

Limit of number of stripes.

(2) In no case shall such punishment exceed thirty stripes and, in the case of a person under sixteen years of age, it shall not exceed fifteen stripes.

This section prescribes the mode of inflicting the sentence of whipping.

The last sentence in sub-section (1) and in sub-section (2) was added by S. 7 of the new Whipping Act IV of 1909. An accused under sixteen years of age is a juvenile offender within the meaning of the Whipping Act. Thirty stripes is the maximum number which could be inflicted on an adult offender, and fifteen is the maximum so far as juvenile offenders are concerned.

Not to be executed
by instalments.
Exemptions.

393. No sentence of whipping shall be executed by instalments; and none of the following persons shall be punishable with whipping, namely:—

(a) females;

(b) males sentenced to death or to transportation or to penal servitude or to imprisonment for more than five years;

(c) males whom the Court considers to be more than forty-five years of age.

The provision contained in this section that the persons mentioned therein shall not be punishable with whipping refers to the executing and not to the passing of the sentence of whipping, See 1 M. 55. A sentence of whipping made in addition to seven years' rigorous imprisonment is illegal, 21 Cr. L.J. 305-55 Ind. Cas. 466. Since no sentence of whipping can be administered by instalments, the High Court cannot enhance the sentence in revision by the addition of more stripes after the infliction has been carried out, Ratanlal 587. See S. 4 of Act IV of 1909 (Whipping).

394. (1) The punishment of whipping shall not be inflicted unless a medical officer, if present, certifies, or, if there is not a medical officer present, unless it appears to the Magistrate or officer present, that the offender is in a fit state of health to undergo such punishment.

Whipping not to be inflicted if offender not in fit state of health.

(2) If, during the execution of a sentence of whipping, a medical officer certifies, or it appears to the Magistrate or officer present, that the offender is not in a fit state of health to undergo the remainder of the sentence, the whipping shall be finally stopped.

Stay of execution.

There is no provision of law authorising a medical officer to give a certificate *before the infliction* of whipping that the accused is fit to undergo only a *smaller number* of stripes than that actually ordered, and such certificate cannot be held as one granted under this section. The Magistrate is not authorised in such cases by the terms of S. 395 *infra* to sentence the offender to imprisonment or fine in lieu of so much of the sentence as was not executed. Under sub-section (1) the sentence of whipping is wholly prevented from being executed when a medical officer certifies that the offender is not in a fit state of health to undergo the punishment and in such a case the section enacts that the whipping shall not be inflicted. Under sub-section (2) the sentence of whipping is partially prevented from being executed if, during the execution of the sentence of whipping, the medical officer certifies that the offender is not in a fit state of health to undergo the remainder of the sentence. Then the procedure laid down in S. 395 *infra* is to be followed, 31 M. 83.

395. (1) In any case in which, under section 394, a sentence of whipping is wholly or partially prevented from being executed, the offender shall be kept in custody till the Court which passed the sentence can revise it; and the said Court may, at its discretion, either remit such sentence or sentence the offender, in lieu of whipping, or in lieu of so much of the sentence of whipping as was not executed, to imprisonment for any term not exceeding twelve months, or to a fine not exceeding five hundred rupees, which may be in addition to any other punishment to which he may have been sentenced for the same offence.

Procedure if punishment cannot be inflicted under section 394.

(2) Nothing in this section shall be deemed to authorise any Court to inflict imprisonment for a term or a fine of an amount exceeding that to which the accused is liable by law, or that which the said Court is competent to inflict.

AMENDMENT.—This section now enables a sentence of fine to be awarded in lieu of a sentence of whipping which cannot be carried out. The amount of fine is not to exceed five hundred rupees.

SUB-SECTION (1).—The power under this section is to be exercised only when execution of the sentence of whipping is prevented wholly or partially from being executed under S. 394, *supra*, 31 M. 85. S. 369 lays down that the power of revision under this section is an exception and this power of revision is conferred only on the Court which passed the sentence. An appellate Court cannot be the court which passed the sentence and which has jurisdiction to revise it even after an appeal from the sentence has been made and the sentence confirmed. The Court in its discretion may remit such a sentence of whipping or sentence the offender in lieu of whipping to imprisonment or fine in addition to the punishment already awarded. The imprisonment if awarded must commence immediately.

SUB-SECTION (2).—The imprisonment awardable by a Court in lieu of whipping is limited by the powers of the Magistrate passing the sentence, that is to say, the term of imprisonment cannot exceed that which the Magistrate is competent to pass. If a Magistrate has passed the maximum sentence he could award, he cannot pass a further sentence in lieu of whipping which could not be carried out, 21 A. 25; *Weir II*, 439. A term of imprisonment here means a substantive term of imprisonment and not imprisonment in default of payment of fine, 11 A. 308.

396. (1) When sentence is passed under this Code on an escaped convict, such sentence, if of death, fine or whipping, shall, subject to the provisions hereinbefore contained, take effect immediately, and, if of imprisonment, penal servitude or transportation, shall take effect according to the following rules, that is to say—

Execution of sentences on escaped convicts.

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately.

(3) When the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped, the new sentence

shall take effect after he has suffered imprisonment, or penal servitude or transportation as the case may be, for a further period equal to that which, at the time of his escape, remained unexpired of his former sentence.

Explanation.—For the purposes of this section—

(a) a sentence of transportation or penal servitude shall be deemed severer than a sentence of imprisonment ;

(b) a sentence of imprisonment with solitary confinement shall be deemed severer than a sentence of the same description of imprisonment without solitary confinement ; and

(c) a sentence of rigorous imprisonment shall be deemed severer than a sentence of simple imprisonment with or without solitary confinement.

Concurrent or consecutive sentences can only be passed in cases of separate convictions at one trial. In all other cases the provisions of this and S. 397 *infra* should be followed. 13 Cr. L.J. 3=13 Ind. Cas. 109. A sentence of imprisonment passed on a life-convict for attempting to escape from lawful custody cannot be directed to commence immediately. The direction for the immediate execution of the sentence is unauthorised, Ratanlal 965. The punishment for escape from lawful custody is to be in addition to the original sentence and the Court in passing such sentence must comply with the provisions of this section, Weir I. 203.

397. When a person already undergoing a sentence of imprisonment, penal servitude or transportation, is sentenced to imprisonment, penal servitude or transportation, such imprisonment, penal servitude or transportation shall commence at the expiration of the imprisonment, penal servitude or transportation to which he has been previously sentenced, *unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence :*

Sentence on offender already sentenced for another offence.

Provided that, if he is undergoing a sentence of imprisonment, and the sentence on such subsequent conviction is one of transportation, the Court may, in its discretion, direct that the latter sentence shall commence immediately, or at the expiration of the imprisonment to which he has been previously sentenced :

Provided, further, that where a person who has been sentenced to imprisonment by an order under section 123 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

AMENDMENT.—The second proviso is new. The words “ unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence ” have been newly added.

SCOPE OF THE SECTION.—This section as recently amended deals with the case of a suspect who has been sentenced to imprisonment in respect of an offence committed by him before the order passed under section 123 for his detention, and the sentence of imprisonment in such a case shall take effect immediately. It is therefore open to a suspect to take advantage of the provisions of this section and to have the sentence of imprisonment run concurrently with his detention under S. 123 even though he has been convicted of an offence committed by him during the time allowed to him by the Magistrate to furnish security. 27 Cr. L.J. 865—98 Ind. Cas. 113.

ALREADY UNDERGOING SENTENCE OF IMPRISONMENT;—An accused under custody begins to undergo a sentence of imprisonment passed on him from the moment the sentence is pronounced and if a second sentence of imprisonment is passed on him on the same day subsequently in a separate trial, he is already undergoing a sentence of imprisonment within the meaning of this section, 25 Cr.L.J. 1310 = 82 Ind. Cas. 478.

A Court is now empowered to pass a sentence to run concurrently with any other term of imprisonment which the person convicted is already undergoing. By the second proviso it is now made clear that a person detained in jail under S. 123, *supra* is undergoing a sentence of imprisonment within the meaning of this section. As a general rule sentences begin to run the moment they are passed but the section enacts that if the accused is already undergoing sentence, the subsequent sentence shall commence after the expiration of the previous sentence. Before the amendment *concurrent sentences* cannot be passed unless the sentences are passed at one trial. A sentence passed with a direction that it was to run concurrently with another passed on the previous day was held illegal by various High Courts, but the amendment clears the difficulty and empowers a Court to order a subsequent sentence to run concurrently with a previous sentence which the accused is undergoing. A doubt was also expressed whether, when legalising such illegal sentence of a Magistrate in revision, by making an order directing the sentences to run *consecutively*, the High Court was not *enhancing* the sentence passed on the accused. A person undergoing a sentence of imprisonment in a foreign territory, *vis.*, in the jail at Mysore, when convicted and sentenced by a Magistrate in British territories it is competent to such Magistrate to order that the imprisonment is to take effect at the only time when it could take effect, *vis.*, after the expiration of the sentence in foreign territory, 20 M. 444. The new proviso was put in to meet the conflict of rulings in Allahabad, Bombay and Madras, 27 M. 525 and 31 M. 515; 1914 M.W.N. 500—27 Ind. Cas 201—6 Cr. L. Rev. 418; 14 Bom. L.R. 965—13 Cr. L.J. 859—17 Ind. Cas. 785; 1912 M.W.N. 396—11 M.L.T. 213—13 Cr. L.J. 486—15 Ind. Cas. 308; 37 B. 178 are no longer law. The views expressed in 30 A. 334 (F. B.), is now adopted by the Legislature. See also 13 C.W.N. 318.

398. (1) Nothing in section 396 or section 397 shall be held to excuse any person from any part of the punishment^o to which he is liable upon his former or subsequent conviction.

Saving as to sections 396 and 397.

(2) When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment, or to a sentence of transportation or penal servitude for an offence punishable with imprisonment, and the person undergoing the sentence is after its execution to undergo a further substantive sentence, or further substantive sentences, of imprisonment, transportation or penal servitude, effect shall not be given to the award of imprisonment in default of payment of the fine, until the person has undergone the further sentence or sentences.

399. (1) When any person under the age of fifteen years is sentenced by any Criminal Court to imprisonment for any offence, the Court may direct that such person, instead of being imprisoned in a criminal jail shall be confined in any reformatory established by the Local Government as a fit place for confinement, in which there are means of suitable discipline and of training in some branch of useful industry or which is kept by a person willing to obey such rules as the Local Government prescribes with regard to the discipline and training of persons confined therein.

(2) All persons confined under this section shall be subject to the rules so prescribed.

(3) This section shall not apply to any place in which the Reformatory Schools Act, 1897, is for the time being in force.

SCOPE OF THE SECTION.—A youthful offender is not yet a Criminal but only 'a Criminal in the making.' Before sending a youthful offender to a Reformatory, the Court must record a clear finding as to his age and that he is a fit person to be an inmate of a Reformatory, 3 Rang. 218. It is not everybody that is convicted of an offence that can be sent to a Reformatory, but only such boys who, there is reasonable cause for supposing, are likely again to lapse into crime, Welr I, 878. It is clearly the duty of the Magistrate to define precisely the nature of the sentence intended. The order must be self-contained and the period of detention must be fixed, so that the functionary who has to execute it should have nothing to do but to obey the direction given without making an enquiry on his own account, 24 M. 13.

IS SENTENCED BY A COURT TO IMPRISONMENT FOR AN OFFENCE.—Where no sentence of imprisonment for an offence is actually passed an order under this section cannot be passed.

SUB-SECTION (3) was newly added in the Code of 1898. See S. 3 of the Reformatory Schools Act VIII of 1897. This section does not apply to places where the Reformatory Schools Act is in force. This section is in force only in Coorg and the moment the Reformatory Schools Act is extended to that Province by a notification under S. 1 (3) of the said Act, this section will cease to be in force there also.

REFORMATORY SCHOOLS IN MADRAS.—The two Schools in Madras are the Reformatory School in Chingleput and the Borstal Institute in Tanjore. The Borstal system derives its name from the prison in the United Kingdom where special effort was first made to reclaim juvenile adult prisoners from the life of crime without prejudice or impairment of the necessary rigour of sentence of imprisonment. The object of the system is to cultivate energies both physical and mental, moral perceptions and powers of self-discipline of the prisoner. The means adopted are:—Juvenile prisoners are drilled and receive both industrial and scholastic training, the latter of an elementary character and lectures of a kind to impress them morally in the right direction. Concentration of individual attention upon a prisoner is one important feature of the scheme. Habits of obedience, industry and good conduct are cultivated with the object of securing that the prisoner on leaving jail is given a fair chance of leading an honest and law abiding life and is able to feel that there are persons who take interest in his so doing.

400. When a sentence has been fully executed, the officer executing it shall return the warrant to the Court from which it issued, with an endorsement under his hand certifying the manner in which the sentence has been executed.

Return of warrant on execution of sentence.

CHAPTER XXIX.

OF SUSPENSIONS, REMISSIONS AND COMMUTATIONS OF SENTENCES.

401. (1) When any person has been sentenced to punishment for an offence, the Governor-General in Council or the Local Government may at any time without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

Power to suspend or remit sentences.

(2) Whenever an application is made to the Governor General in Council or the Local Government for the suspension or remission of a sentence, the Governor General in Council or the Local Government, as the case may be, may require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion, *and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.*

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the Governor General in Council or of the Local Government, as the case may be, not fulfilled, the Governor General in Council or the Local Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any police-officer without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section, may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(4A) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law, which restricts the liberty of any person or imposes any liability upon him or his property.

(5) Nothing herein contained shall be deemed to interfere with the right of His Majesty or of the Governor-General when such right is delegated to him to grant pardons, reprieves, respites or remissions of punishment.

(5A) Where a conditional pardon is granted by His Majesty or, in virtue of any powers delegated to him, by the Governor General, any condition thereby imposed, of whatever nature, shall be deemed to have

been imposed by a sentence of a competent Court under this Code and shall be enforceable accordingly.

(6) The Governor General in Council and the Local Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with.

AMENDMENT.—The words in italics in sub-section (2), sub-sections (4A), (5) and (5A) are new.

SCOPE OF THE SECTION.—This section authorises the Governor General in Council or a Local Government to suspend the execution or remit the whole or part of any sentence passed upon any person sentenced to punishment. The power to grant pardon rests primarily in the sovereign and this Section does not in any way touch the prerogative of the Crown. The special authority given to Government relates to persons convicted and sentenced and does not touch cases relating to tender pardon under S. 337, *supra* to a person charged along with others with crime and to whom a conditional pardon is tendered, 11 A. 79; 36 A. 236 at 241. The High Court may when dismissing an appeal forward the records to the Local Government to be dealt with under this section, 23 C. 604; 1884 W.R. (Cr.) 27.

SUB-SECTION (2).—The addition newly made to this sub-section empowers a Local Government to call for the record of the trial along with the presiding Judge's opinion when considering an application for the suspension or remission of a sentence. When the plea of insanity set up by an accused to a charge of murder was found by the Court not established, the Court having regard to the diseased condition of the accused's mind and the absolutely motiveless nature of the offence, sent up the record to the Local Government with a recommendation that the case be dealt with under this section as under the strict provisions of law, the High Court had no alternative but to uphold the conviction and sentence, 6 M.L.T. 101, at 108; 28 C. 804.

SUB-SECTION (3).—Compare S. 227, I.P.C., which deals with violation of the condition of remission of punishment and punishment for such violations.

SUB-SECTION (4A).—This sub-section is new. It empowers the Government to apply the provisions of this section to any order passed by a Criminal Court under any section of the Code or under any other law restricting the liberty of any person or imposing any liability upon him or his property. The language employed here is very wide, and apply to all orders passed, say under Chapters VIII, XI, XLII, etc. A person undergoing imprisonment for failure to furnish security can now be dealt with under this section as the language of this sub-section clearly applies to such a case. Orders under S. 565; *infra*, requiring a convicted person when released to notify residence may also come under this sub-section as such orders are undoubtedly of a penal nature.

REPRIEVE.—A reprieve is the withdrawal of the sentence for an interval of time whereby the execution of it is suspended. It may be granted by the King or by the Court empowered to award the execution. A reprieve is granted by the Crown at its mere discretion whenever substantial justice require it, such as when the prisoner is a pregnant woman under capital sentence or when the prisoner becomes insane after judgment is pronounced against him. *Arch. Cr. Pl. & Pr.* p. 220 (25th Ed.)

RESPIRE.—The term 'respite' is usually applied to postponement of a judgment or sentence of the Court until a future date. This may be done when an appeal is pending or a case is stated for the Court of Crown Cases Reserved or where the Court having regard to the nature of the offence or antecedents or mental or physical condition of the convict desires to defer sentence. It is usual to put the offender under recognizance to come up for judgment when called upon. *Arch. Ibid* p. 220.

SUB-SECTION (5A) is new, and enacts that any condition imposed when granting a conditional pardon shall be deemed to have been imposed by a sentence of a competent Court under this Code, and shall be enforceable accordingly.

SUB-SECTION (6) was introduced in the Code of 1898. This sub-section enables the Governor-General in Council and the various Local Governments to make rules for suspension of sentences in emergent cases. After the famous *Sitapur case (Oudh Talukdars' Case)* special rules are framed now for applications to the Governor-General in Council and for suspension of sentence when a Local Government refuses to interfere. The sentence, especially one of death, is not to be carried out till final orders of the Governor-General in Council is passed, even though a Local Government has thought it not fit to interfere. The new rules provide that where a capital sentence has been passed on a Local Government's appeal after acquittal by the Sessions Court or after an enhancement of sentence, the petition for mercy must in all cases be submitted to the Governor-General and the execution of the sentence of death must be suspended until the Governor-General's order on the petition is received.

402. (1) The Governor General in Council, or the Local Government, may, without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it :—

Power to commute punishment.

death, transportation, penal servitude, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, fine.

(2) *Nothing in this section shall affect the provisions of section 54 or section 55 of the Indian Penal Code.*

AMENDMENT.—Sub-section (2) is new and it removes the doubt expressed as to the consistency of this section with S. 55, Indian Penal Code,

SUB-SECTION (2).—S. 54, I.P.C., says that a sentence of death may be commuted for any other punishment provided by that Code and S. 55, I.P.C. says that a sentence of transportation may be commuted for imprisonment of either description for a term not exceeding fourteen years. There was some uncertainty as to whether the provisions of this section or S. 55, I.P.C. was to prevail in the case of transportation for life as to the scale of imprisonment and this uncertainty is now removed by the amendment.

CHAPTER XXX.

OF PREVIOUS ACQUITTALS OR CONVICTIONS.

403. (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.

Person once convicted or acquitted not to be tried for same offence.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, subsection (1).

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.

(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

(5) Nothing in this section shall affect the provisions of section 26 of the General Clauses Act, 1897, or section 188 of this Code.

Explanation.—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 for the purposes of this section.

Illustrations.

(a) A is tried upon a charge of theft as a servant and acquitted. He cannot afterwards, while the acquittal remains in force, be charged with theft as a servant, or upon the same facts with theft simply, or with criminal breach of trust.

(b) A is tried upon a charge of murder and acquitted. There is no charge of robbery; but it appears from the facts that A committed robbery at the time when the murder was committed; he may afterwards be charged with, and tried for robbery.

(c) A is tried for causing grievous hurt and convicted. The person injured afterwards dies. A may be tried again for culpable homicide.

(d) A is charged before the Court of Session and convicted of the culpable homicide of B. A may not afterwards be tried on the same facts for the murder of B.

(e) A is charged by a Magistrate of the first class with, and convicted by him of, voluntarily causing hurt to B. A may not afterwards be tried for voluntarily causing grievous hurt to B on the same facts, unless the case comes within paragraph 3 of the section.

(f) A is charged by a Magistrate of the second class with, and convicted by him of, theft of property from the person of B. A may be subsequently charged with, and tried for, robbery on the same facts.

(g) A, B and C are charged by a Magistrate of the first class with, and convicted by him of, robbing D. A, B and C may afterwards be charged with, and tried for, dacoity on the same facts.

SCOPE OF THE SECTION.—The principle upon which the right to plead '*autrefois acquit*,' or '*autrefois convict*,' depends, is that a man should not be put twice in jeopardy.

for the same matter and it does not rest on any doctrine of estoppel. But it seems always to have been held that a previous acquittal can only be pleaded in bar to a subsequent indictment (1) where the acquittal is for the exact offence charged or (2) where the subsequent indictment is based on the same facts and omissions, in respect of which the previous acquittal was made and the same statute directs that the defendant shall not be tried or punished twice in respect of the same acts or omissions.....If therefore a man has been tried and found not guilty of an offence by a Court competent to try him, the acquittal is a bar to a second indictment for the same offence. And the rule applies not only to the offence actually charged in the first indictment but to any offence of which he could have been properly convicted, on the trial of the first indictment. *Arch. Cr. P. and Pr. p. 153 (25th Ed.)* The pleasure based on the well-known legal maxim. '*nemo debet bis vexari pro una eadem causa*' i.e., no man should be vexed twice for one and the same cause. When a criminal charge has been adjudicated upon by a Court of competent jurisdiction that adjudication is considered final and can be pleaded as a bar to a subsequent prosecution for the same offence. The adjudication may be in the form of an acquittal or conviction. This section is not a section easy of construction but the general principle underlying it is to be borne in mind namely that a man should not be put on his trial twice over on the same facts and it is a great hardship for a man to stand more than one trial for one offence, 19 L.W. 31. The plea of *autrefois acquit* will not be available to a set of accused tried in respect of a complaint of an occurrence when as a matter of fact on the identical complaint another set of accused had been already tried and acquitted by another Magistrate. But that circumstance could be taken into account by the Magistrate to determine whether there are sufficient grounds for issuing process and the Magistrate in issuing process to the accused under such circumstances will be acting improperly without paying regard to what had happened in the earlier proceedings, 20 C.W.N. 548—27 Cr. L.J. 788—95 Ind. Cas. 888 where 37 C. 680; 41 C. 764 and 38 A. 168 are followed. This section embodies the general rule which affirms the validity of pleas of *autrefois acquit* and *autrefois convict* subject only to the exceptions specified in it. When a man has been tried and convicted or acquitted for an offence arising out of a particular set of facts, he cannot, while such conviction or acquittal remains in force, be again tried in respect of any offence based on the same facts, unless the case can be brought under one or other of the specific exceptions to the rule provided by this section. See 20 C.W.N. 384. A withdrawal after a charge is framed which results in an acquittal under S. 494, *infra* can be pleaded as a bar under this section, 14 Cr. L.J. 135—18 Ind. Cas. 887. This section deals with the maxim that no man ought to be tried twice upon the same facts, which means that a person cannot be tried a second time for an offence which is involved in the offence with which he was previously charged, 23 C. 174; 43 C. 727; 21 Cr. L.J. 164—54 Ind. Cas. 772. The true test is not so much whether the facts are the same in both the trials as whether the acquittal on the first charge necessarily involves an acquittal on the second charge, 48 C. 78 at 83. This section has nothing to do with pleading, being in terms a limitation to the jurisdiction of the Court, and is not to be construed with reference to the English law of criminal pleading. Ss. 271 and 272, *supra*, contain all that is necessary as to pleading without reference to English rules, 41 C. 1072 at 1084. It protects an accused against a subsequent trial for the same offence on the same facts, and any other offence for which a different charge from the one made against him "might have been made," but was not made, and not when such a different charge was made at the previous trial and the jury disagreed with it, 41 C. 1072. This section does not direct that a person shall be acquitted, but says that he shall not be tried again. When a man is put on trial and he produces an order of acquittal passed by a Court which on the face of it is a Court of competent jurisdiction, in respect of the offence charged, the Court before which such order is produced is not entitled to impeach the competency of the Court which passed the order, on the ground that the presiding officer may perhaps have laboured under the disqualification prescribed by S. 556, *infra*. Until such an order is set aside by some competent Court, the man acquitted is entitled to plead it under this section in connection with any other proceeding that may be taken against him, 8 A.L.J. 1129—12 Cr. L.J. 575—12 Ind. Cas. 839. It would be interesting to consider whether the doctrine that an order of acquittal was obtained by fraud would be applicable to render null and void an acquittal

within the meaning of this section without any further proceedings being taken to set aside the acquittal, 22 A.L.J. 820 at 822. See in this connection 38 M. 1028. The onus of proving the plea of *autrefois acquit* is on the accused who pleads it, 1 L.W. 837. But when the trial is by a Court without jurisdiction, the trial is void under S. 530, *infra*, and the acquittal cannot be pleaded in bar to a subsequent trial, and it is unnecessary that such an acquittal should be set aside by a superior Court before the accused could be retried, 8 B. 307. Similarly a Court may be incompetent to try a case for want of sanction, and a dismissal or discharge by the Court under such circumstance is no bar to a subsequent proceeding with the necessary sanction, 24 M. 337; 22 B. 711. When a conviction had by a Magistrate who had no jurisdiction to try, is set aside by an Appellate Court, this section does not bar a fresh trial by a competent Court, 29 C. 412; 31 A. 317; 9 A. 134 (F.B.)

CONVICTED OR ACQUITTED OF SUCH OFFENCE.—When an accused is convicted there is not much difficulty in the application of this section and there cannot be much room for doubt whether an order amounts to a conviction or not. Sub-section (3) deals with convictions alone, whereas sub-sections (1), (2) and (4) deal with convictions as well as acquittals. Whether the omission is deliberate or due to an oversight it is not easy to say. But it is not by any means easy to say whether an order amounts to an acquittal or not, within the meaning of this section. The explanation to the section enumerates what are not acquittals for the purposes of this section. A conviction may be had in accordance with the provisions of Ss. 243, 245, (2), 258, (2), 271 (2), 305, (1), 306, 307, 309 (2), 423, 480 and 485. A discharge under S. 263 or S. 203 is not an acquittal, 31 M. 543; 29 M. 126 (F.B.); 29 C. 726; 16 C.W.N. 983; 17 A.L.J. 867; 10 B. 131; nor is an order under S. 209, *supra* an acquittal, 4 Bom. L.R. 779 at 788. An order purporting to be an acquittal when the act done does not amount to an offence under any law it is not an acquittal, 24 M. 660. When there is no proper complaint before a Magistrate as required by law (say under S. 199, *supra*) and the Magistrate acquits the accused, it was held that there was no acquittal within the meaning of this section, the Magistrate having no complaint which he could take cognizance of, 31 A. 317. A verdict of acquittal is no doubt immune from challenge but it is only when the accused is 'tried' and acquitted the immunity arises, 43 C.L.J. 110 at 113—30 C.W.N. 382—27 Cr. L.J. 731—98 Ind. Cas. 79. An order under S. 247, *supra* is an acquittal, 34 M. 253; 40 M. 976 dissenting from 40 M. 977 (foot-note); 26 M.L.J. 160; 4 C.W.N. 346. So also an order passed by a Magistrate who re-commenced an inquiry or trial after his predecessor had framed a charge under S. 360 in a warrant-case, 38 M. 585. See also Ss. 240, 245 (1), 248, 268 (1), 289, 305 (1) 306 to 309 (2), 333, 423, 494 (6), 495 (2) as to acquittals under the Code.

SUB-SECTION (1): ONCE BEEN TRIED.—The word "*tried*" in this sub-section does not necessarily import a decision of the case on the merits so far at least as proceedings under S. 247, *supra* are concerned and any other construction would render the provisions of the latter section nugatory. The non-mention of S. 247, *supra* in the explanation to this section would also show that S. 247, *supra* was not intended in any way to limit the effect of an order of acquittal under S. 247, *supra*. There is no difference in the case of an acquittal under S. 247, *supra*, whether the acquittal was before process was issued to the accused, or whether it was after the issue of process to the accused (say a summons case) and he appears or fails to appear. In either case the accused is entitled to the full benefit of an acquittal, 35 M. 253; Weir II, 437. When the accused has pleaded to a formal charge, the Magistrate is bound to acquit or convict, and his order only dismissing the case will amount to an acquittal, 8 C.L.R. 359. But there cannot be a bar to a second trial when the previous proceedings did not amount to a trial. The principle of *autrefois acquit* can have no application as there is no trial terminating in an acquittal when an accused is discharged under S. 203, or S. 263 *supra*. The Legislature has indicated in the Code the extent to which it intended that the doctrine of *autrefois acquit* should be applied in this country, and it is not open to Courts by interpretation to extend its application, 31 M. 543 at 548; 29 M. 126 (F.B.); 29 C.726; 10 B.131. An order of acquittal passed when the offence was compounded by the parties without the Court inquiring into the authority of the complainant, is a valid acquittal by a Court of competent jurisdiction and until that order is set aside, the accused could not be further prosecuted for that offence, 22 A.L.J. 820;

BY A COURT OF COMPETENT JURISDICTION.—The language of this section is very wide. The expression "Court of competent jurisdiction" does not merely refer to the character and status of the tribunal to try the offence but also refers to want of jurisdiction on other grounds, e.g., for want of a complaint of Court under S. 195, *supra*, 27 Cr. L.J. 819—95 Ind. Cas. 929 where 36 M. 308 ; 39 A. 293 ; 19 Cr. L.J. 798—36 Ind. Cas. 716, are referred to. Generally before further proceedings are taken, the fact of the incompetency of the Court which purported to convict or acquit the accused should be declared first by some superior Court. In exceptional cases, say cases which require previous sanction for institution of proceedings the incompetency of the Court is apparent. When a person put on his trial, produces an order of acquittal passed by a Court which on the face of it is a Court of competent jurisdiction in respect of the offence charged, the Court is not entitled to impeach the competency of the Court which passed the previous order holding that the presiding Judge may have been disqualified to try under S. 556 *infra*. Until such order is set aside by a competent Court, the person acquitted is entitled to plead it under this section as a bar to his trial, 8 A.L.J. 1129—12 Cr. L.J. 375—12 Ind. Cas. 839. If the order of acquittal was by a Court [departmental punishment being of no avail, Ratanlal 318,] which on the face of it was a Court of competent jurisdiction in that it had both territorial jurisdiction and the jurisdiction under the second schedule of the Code in respect of the offence charged, the competency of that Court cannot be questioned on any technical ground of personal disqualification to try under S. 556, *infra*. The phrase "has once been tried by a Court of competent jurisdiction" in this sub section is not one which limits the application of the provision to reasons affecting the nature or the ordinary powers of the tribunal. It is wide enough to cover the case where a first trial was *ab initio* void for want of a complaint, 19 Cr. L.J. 798 ; 39 A. 393. Where an accused is tried and acquitted of an offence referred to in S. 195 (1) (a) *supra* on the ground that the Court which tried him was not a Court of competent jurisdiction in the absence of a complaint in writing of the public servant concerned or his superior, the accused when tried subsequently on the strength of a complaint in writing by the public servant concerned cannot raise the plea of *autrefois acquit* under this section, 27 Cr. L.J. 1103—27 Ind. Cas. 317. The acquittal or conviction of an accused must be by a Court of competent jurisdiction. Otherwise such order is of no avail under this section, 29 C. 312. Where an offence is tried by a Court without jurisdiction the proceedings are void under S. 530 *infra* and the accused if acquitted, is liable to be tried again, under this section, 8 B. 307, followed in 43 C.L.J. 110. It is not necessary that such an acquittal should be reversed before a re-trial can be had, 18 C.W.N. 1211—15 Cr. L.J. 726—26 Ind. Cas. 175. There can be no acquittal unless the Court which tried the accused had jurisdiction, 8 M. 48. If the offence is tried in the first instance without the Court having jurisdiction the proceedings are void under S. 530, *infra*, and the offender can be charged again under this section. But if the Court had jurisdiction there can be no re-trial unless the acquittal is set aside by the High Court on the application of the Local Government, 10 B. 181 ; 5 Pat. 482 where 39 A. 293 and 46 Ind. Cas. 710 followed, and 36 M. 308 not followed. If the trial be by a Court of competent jurisdiction for an offence and the accused has been convicted of such offence, so long as the conviction remains in force, he is not liable to be tried again for the same offence. A village headman under the Burma Village Act convicted the accused under S. 294, I.P.O. but the Magistrate, holding that the village headman is not a Court, mentioned in S. 6, *supra*, overlooking the express words "Courts constituted under any law other than the Code" overruled the objection under this section, and again tried and convicted the accused. It was held by the High Court that the trial held by the Magistrate was barred and the conviction and sentence were set aside. 1 Rang. 439.

WHILE SUCH CONVICTION OR ACQUITTAL REMAINS IN FORCE.—So long as the judgment or order convicting or acquitting the accused has not been set aside, the accused cannot be tried again and the plea of *autrefois convict* or *autrefois acquit*, could be urged to bar the trial. So long as the order remains in force it operates as a bar to further proceedings under this section. The fact that the appellate Court did not expressly order a fresh trial is not material and could not bar a fresh trial, 29 C. 312.

NOT LIABLE TO BE TRIED AGAIN FOR THE SAME OFFENCE, ETC.—This section does not direct that a person shall be acquitted but only says that he shall not be tried

again. So an order of acquittal cannot be passed under this section on the ground that accused had been previously acquitted. 9 Cr. L.J. 578=2 Ind. Cas. 357. and therefore no consequential relief also can be granted on such an acquittal of the accused, 7 Cr. L.J. 490. To bar a second trial, the previous conviction or acquittal must have been for the same offence. It would be no answer in a trial for one offence to say that the accused had been acquitted of another, in a trial in which evidence was given respecting two offences and which if believed would have sustained the conviction of the prisoner for both, 7 W.R. (Cr.) 15. An illegal conviction had under S. 21 of the Forest Act will not bar a second trial under the Penal Code for such other offence as the accused may have been proved to have committed, Weir I, 759. A Court before which a second trial is commenced has nothing to do with the evidence recorded in the previous trial except for the purpose of ascertaining whether the offence is the same, 7 W.R. (Cr.) 15. Theft and mischief committed by cutting the branches of a tree are not distinct offences. When the complaint was for theft and mischief, and the accused was tried for mischief, and acquitted, this sub-section barred a subsequent trial for the theft and sub-section (2) had no application to the case, 8 M. 296. An acquittal on a charge under S. 352, I.P.C., operates as a bar to a subsequent trial for an offence under S. 323, I.P.C., 7 B.L.R. (Appx.) 25. An acquittal of the accused on a charge under S. 211, I.P.C., is a bar to the trial on the same facts under S. 182, I.P.C., 36 M. 398. This section imposes a bar on the jurisdiction of the Court, and the defence can be set up at any time before verdict, 41 C. 1072, see also 49 C. 924. An acquittal on a charge of mischief committed by cutting the spathes of some palmyra trees under S. 427, I.P.C. is a bar to a subsequent trial for rioting under S. 147, I.P.C., on the same facts, that there was an unlawful assembly animated with the common object of committing mischief. The two transactions were so closely overlapping that it was open to the prosecution to have framed an alternative charge of mischief and rioting under S. 336, *supra* and the case fell under sub-section (1) of this section, 19 L.W. 31. An acquittal of the offence of forgery and abetment thereof bars a subsequent trial for offences under the Registration Act on the same facts, 1 Rang. 289. When a person who was tried and convicted for misappropriating certain sums of money during a certain period was again put on his trial in respect of certain other sums alleged to have been misappropriated during the same period, it was held that the charge in the previous trial should be taken to include all the items misappropriated by the accused in the same transaction during that period and that the subsequent trial was barred by this section. The Legislature apparently intended, where there is to be trial for misappropriation of a gross sum, there should be only one trial for such an offence committed within the period covered by the defalcation, 32 Ind. Cas. 186. Where facts are not the same in the two trials recourse could not be had to sub-section (1) of this section, 40 B. 97 at 104. Possession of counterfeit coin under S. 243, I.P.C., is a distinct offence from uttering counterfeit coin under S. 240, I.P.C. A previous conviction under S. 243, I.P.C., in regard to one set of coins is no bar to a subsequent trial under S. 240, I.P.C., in regard to a second set of coins even though the second set had originally been part of the same stock as the first set of coins, 31 C. 1007. Where on a charge of theft against A, B and C, A and B were tried and acquitted by a competent Magistrate and subsequently C was put on his trial for an offence under S. 411, I.P.C., on discovery of property in his house, it was held that the acquittal of A and B was no bar to the trial of C as there were additional facts before the Court subsequent to the acquittal of A and B supporting the charge under S. 411, I.P.C., 10 C.W.N. 1031. But a conviction under S. 411, I.P.C. will bar a subsequent trial under S. 414, I.P.C., 28 A. 313. Acquittal of criminal breach of trust with regard to one item will not bar a second trial with regard to another item during the same period, 12 Bom. L.R. 226=11 Cr. L.J. 337=5 Ind. Cas. 970. The acquittal of an accused on a charge under S. 400, I.P.C., cannot operate under this section as a bar to his being prosecuted again on a charge under S. 395, I.P.C., for committing only one of the dacoities in respect of which evidence was given at the previous trial. This section bars a separate trial on the same basis of facts, only in cases falling under S. 236 and S. 237, *supra*, 1 Bom. L.R. 13. Acquittal under Ss. 325 and 147, I.P.C., is no bar to a subsequent trial under S. 32, I.P.C., 27 Cr. L.J. 615=94 Ind. Cas. 369 following 42 A. 128; 24 M. 186. Where A was charged under S. 411, I.P.C., with regard to some articles of stolen property and acquitted, he cannot be

subsequently tried for other articles in his possession unless those articles were recovered at different times, 30 C. 594 where 15 A. 317 and 15 C. 511 are followed. The acquittal of some out of several persons charged will not bar the subsequent trial of other persons implicated in the same transaction when arrested and put on their trial, 37 C. 680. Where a former conviction or acquittal is set up as a bar to subsequent trial, the Court before which the second trial is held has nothing to do with the evidence given on the former trial except for the purpose of ascertaining whether the offence which forms the subject of the first trial is the same as that which forms the subject of the second charge. If the offence is the same the conviction or acquittal is a bar to a second trial whether the second Court considers the former conviction or acquittal was warranted by the evidence given at the first trial or not. If the offence is not the same, the former conviction or acquittal is no bar to the trial upon the second charge notwithstanding the evidence given is the same in the two cases. 7 W.R. (Cr.) 16. Acquittal under S. 498, I.P.C. of an accused who was alleged to have enticed away a married woman with two of her minor children is a bar to the trial of the accused for the offence of the kidnapping the two minor children, kidnapping not being a continuing offence and there could be no abetment of kidnapping after the minors were once taken away from lawful guardianship, 12 Cr. L.J. 93-9 Ind. Cas. 511. Where an accused was charged with kidnapping from lawful guardianship in general terms without stating from whose guardianship the kidnapping took place, an acquittal had on such a charge of the offence of kidnapping from the guardianship of a particular person may be pleaded as a bar to a trial on a charge of kidnapping from lawful guardianship of another person, 25 M. 284. The trial of an accused for offences under Ss. 341 and 352, I.P.C., does not bar the trial for an offence under S. 504, I.P.C., in connection with the same transaction. 7 Cr. L. Rev. 238. When two distinct and separate offences such as affray and hurt are committed the case does not fall within this clause and the conviction for affray is no bar to a subsequent trial for causing hurt. Such a case does not fall under sub-section (2) of S. 235, *supra*, and the matter is clear from the illustrations to that section, 47 A. 284. Where a charge has been framed for murder, culpable homicide and abetment thereof and the jury returned a verdict of "not guilty" on the first charge and they had to be discharged being not unanimous on the remaining charges, the acquittal for murder could not be pleaded as a bar to the trial of the other offences, as there was an express charge and this section could not therefore protect the accused, 41 C. 1072

SUB-SECTION (2).—When an accused who was tried for abetment of forgery and acquitted was again put on his trial for using as genuine a forged document, it was held that sub-section (1) of this section did not apply to the case inasmuch as the case was not one contemplated by S. 285, *supra*, and that the case fell directly under this sub-section as the series of acts beginning with forgery and ending with the user in the Civil Court to support the claim must be regarded as so connected together as to form the same transaction, or carrying through of a single predetermined plan, so that under S. 235 (1) it would have been competent to try the accused for both the offences in the same trial, 40 B. 97. Where an accused was acquitted on a charge under S. 183, I.P.C., on the ground that the person informed was not a public servant, it was held that a subsequent trial under S. 500, I.P.C., at the instance of the Sub-Inspector against whom false information was given, was permitted by this sub-section, 37 C. 604; see also 28 C. 174 and 1 Bom. L.R. 16. For what are distinct offences, see notes under Ss. 35 and 233. A person previously convicted of theft of a quantity of opium can again be tried for illicit possession of the same opium under S. 3 of the Opium Act because this sub-section permits a separate trial for a distinct offence of which a charge might have been made under S. 235 (1), *supra* as having been committed in the course of the same transaction, 43 A. 496.

SUB-SECTION (3).—In this sub-section, unlike the others, conviction alone is referred to and no mention is made of an acquittal. It is difficult to say whether the omission is deliberate or due to oversight. A conviction for causing simple hurt is no bar to the subsequent trial of the accused for culpable homicide if in consequence of the injury caused by the accused, the injured person dies. But if the accused is acquitted of causing hurt on the

ground that he merely caused some slight injury in the exercise of the right of private defence and it was subsequently found out on a closer examination of the injured person that the so-called slight injury was of a serious nature which affected a vital part, and in consequence of which the injured person died, *quæres* whether the accused could plead the acquittal as a bar to his subsequent trial for culpable homicide in view of the omission of the word "acquittal" in this sub-section. It is submitted that such a result is not contemplated by the Legislature. If a person is tried and acquitted of a charge of simple hurt under S. 323, I.P.C. by reason of the parties having compounded the case, there is no legal bar for a subsequent trial of the same person under S. 304, I.P.C. on its being found that death had resulted from the hurt, 2 Cr. L. Rev. 366; 48 M.L.J. 490—(1925) M.W.N. 553—22 L.W. 205. But see 16 Cr. L.J. 367—28 Ind. Cas. 153, where it was held that the mere fact that subsequent to a conviction further facts came to light which showed the commission of a major offence, will not render an accused liable to be tried again for the graver offence.

SUB-SECTION (3).—This sub-section restricts the right given by sub-section (1). This clause lays down that a person acquitted of any offence constituted by any acts may, notwithstanding such acquittal, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged. The words "not competent to try" in this sub-section mean, had no jurisdiction to try, 24 M. 541; 36 M. 308; 48 M.L.J. 490—22 L.W. 205—(1925) M.W.N. 553—26 Cr. L.J. 1087—88 Ind. Cas. 31. This clause refers to the character and status of the tribunal when it refers to the competency to try the offence and this is made clear by illustrations (f) and (g) to this section, 36 M. 308. When on a trial of the accused under Ss. 366, 368 and 376 the accused was acquitted on the ground that the case was one of adultery and subsequently the husband preferred a complaint under S. 498, I.P.C., it was held that the sub-section is no bar as the Court which tried and acquitted was not competent to try the accused under S. 498, for want of a complaint by the husband under S. 199, *supra*, 17 Bom. L.R. 678—16 Cr. L.J. 657—30 Ind. Cas. 341. Similarly an acquittal by a second class Magistrate for an offence under S. 406, I.P.C., is no bar to a subsequent trial by a first class Magistrate under S. 403, 18 Cr. L.J. 633—40 Ind. Cas. 291 followed in 26 Cr. L.J. 1087—88 Ind. Cas. 31. An acquittal on a charge under S. 409, I.P.C. of breach of trust of a sum of money, committed between two dates, does not bar, under this section, a subsequent trial of criminal breach of trust on an intermediate date, of a separate sum which was not included in the amount forming the subject of the first trial by reason of the facts relating to the misappropriation of the latter sum not being known to the prosecutor at the time of the previous charge, 50 C. 632 following 12 Bom. L.R. 225—11 Cr. L.J. 337—15 Ind. Cas. 970, and *dissenting* from 17 Cr. L.J. 80. Acquittal of an accused under S. 426, I.P.C. on the ground of absence of the complainant is a bar under this section to his being put on his trial on the same facts for theft, or an application to the District Magistrate to set aside the order under S. 247, *supra*, 25 Cr. L.J. 143—76 Ind. Cas. 293. When a person was charged and acquitted of an offence of abetting and aiding, cheating under the Penal Code in connection with registration of a document, the acquittal is no bar to the trial for an offence under S. 82 of the Registration Act, 37 A. 107. Where several accused were tried by a first class Magistrate who acquitted some and convicted the rest and on appeal by the convicted persons, the Sessions Court directed the acquitted accused to be committed on the same facts for murder, it was held that the commitment was legal and this section did not bar such commitment, 18 Cr. L.J. 742—17 Ind. Cas. 84. Where a person was first tried for offences under S. 465 read with S. 109, I.P.C. with regard to an attestation of a voting paper at a Municipal election and acquitted of the offence charged, he can be tried again for an offence charged under S. 171F, I.P.C. of intentionally abetting false personation at the election which the Court when it tried the accused under S. 465 and 109, I.P.C. could not try for want of the necessary sanction of the Local Government at the date of the first trial and such sanction being granted after the first acquittal, 24 A.L.J. 181—27 Cr. L.J. 705—94 Ind. Cas. 897 where 37 A. 107 and 19 A.L.J. 813 are referred to.

IF THE COURT NOT COMPETENT TO TRY THE SUBSEQUENT OFFENCE CHARGED.—Wherean accused was charged under S. 304, I.P.C. the Magistrate being of

opinion that the evidence was insufficient for committing the accused to the sessions, tried and convicted him under S. 323, I.P.C. and the District Magistrate differing from the view of the Magistrate directed a commitment to the Sessions Court, it was held that the order was not bad as the conviction under S. 323, I.P.C. was no bar to a trial under S. 304, I.P.C., as the Magistrate was not so competent to try that charge, 5 Bom. L.R. 125; 36 A. 4 but an acquittal or conviction for a minor offence is no bar to the trial of a major offence, 7 M. 557; see 24 M. 641 and 675; 13 Cr. L.J. 742-17 Ind. Cas. 83 where 5 Bom. L.R. 125 is followed and 20 C. 633 is distinguished. Where the accused tried by the Sessions Court with the aid of assessors of the offence of abetment of murder in dacoity, under S. 396 I.P.C., was acquitted, and he was subsequently tried by the Sessions Court with a jury of the offence under S. 412, I.P.C., of receiving stolen property, the proceeds of dacoity, and convicted, it was sought to sustain the conviction under the sub-section on the ground that the Court which tried the accused on the first occasion, viz., the Sessions Court with assessors, was not competent to try the subsequent offence under S. 412, I.P.C., which was triable by the Sessions Court with a jury. It was held that the Court by which the accused was first tried, i.e., the Court of Session, was competent as a Court of Session to try the offence of receiving stolen property. Illustrations (f) and (g) show that the words "not competent to try" mean had no jurisdiction to try, and the conviction had, was set aside as illegal, 24 M. 641 at 644.

SUB-SECTION (5) was introduced in the Code of 1898. S. 26 of the General Clauses Act lays down that when an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of these enactments, but shall not be liable to be punished twice for the same offence.

EXPLANATION.—The explanation enumerates cases not amounting to an acquittal for purposes of this section.

ILLUSTRATIONS.—Illustrations (a) and (d) relate to a case falling under sub-section (1). Illustration (b) deals with a case coming under sub-section (2), while illustrations (c) and (e) refer to cases falling under sub-section (3). Illustrations (f) and (g) relate to the non-competency of the Court to try the offence coming under sub-section (4).

PART VII.

OF APPEAL, REFERENCE AND REVISION.

CHAPTER XXXI.

OF APPEALS.

APPEAL.—The term "appeal" is not defined in the Code. It means a complaint to a superior Court of an injustice done by an inferior Court. The party complaining is called the appellant and the other party the respondent. *Wharton's Law Lexicon* explains the term thus: "The removal of a cause from an inferior to a superior Court for the purpose of testing the soundness of the decision of an inferior Court." See 22 M. 68 at 80; 12 Cr. L.J. 43-9 Ind. Cas. 281. An appeal is not a second trial but a continuation of the trial already held, 37 M. 119. All jurisdiction starts from the first Court and remains constant throughout the subsequent stages of the proceeding, 13 Cr. L.J. 444-11 Ind. Cas. 788. A Criminal appeal differs from a Civil one in that, in the former where questions of fact are in issue, the sound rule is to consider whether the conviction is right, whereas in the latter case the Court must be convinced before reversing, finding of fact by the lower Court that the finding is wrong, 11 C.L.R. 25- at 29-30; 23 C. 347; 20 C. 353. The general tendency of the amending Act of 1923 has been to enlarge rather than to curtail the right of appeal in favour of accused persons. By that Act several orders which were not formerly appealable have been made so. The right of appeal to a higher Court has been conferred by S. 406. An order refusing to accept or rejecting a surety has been made appealable by S. 406A; the immunities enjoyed by certain sentences passed under Ss. 413 and 414 have now been taken away, special right of appeal has been created in certain cases under Ss. 415A, and 418 (2) and it is also interesting to-

note that in the matter of refusal to accept or of rejecting sureties offered in compliance with an order under S. 562 (1) the provisions as to right of appeal have been made appealable by S. 562 (4). An appeal also lies on behalf of a convicted person against whom an order under S. 562 (1) has been passed, under Ss. 407 and 409 even though it is not expressly mentioned in the section. 26 Cr. L.J. 455—85 Ind. Cas. 135. An appeal is only a creature of Statute and where it is given it became a matter of right as distinguished from a revision which is purely discretionary. When an appeal lies and no appeal is filed, no proceedings by way of revision can be entertained S. 439 (5), *infra*, Rules of limitation govern appeals. See Arts. 150, 154, 155, 157 of the 2nd Schedule and S. 5 of the Limitation Act IX of 1908.

404. No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force.

Unless otherwise provided, no appeal to lie.

NO APPEAL SHALL LIE.—In cases where no appeal is allowed by law the remedy for the aggrieved party is to move the High Court in revision under S. 439, *infra*. The High Court is empowered to exercise all the powers of an Appellate Court under S. 423, *infra* when exceptional grounds exist for its interference, 22 C. 988; 8 B. 197; 14 B. 331; 2 A. 53.

EXCEPT AS PROVIDED FOR BY THIS CODE.—Besides the matters made appealable under this Chapter of the Code, there are other orders made appealable. Under S. 260, *supra* an appeal is provided in the case of an order for compensation passed by a second or third class Magistrate and also where the first class Magistrate awards more than rupees fifty as compensation. S. 486, *infra*, provides for an appeal from conviction in cases of contempt and makes the provisions of this chapter applicable to such appeals, as also S. 476 B. against making or refusing to make a complaint under S. 476 or S. 476A. Again, an order as to disposal of property under S. 517 or S. 518 or S. 519, *infra* may be considered by a Court of appeal solely with reference to such order although no appeal might have been preferred in the case in which the order was passed, 8 M. 448. The question as to the propriety of the order as to the disposal of the property may not concern in the least a convicted person, 8 C. 379.

OR ANY OTHER LAW FOR THE TIME BEING IN FORCE.—See the Letters Patent of the various High Courts which provide that the High Court shall exercise appellate jurisdiction in such cases as are subject to appeal by virtue of any law now in force.

LIMITATION FOR PREFERING APPEALS.—The provisions of the Indian Limitation Act are to be applied with as much strictness to criminal as they are in civil cases, 1891 A.W.M. 10.

Time for appeal from a sentence of death by a Sessions Judge is seven days (Art. 150, Sob. II).

Time for appeal to the High Court from a conviction except a sentence of death is sixty days (Art. 155, Sob. II).

Time for appeal to any Court other than High Court is thirty days (Art. 154, Sob. II).

Time for appeal by Government against acquittal is six months (Art. 157, Sob. II).

Time for appeal from a finding rejecting a claim under S. 443 *infra* is seven days (Art. 150A, Sob. II).

The provisions of S. 5 of the Limitation Act are important. Time taken for obtaining a certified copy of judgment is excluded. Filing an appeal on the re-opening day of the Court when time expires when the Court is closed is permitted. The Appellate Court is also given a wide discretion to excuse delay in presenting an appeal for good and sufficient cause being shown. A criminal appeal filed after the expiry of the period of limitation may be

admitted if the court is satisfied that the appellant had sufficient cause for not preferring the appeal in time. When the appellate court is not so satisfied it has no power to extend the period and admit the appeal and the proper proceeding in such a case is to move the High Court in Revision. 26 Cr. L.J. 1110=88 Ind. Cas. 278 where 1 Lah. 508 and 26 Cr. L.J. 19=83 Ind. Cas. 499 are followed. Presentation of an appeal by a prisoner in jail to the officer in charge of the jail is for the purposes of the Limitation Act equivalent to presentation to the Court, 9 M. 258. So also time taken in forwarding an application for a copy of judgment by the prisoner and in transmitting the same to him must be excluded, 9 M. 258.

APPEALS TO THE PRIVY COUNCIL.—His Majesty the King is supreme over all persons and courts within His Dominions and a right of appeal in all cases to the King in Council exists from the High Courts of each separate Colony, Province, State or Possession whether it be a Court of error or not, except so far as the prerogative in this behalf has been expressly surrendered. Criminal proceedings are in practice reviewed only if it is shown that by a disregard of the forms of legal process or by some violation of natural justice or otherwise substantial and grave injustice has been done. The Judicial Committee do not as a rule advise His Majesty to grant appeals in criminal cases except where questions of general and great importance likely to occur often are raised, and where the due and orderly administration of the law is shown to be interrupted or diverted into a new course, which might create a precedent for the future and where there are no other means of preventing these consequences. Such appeals lie either by the right of grant in pursuance of leave obtained by the appellant from, or by reason of special leave granted by the Judicial Committee, 39 C.L.J. 1. It is well settled that the unwritten principles of the Constitution of the Empire restrain the Judicial Committee from being used in general as a Court of review in criminal cases. But while the Sovereign in Council does not interfere merely on the question whether the court below has come to a proper conclusion as to the guilt or innocence, such interference ought to take place where there has been a disregard of the proper forms of legal process grievous and not merely or a technical character or a violation of principle in such a fashion as amounts to a denial of Justice. 39 C.L.J. 1 at p. 11 quoting from 47 Ind. App. 137.

"The responsibility for the administration of criminal justice in India, this Board will neither accept nor share unless there has been some violation of the principles of justice or some disregard of legal principles. This Board will not consider appeals brought from criminal jurisdiction in the Provinces of India. They cannot but regret that those who are connected with the legal profession in India should have so completely disregarded those injunctions that their Lordships have so often laid down. It is a grievous thing to think of the distress and anxiety which must be caused to the relations and friends of the condemned man, by holding out to them vain hopes that the penalty which had been inflicted can be mitigated or reversed by this Board except in the special circumstances to which I have referred."—per Lord Buckmaster in 22 L.W. 57 at 58 (P.C.). The Judicial Committee of the Privy Council is not a court of criminal appeal. When there has been evidence before the court below upon which it has come to a conclusion their Lordships will not disturb that conclusion. They will only interfere in such cases as are referred to in the well known case of *In re Dillet*, where there has been a gross miscarriage of justice or a gross abuse of the forms of legal process, 49 M.L.J. 834 (P.C.)=1125 M.W.N. 418=27 Cr. L.J. 228=92 Ind. Cas. 212=43 C.L.J. 67. The Privy Council is not a court of criminal appeal. So pending leave to appeal against a capital sentence, the Privy Council has no power to stay the sentence, 42 C. 739. The adequacy or otherwise of a charge to the jury by a Judge, though it may furnish proper ground of appeal to a court of criminal appeal does not amount to "a disregard of the forms of process or violation of the principles of natural justice" to warrant the Privy Council in entertaining an application for special leave to appeal to His Majesty in Council by a convicted person, 49 M.L.J. 834 (P.C.)=80 C.W.N. 557=43 C.L.J. 67. The Letters Patent, of the various High Courts provide for an appeal from certain judgments in cases tried by the High Court in the exercise of its ordinary original criminal jurisdiction, and in cases where any point of law has been reserved for the opinion of the said

High Court, but it is necessary that the High Court should certify that the case is a fit one for an appeal to the Privy Council. See in this connection the observation of the Judicial Committee in the case in 52 C. 197 at 221. Special leave to appeal may be granted by the Privy Council when there is a question of jurisdiction of general importance, 7 M.I.A. 72; where there is a grave error of procedure touching jurisdiction, 25 M. 61, where by some disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, some substantial and grave injustice has been done, 35 M. 501; L.R. 12 A.C. 439; 26 C.L.J. 13; 33 C.L.J. 124 and 222; 1914 A.C. 889; 18 C.W.N. 703 (P.C.). When a sentence passed was found not to be authorised by law, *i.e.*, a sentence of transportation for 14 years when only a transportation for 10 years is permissible under the law, it was held that there was substantial injustice, requiring the interference of the judicial committee of the Privy Council. 44 M. 297 (P.C.)

Power to entertain appeals by the Privy Council arises not from the relation of the Privy Council to the court below, as a court of criminal appeal but as the Privy Council advising the Sovereign with regard to the exercise of the prerogative which is that remnant power of the Crown which remains to the crown to interfere with tribunals of justice which does not exist in England at all. It has passed away in the historic development of the constitution. It used to exist and it does exist to some extent in the case of Crown Colonies because they are managed directly by the Crown through Ministers, but when one comes to self-governing dominions it is doubtful whether even the principle of *Dillet's case* could be applied to the constitution of Canada and Australia. India is not yet in that stage but it has been publicly said that India is recognised by the Imperial Government as being on the way to be a self-governing dominion and so even with regard to India it is with the utmost care, that we should pronounce any proposition that that disappearing fragment of the prerogative remains. Unless it can be proved that there was no proper trial at all, that the forms of all judicial procedure were disregarded, not merely according to local ordinances but according to the varying character which is common to all, the Privy Council cannot interfere. If there was anything very gross it might come under this same category, but even then the Crown has to be extraordinarily cautious in asserting the survivor even of that very restricted prerogative which existed 50 years ago but which may not exist now. It is a mistake if at all in the exercise of its jurisdiction by the Courts in India; The Privy Council is not a court of Criminal Appeal and cannot take cognizance of a mere mistake. It is not a case in which Justice has been set at naught and therefore the Privy Council, has no jurisdiction. It is not right for either Counsel or Privy Council agents to encourage the bringing of such petitions like this. It is a waste of time of the Judicial Committee and after the repeated intimations given by their Lordships it is hardly respectable to the tribunal, 26 Cr. L. J. 1419 (P.C.) = 39 Ind. Cas. 843.

405. Any person whose application under section 89 for the delivery of property or the proceeds of the sale thereof has been rejected by any Court may appeal to the Court to which appeals ordinarily lie from the sentences of the former Court,

Appeal from order rejecting application for restoration of attached property.

APPEALS ORDINARILY LIE.—Compare cl. (3) of S. 195. Ordinarily lie, *i.e.*, in the majority of cases, 28 M.L.J. 486; 27 M. 124; 11 B. 438; 26 M. 656 (F.B.); 39 C. 774 22 C. 487. See notes under S. 195, cl. (3), *supra*, at p. 273.

Appeal from order requiring security for keeping the peace or for good behaviour.

406. Any person who has been ordered under section 118 to give security for keeping the peace or for good behaviour may appeal against such order—

- (a) if made by a Presidency Magistrate, to the High Court;
- (b) if made by any other Magistrate, to the Court of Session :

Provided that the Local Government may, by notification in the local official Gazette, direct that in any district specified in the notification appeals from such orders made by a Magistrate other than the District Magistrate or a Presidency Magistrate shall lie to the District Magistrate and not to the Court of Session :

Provided, further, that nothing in this section shall apply to persons the proceedings against whom are laid before a Sessions Judge in accordance with the provisions of sub-section (2) or sub-section (3A) of section 123.

AMENDMENT.—This section has been re-drafted. Appeal is provided in cases of security for keeping the peace also ; appeal lies to the High Court from a Presidency Magistrate's order and to the Sessions Court from other Magistrates' order. Power is also given to Local Government by notification to direct that such appeals shall lie to the District Magistrate and not to the Sessions Court.

SCOPE OF THE SECTION.—Before the new amendment there was a right of appeal only from an order directing *security for good behaviour* but now a right of appeal is also given in proceedings to keep the peace under S. 107, *supra*. The appeal lies to the Sessions Court if made by Magistrates other than Presidency Magistrates in which the appeal lies to the High Court, but under the proviso the Local Government may notify that appeals from Magistrates may lie to the District Magistrate and not to the Court of Session. Although the person bound over under S. 107 is not convicted of any offence the appellate Court when hearing an appeal under this section from such an order is, competent to order a retrial as the order for retrial in such a case is an incidental order within S. 429, *infra*, 24 A.L.J. 566. The High Court has power to revise the order of the District Magistrate or Sessions Judge on appeal and under Ss. 124 and 125, *supra* the District Magistrate himself may release the person imprisoned for failure to give security or cancel the bond already taken. The order of a Sessions Judge under this section discharging a person under security under S. 118, *supra*, is not an original or appellate order of acquittal under S. 417, *infra*; and the local Government has no right of appeal against such an order, but may move the High Court in revision, 27 Cr. L.J. 628—94 Ind. Cas. 402, following 21 A. 107 ; 24 A. 143 ; 36 A. 147.

APPEAL.—Before the amendment no appeal lay under this section when a District Magistrate or Presidency Magistrate ordered security for keeping the peace or to be of good behaviour. But now an appeal lies to the High Court in the case of a Presidency Magistrate and to the Sessions Court in the case of a District Magistrate. If security order is confirmed in appeal by the Sessions Court, the further remedy is to move the High Court in revision to have the order set aside under S. 439, *infra*. If the person from whom security is demanded fails to furnish the security and is imprisoned, S. 124 makes provision for releasing such a person if it could be done without hazard to the community. This power is vested in the Chief Presidency Magistrate and not in a Presidency Magistrate. Similarly under S. 125, *supra*, a Chief Presidency Magistrate or District Magistrate may cancel any bond taken by the order of any Court in his district not superior to his own. The High Court will not ordinarily interfere on the merits with orders under security sections and where no appeal has been preferred against such orders, the High Court will refuse to exercise its revisional jurisdiction, 18 Cr. L.J. 9—13 Ind. Cas. 102 ; 16 Cr. L.J. 262—28 Ind. Cas. 108 ; 6 A.L.J. 487—9 Cr. L.J. 528—2 Ind. Cas. 225.

THE PROVISOS are new. The first proviso is important. The Local Government may by notification direct that appeals from Magistrates other than the District Magistrate shall be to the District Magistrate and not to the Sessions Court. Even in such a case the party aggrieved may move the High Court to revise the order after the appeal was decided by the District Magistrate. The second proviso makes it clear that this section does not apply to cases laid before the Sessions Judge under S. 123 *supra*. When a Sessions Judge

deals with a case under S. 123, *supra*, the order passed by him, whatever it may be, becomes the order in the case and there is no longer an order by a Magistrate made under S. 118 which can be subject of an appeal to the District Magistrate under this section, 35 B. 271 at 272. The only course open is to move the High Court to revise the order of the Sessions Judge.

406A. *Any person aggrieved by an order refusing to accept or rejecting a surety, 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.*

AMENDMENT.—This section is new and provides for appeals from orders refusing to accept or rejecting a surety under S. 122, *supra*. See S. 439 (5) which enacts that where an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. See 16 Cr. L.J.—28 Ind. Cas. 108.

407. (1) Any person convicted on a trial held by any Magistrate of the second or third 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 380 by a Sub-divisional Magistrate of the second class, may appeal to the District Magistrate.

(2) The District Magistrate may direct that any appeal under this section, or any class of such appeals, shall be heard by any Magistrate of the first class subordinate to him and empowered by the Local Government to hear such appeals, and thereupon such appeal or class of appeals may be presented to such Subordinate Magistrate, or, if already presented to the District Magistrate, may be transferred to such Subordinate Magistrate. The District Magistrate may withdraw from such Magistrate any appeal or class of appeals so presented or transferred.

AMENDMENT.—An appeal is provided for under this section against any sentence or order passed under S. 380, *supra*, by the addition of the words "in respect of whom an order has been made or a sentence has been passed under S. 380" in sub-section (1).

SCOPE OF THE SECTION.—This section deals with appeals by persons convicted on trials held by Magistrates of the second and third classes and from a sub-divisional Magistrate of the 2nd class and also against an order (which is not a sentence) passed by a sub-divisional Magistrate of the second class passed under S. 380 *supra*. An order under S. 562 (1) may be passed by a sub-divisional Magistrate under the provisions of S. 380, under the provisions of S. 562. Such an order would be clearly appealable under this section. 26 Cr. L.J. 453—85 Ind. Cas. 138.

CONVICTED ON A TRIAL.—The word "offence" in S. 4 (1) (c) *supra* includes an act in respect of which a complaint may be made under S. 20 of the Cattle-trespass Act and a person against whom an order under S. 22 of the said Act is made is a "person convicted on a trial".

See 45 B. 58 ; 27 C. 992 ; 34 C. 926 ; 41 B. 42 in this connection. When such trial is by a second or third class Magistrate an appeal under this section lay against that conviction, 29 M. 517 at 518. This section applies only to the case of a conviction and the power of the Appellate Court is confined to the hearing of an appeal presented against such conviction, 34 A. 234.

BY ANY MAGISTRATE OF THE SECOND OR THIRD CLASS.—An appeal lies under this section from a conviction by a Bench invested with second or third class powers, 9 M. 36. The question whether an appeal lies to the District Magistrate or not depends upon the power of the Magistrate at the commencement of the trial. If a second class Magistrate before the conclusion of the trial is appointed a Magistrate of the first class, the appeal still lay to the District Magistrate, 8 Cr. L.J. 48. But a Bench of the *Patna High Court* in 26 Cr. L.J. 915—86 Ind. Cas. 978 (2) has held *distinguishing* 8 Cr. L.J. 48 that the appeal lay to the Sessions Judge and not to the District Magistrate on the ground that part of the trial was held by a Magistrate of the second class only and part was held by a Magistrate of the first class when he heard arguments in the case.

ANY PERSON SENTENCED UNDER S. 349.—S. 349 refers to cases where a second or third class Magistrate submits proceedings to a superior Magistrate for passing a sufficiently severe sentence which he is not empowered to inflict or that the accused should be bound over to keep the peace under S. 106, *supra*. An appeal under this section lies in cases where the person is sentenced by a Sub-divisional Magistrate of the second-class to the District Magistrate. In cases where the sentence is passed by a Sub-divisional first-class Magistrate, the appeal lies to the Sessions Court. A Sub-divisional Magistrate may be a Magistrate exercising first or second class powers. See S. 13, *supra*.

OR IN RESPECT OF WHOM AN ORDER HAS BEEN MADE OR A SENTENCE PASSED UNDER S. 380.—These words are newly added and an appeal is now provided under this section against an order made or sentence passed under S. 380 *supra* which deals with cases submitted to a superior Magistrate by Magistrates not empowered to act under S. 562 *infra*, *vis.*, to release first offenders upon probation of good conduct instead of sentencing them to punishment. Such superior Magistrate may pass such sentence or make such order as he might have passed or made if he had originally tried the case.

THE DISTRICT MAGISTRATE MAY DIRECT.—A Sub-divisional Magistrate has only delegated powers given by the District Magistrate, 28 M. 655 *distinguishing* 18 M. 487.

ANY APPEAL UNDER THIS SECTION.—This section deals with only appeals from conviction by Magistrates of the second or third class, or by a person sentenced under S. 349, *supra*, or in respect of whom an order or sentence has been passed under S. 380, *supra*, by a Sub-divisional Magistrate. It has no reference to appealable orders such as those falling under Ss. 250, 405, 406, 406A, 476, 486, 515, 517, 518, 519, etc. Such appeals from orders cannot be transferred under this section. 27 M. 124 ; 26 M. 655 (F.B.) ; 30 C. 395 ; 39 C. 775 ; 40 C. 37 ; 35 A. 234 ; 8 Cr. L.J. 432 ; 26 Cr. L.J. 423—86 Ind. Cas. 39.

ANY CLASS OF APPEALS.—This refers to appeals which in the ordinary course of procedure come to the District Magistrate's Office, and this power of the District Magistrate to allot work to the subordinate Magistrate is not limited in any way, 2 Bom. L.R. 336.

MAY BE PRESENTED AND MAY BE TRANSFERRED.—The word "may" was substituted for "shall" in the Code of 1998.

MAY WITHDRAW ANY APPEAL OR CLASS OF APPEALS.—The District Magistrate is empowered to withdraw any appeal or class of appeals even though the appeals are part heard by the subordinate Magistrate. There is no limitation in the section or elsewhere in the Code on this power of withdrawal and we should not be justified in introducing a limitation in respect of part-heard appeals, which the Legislature has not thought fit to enact. As observed by the Privy Council in 29 Ind. Ap. 196, at 202 "the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a

Judge to disregard or go outside the letter of the enactment according to its true construction." If the Legislature desired to impose the suggested limitation it would have no difficulty in enacting it, moreover the power of withdrawal is given with a view to promote the ends of justice and the convenience of the parties, and there is no reason why the promotion of these objects should be barred in the case of part-heard cases. He is also not bound after withdrawal to examine the witnesses whom the subordinate Magistrate had summoned under S. 428 *infra* as Court-witnesses but had not heard them before the appeal was withdrawn. The Court to which an appeal is transferred for disposal, and on which the responsibility for its correct disposal rests, is certainly not bound by any opinion as to the necessity for taking further evidence, formed by a Court from which the appeal was transferred, and which is no longer responsible for the due decision of the appeal. 31 M. 277 at 279.

408. Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other 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 380* by a Magistrate of the first class, may appeal to the Court of Session :

Appeal from sentence of Assistant Sessions Judge or Magistrate of the first class.

Provided as follows :

(a) [*Omitted by Act XII of 1923, S. 23.*]

(b) when in any case an Assistant Sessions Judge or a Magistrate specially empowered under section 30 passes any sentence of imprisonment for a term exceeding four years, or any sentence of transportation, the appeal of *all or any of the accused convicted at such trial* shall lie to the High Court ;

(c) when any person is convicted by a Magistrate of an offence under section 124A of the Indian Penal Code, the appeal shall lie to the High Court.

AMENDMENT.—The words in italics are newly added, and proviso (a) which enabled European British subjects to appeal at his option either to the High Court or the Court of Session has now been repealed.

SCOPE OF THE SECTION.—This section gives a right of appeal to a person convicted by an Assistant Sessions Judge, District Magistrate or a Magistrate of the first class and from a sentence passed under S. 349 by a Magistrate of the first class or an order (which is not a sentence) passed by a Magistrate of the first class under S. 380, *supra*. Such an order may include an order under S. 562 (1) releasing a first offender on probation of good conduct. This section is controlled by two sub-sections to the proviso, *vis.*, (b) and (c), sub-section (a) having been omitted now. These two sub-sections (b) and (c) contained in the proviso, do not curtail the right of appeal given by this section itself, but make exceptions as to the *verus* of the appeal which ordinarily lies to the Court of Session, in cases specifically mentioned in (b) and (c). The right of appeal conferred by S. 407, *supra*, and this section are only restricted by the reservation contained in Ss. 412, 413 and 414 and subject to the provisions of S. 415 which is a proviso to Ss. 413 and 414. 26 Cr. L.J. 458—85 Ind. Cas. 135.

CONVICTED ON A TRIAL.—See notes under the previous section. An appeal lies under this section from an order awarding compensation under S. 22 of the Cattle-trespass Act. The compensation so awarded is not a fine and consequently the restrictive provisions of S. 473 do not apply. 36 B. 58. See also in this connection 44 B. 43 ; 34 C. 926 ; 27 C. 992.

ANY MAGISTRATE OF THE FIRST CLASS.—When a Magistrate of the first class sentenced an accused to one day's imprisonment and a fine of rupees fifty and on appeal the Sessions Judge declined to entertain the appeal on the ground that in fact the accused was neither sent to jail nor actually imprisoned, it was held by the High Court that an appeal did lie to the Sessions Court as there was a combination of sentences under S. 413, *infra*, and it was immaterial whether the accused actually suffered imprisonment in jail or not, 33 A. 540. Where a second class Magistrate sends up a case under S. 349, *supra*, to a first class Magistrate, such Magistrate should be deemed not a Magistrate exercising powers under S. 80, *supra*, and when he sentences to a period of five years an appeal lies to the Sessions Court and not to the High Court, 6 Cr. L.J. 289. When a second class Magistrate sends up a case to a first class Magistrate, being of opinion that the provisions of S. 563, *infra*, is applicable to the case of the accused but the first class Magistrate convicts and sentences the accused to a term of imprisonment an appeal lies to the Sessions Court against the conviction, 17 Bom. L.R. 895—16 Cr. L.J. 738—31 Ind. Cas. 338—7 Cr. L. Rev. 129.

PROVISO (b).—The words "of all or any of the accused sentenced at such trial" have been newly added in order to make it clear that in a trial in which more persons than one are convicted and in which by reason of the sentence passed, an appeal lay in the case of some of the accused to the Sessions Court and of others to the High Court, the appeal of all the accused shall lie to the High Court. This is in accordance with the decision in, 23 Cr. L.J. 595; 11 Bom. L.R. 534—10 Cr. L.J. 250—3 Ind. Cas. 171; 35 A. 154; 17 M.L.J. 248; 13 A.L.J. 272—16 Cr. L.J. 353—28 Ind. Cas. 737; 38 A. 398; 11 A.L.J. 111—14 Cr. L.J. 119—18 Ind. Cas. 679. The decision in 30 M. 891 is no longer law. A Sessions Judge to whom a jail appeal was sent by mistake from the conviction and sentence of five years by a Magistrate specially empowered under S. 80, *supra*, dismissed the appeal summarily. Such dismissal is a nullity, under S. 530 (r), *infra*, and the accused still had a right of appeal to the High Court under this section. 2 Rang 388. Under this proviso when an accused has been sentenced to more than four years all the other accused convicted at the same trial have to appeal to the High Court even though they have received smaller sentences and this is so even if the accused who has been sentenced to more than four years does not choose to appeal, 25 A.L.J. 161—27 Cr. L.J. 175—91 Ind. Cas. 959 where 37 A. 471 is followed.

PROVISO (c) was added in the Code of 1898. See 38 C. 214. Appeals from convictions under S. 124A, I.P.C., by Magistrates, lie direct to the High Court. A person was convicted under S. 124A and sentenced to two years' rigorous imprisonment and also convicted under S. 153, I.P.C., and sentenced to one year's rigorous imprisonment. Under S. 95 (3), *supra*, if a person is convicted of several offences at one trial, the aggregate sentences are to be deemed as one sentence for purposes of appeal and this proviso enacts that a person convicted under S. 124A, I.P.C., has an appeal direct to the High Court. It is a reasonable inference that appeal against the single sentence of three years under both the sections lie to the High Court. But as the appeal originally filed against the conviction under S. 153A, I.P.C., to the Sessions Court was called up to the High Court under S. 526, *infra*, and unified, the point was not decided, 38 C. 214 at 219.

MAY APPEAL TO THE COURT OF SESSION.—Where there are two Sessions divisions in the same district and the Magistrate who convicts the accused had his headquarters in one of the Sessions divisions but had jurisdiction throughout the whole district, it was held that all appeals from convictions should be preferred to the Sessions Court within whose division the headquarters of the Magistrate was situate irrespective of the division in which the offence was committed, 30 M. 133. This section makes the sentences of Magistrate appealable under S. 409 read with S. 9, *supra*.

409. An appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge :
 Appeals to Court of Session how heard.

Provided that an Additional Sessions Judge shall hear only such appeals as the Local Government may, by general or special order, direct or as the Sessions Judge of the division may make over to him.

AMENDMENT.—The proviso is newly added and restricts the power of the Additional Sessions Judge to hear appeals. Assistant Sessions Judges have no power at all to hear appeals.

Appeal from sentence of Court of Session.

410. Any person convicted on a trial held by a Sessions Judge, or an Additional Sessions Judge, may appeal to the High Court.

CONVICTED ON A TRIAL.—The conviction contemplated by this section may be either under the Indian Penal Code or under a Special or Local law, 41 C. 694. The words "convicted on a trial" is important. If a Sessions Judge when hearing an appeal requires the trial Court to take additional evidence and disposes of the appeal after the additional evidence is taken and submitted to it, there will not be a further appeal to the High Court in such a case, 27 C. 373 ; 6 B.L.R. 483=18 W.R. (Cr.) 33. See notes under S. 407, *supra*. An order of a Sessions Judge under S. 123 (3) cannot be appealed against. An appeal lies to the High Court against an order of a Sessions Judge imposing a fine upon a witness under S. 278-I.P.C., for insult, 4 M.H.C.R. 146.

411. Any person convicted on a trial held by a Presidency Magistrate may appeal to the High Court, if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees.

Appeal from sentence of Presidency Magistrate.

This section relates to appeals from convictions by Presidency Magistrates.

IMPRISONMENT EXCEEDING SIX MONTHS OR FINE EXCEEDING TWO HUNDRED RUPEES.—It is to be noted that this section is not referred to in S. 415, *infra*, so that the principle of combination of sentences may apply to sentences passed by Presidency Magistrates also. The result is that no appeal lies from a sentence of six months' imprisonment and a fine of rupees two hundred or a further period of three months' simple imprisonment passed by a Presidency Magistrate, 2 M. 30 ; 16 C. 799 ; 20 B. 145 ; 33 C. 1036 ; 10 Cr. L.J. 265=3 Ind. Cas. 285. Where the accused is convicted of two offences and sentenced to six months' imprisonment for each offence the sentences to run concurrently, there is no appeal under this section as there is only a single sentence of six months. The intention to be gathered from this section is that a person who is to suffer by being imprisoned for more than a certain period shall have the privilege of an appeal, 17 C.L.J. 392=13 Cr. L.J. 787=17 Ind. Cas. 531.

412. Notwithstanding anything hereinbefore contained, where an accused person has pleaded guilty and has been convicted by a Court of Session or any Presidency Magistrate or Magistrate of the first class on such plea, there shall be no appeal except as to the extent or legality of the sentence.

No appeal in certain cases when accused pleads guilty.

SCOPE OF THE SECTION.—This section provides that there is no right of appeal in certain cases where the accused pleads guilty. There should be a real plea of guilty properly made by the accused, 22 B. 759. But when the plea of guilty is based on a mistake of law.

it shall not be accepted and it is incumbent on the Magistrate to try the accused on the merits, 31 C.L.J. 122 ; 11 W R. (Cr.) 53.

OR MAGISTRATE OF THE FIRST CLASS.—These words were added in the Code of 1898 to meet the decision in, 22 B. 759.

NO APPEAL EXCEPT AS TO THE EXTENT OR LEGALITY OF SENTENCE.—No appeal will lie on the ground that the conviction was illegal. But the provisions of this section will not preclude an accused person who pleads guilty to the charge from contending in revision that his conviction is illegal and such a plea as to the illegality of the conviction was allowed to be raised by the Bombay High Court in 27 Cr. L.J. 1148=97 Ind. Cas. 668. Exception is made only as regards the extent and legality of the sentence, 22 B. 759 at 760. The intention of the Legislature would appear to be to treat the plea of guilty as a waiver of the right of appeal except as to the extent and legality of the sentence itself, 5 B. 85 ; 31 C.L.J. 122. See explanation to S. 418, which says that severity of sentence shall be deemed to be a matter of law. Limited admission of appeals is not permitted except as provided by this and S. 418, *infra*. In all other cases, if the appeal is admitted the appellant is of right entitled to have the whole case dealt with by the Court of appeal, Ratanlal 826. The appellant cannot be restricted to any selected ground out of those specified in his appeal petition. A restrictive order for admission is not clearly contemplated by S. 421, *infra* and must be deemed *ultra vires*, 41 C. 406 at 410 following 15 C.W.N. 921 at 922 ; 4 Pat. 254 ; 13 Bom. L.R. 1350=11 Ind Cas. 815.

413. Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which a Court of Session passes a sentence of imprisonment not exceeding one month only, or *in which a Court of Session or District Magistrate or other Magistrate of the first class passes a sentence of fine not exceeding fifty rupees only.*

Explanation.—There is no appeal 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.

AMENDMENT.—A sentence of one month alone passed by a Court of Session is not appealable, but such a sentence passed by Magistrates are appealable now. The words " or of whipping only " have now been omitted and only a sentence of fine not exceeding rupees fifty is not appealable now.

SCOPE OF THE SECTION.—This section is an exception to S. 408, *supra*, and is intended to restrict the right of appeal by the exclusion of petty cases where finality is more important than correction of any mistake which had crept in, during the trial. A sentence of one month passed by a District Magistrate or a first-class Magistrate is now made appealable unlike a similar sentence passed by a Sessions Judge, but only a fine not exceeding rupees fifty passed by a Sessions Judge or a District Magistrate or Magistrate of the first class is not appealable. Proviso to S. 408 and S. 416 have now been repealed.

IMPRISONMENT NOT EXCEEDING ONE MONTH ONLY OR FINE NOT EXCEEDING FIFTY RUPEES ONLY.—It is now quite clear from the provisions of this section that where a Magistrate had passed a sentence of one month then an appeal lies. But when a Sessions Judge passes a sentence of one month there is no right of appeal. When an accused is convicted in one trial of two offences and sentenced separately, the sentences taken cumulatively determine the right of appeal. See S. 95 (3), *supra*. An order under S. 31 of the Court Fees Act directing the accused on conviction to pay the complainant the fee paid on the complaint petition is not part of the sentence passed on the accused for the offence, 31 M. 547 ; 29 M. 188 ; 20 C. 587 and cannot therefore be taken into account

for the purpose of an appeal. Concurrent sentences cannot be added to make the sentence an appealable one. Unless the sentence of fine exceeds rupees fifty there is no right of appeal. An award of compensation not exceeding rupees fifty under the Cattle-trespass Act is appealable under S. 408, *supra*, as such compensation cannot be held to be a fine falling within the restrictive provisions of this section, 46 B. 58. In this connection see also 27 C. 922; 34 C. 926; 44 B. 43; 29 M. 817 at 818 and Cr. R.C. 157 of 1926 (M.H.C.). Where a Magistrate after passing a non-appealable sentence at the request of the accused person made it appealable by adding one day's imprisonment to the sentence passed and when an appeal was presented to the Sessions Judge who rejected the same on the ground that the sentence originally passed was non-appealable and no appeal lay to him, it was held that although the Magistrate had no power to alter the judgment once signed and pronounced the sentence as it stood on record was appealable and the Sessions Judge was directed to hear and dispose of the appeal on the merits. 38 B. 480.

414. Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in any case tried summarily in which a Magistrate empowered to act under section 260 passes a sentence of fine not exceeding two hundred rupees only.

No appeal from certain summary convictions.

AMENDMENT.—The words "imprisonment not exceeding three months only or of whipping only" have now been omitted. By the new amendment an appeal lies when a sentence of imprisonment is passed.

TRIED SUMMARILY.—This section precludes appeals in certain cases tried summarily by a Magistrate empowered to act under S. 260, but S. 260 itself refers only to Magistrates of the first class or a Bench having the powers of a Magistrate of the first class. When an accused is convicted by a Bench invested with second or third class powers an appeal lies under S. 407, *supra*, 9 M. 36. An order passed under S. 562, *infra*, in a summary trial is not a sentence within this section and is therefore appealable. The section does not say in what cases there shall be an appeal. 46 A. 828.

MAGISTRATE EMPOWERED TO ACT UNDER S. 260.—The Magistrates empowered under S. 260 are the District Magistrate, any Magistrate of the first class specially empowered and a Bench of Magistrates invested with first-class powers and specially empowered, and they may try summarily certain offences specified in the section.

FINE NOT EXCEEDING TWO HUNDRED RUPEES ONLY.—Before the amendment when a first-class Magistrate tried a case summarily, and sentenced an accused to three months' imprisonment with evidence recorded in full, there was no right of appeal. There is an appeal now provided for, when the accused is sentenced to imprisonment, but in cases where a fine only is imposed then the fine must exceed rupees two hundred to make it appealable.

415. An appeal may be brought against any sentence referred to in section 413 or section 414 by which any two or more of the punishments therein mentioned are combined, but no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace.

Proviso to Ss. 413 and 414.

Explanation.—A sentence of imprisonment in default of payment of fine is not a sentence by which two or more punishments are combined within the meaning of this section.

This section is a proviso to Ss. 413 and 414, *supra*, but it makes no mention of S. 411, *supra*. So the conviction and sentences permitted by this section do not apply to sentences

passed by Presidency Magistrates. A sentence of six months and a fine of rupees two hundred in default of payment to three months further imprisonment passed by a Presidency Magistrate does not make the sentence appealable though such combination is expressly permitted in cases of sentences passed by Provincial Magistrates. A sentence of fine and one day's imprisonment by a Provincial Magistrate is a combination of sentences for the purpose of this section even though the accused is not actually sent to jail, 33 A. 510. It has been held that confiscation of property with other punishments is not a combination to make the sentence appealable, 3 C. 355. An order under S. 106, *supra*, to find security to keep the peace does not make the sentence appealable if it is not otherwise appealable. So also a sentence of imprisonment in default of payment of fine cannot be combined with a substantive term of imprisonment to make the sentence appealable. Where in a trial held, non-appealable sentences are passed on conviction on all the accused except one against whom an order under S. 562 (1) has been made, the order under S. 562 (1) being appealable, by operation of this section, the right of appeal is conferred on all the accused jointly tried, even though they were awarded non-appealable sentences, 26 Cr. L.J. 455—56 Ind. Cas. 135.

415A. *Notwithstanding anything contained in this Chapter, when more persons than one are convicted in one trial, and an appeal in certain cases, appealable judgment or order has been passed in respect of any of such persons, all or any of the persons convicted at such trial shall have a right of appeal.*

AMENDMENT.—This section is new and specially confers a right of appeal on persons jointly tried and an appealable sentence is passed in the case of any of the accused; there was a conflict of decisions before the amendment whether an appeal would lie at the instance of a person on whom no appealable sentence was passed. See 9 Cr L.J. 355 and 358; 7 B. H C R. (Cr. Ca.) 25; 9 M.L.T. 322; 39 A. 293; 28 A. 395; 42 C. 374; 31 M.L.J. 897; 40 M. 591; 42 C. 375; 4 Pat. L.J. 436; 17 M.L.J. 245; 17 Cr.L.J. 173—33 Ind. Cas. 653. By this new section the conflict is set at rest.

416. [Omitted by Act XII of 1923, S. 26.]

417. The Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court.

Appeal on behalf of Government in case of acquittal.

SCOPE OF THE SECTION.—In English Courts the maxim "*nemo bis vexari debet*" is given full scope. It has been repeatedly held in England that if an accused person has been once tried and acquitted upon the merits by a Court of competent jurisdiction so as to have been put in peril of conviction he cannot again be tried upon the same charge, but if charged he can successfully plead *autrefois acquit*.....In India, however, matters stand on a different footing. Here appeals against order of acquittal are governed by this section, a provision of law which is quite alien to the principles upon which English Courts administer the law against criminals. S. 403, *supra*, prohibits a second trial for the same offence, provided that the conviction or acquittal is in force and is not set aside by a Court of competent jurisdiction. The safeguard of the subject consists in the fact that no appeal from an acquittal will lie except at the instance of Government, and that Government exercises this power only in cases where there is a substantial failure of justice.....There is nothing in the language of the section to limit appeals against acquittals to cases in which Courts have owing to some error of law or misappreciation of evidence come to a wrong decision on the evidence before them. The Legislature has allowed by this section an appeal by the Local Government in the widest terms and without any limitation whatever, and there is no distinction in the Code between the right of appeal against an acquittal and the right of appeal against a conviction, both being governed by the same rules and being subject to the same

limitations, 38 M. 1028 at 1032-1033; 35 A. 168; 20 C.W.N. 128-17 Cr. L.J. 9-32 Ind. Cas. 137; 17 C. 485; 20 A. 459. The Code makes no difference between an appeal against acquittal and one against conviction, 35 A. 168. In an appeal against acquittal if the High Court thinks that the lower Court has taken an erroneous view of the evidence and should have convicted, it has no jurisdiction to refuse to convict. The power is to be exercised very sparingly and the discretion to exercise it appertains to Government and the High Court cannot control it 21 Bom. L.R. 1034-21 Cr. L.J. 17-54 Ind. Cas. 161; 16 Cr. L.J. 604-30 Ind. Cas. 156. But there is a distinction of considerable practical importance between an appeal from acquittal and one from conviction. When there is an acquittal after hearing all the evidence against the accused the presumption is that there was at least a reasonable doubt and the appellate court must be positively convinced that there was no such reasonable doubt before it can set aside the acquittal. So in an appeal against acquittal the benefit of all doubt is shown to exist against the appellant whereas in an appeal from conviction the benefit of all reasonable doubt is in favour of the appellant, 11 Cr. L.J. 66-4 Ind. Cas. 864. The right of appeal against an acquittal under this section is one that vests with the Local Government, 26 Cr. L.J. 516-85 Ind. Cas. 356, and should sparingly be used. But the discretion is not subject to the control of the court. The Code makes no distinction between an appeal from an acquittal and with an appeal from conviction. If from an appeal against an acquittal the appellate court thinks that the lower court has taken an erroneous view of the evidence it has no power to refuse to convict, 26 Bom. L.R. 113. The law by limiting the right of appeal against judgments of acquittal to the Local Government prevents personal vindictiveness from seeking to call in question judgments of acquittal by way of appeal and evidently intends that such an interference shall take place only in cases where there has been a miscarriage of justice so grave as would induce the Local Government to move in the matter. It is a most salutary principle, quite as necessary for the well being of society as to the repression and punishment of crime, that interference with judgments of acquittal should take place only in cases where there has been a miscarriage of justice of a grave nature. 21 C. 164 at 170. The right of appeal is only from the final order of acquittal. Such a right is an exceptional privilege and is a restraint on the liberty of the subject and should not be allowed to be extended beyond the statutory limits, 16 B. 414 at 423-429. The Government have the same right of appeal against an acquittal as a convicted person has against his conviction. The Code makes no distinction as to the procedure to be adopted or as to the principles upon which the appeals are to be decided. What the High Court is to be satisfied is, whether upon the evidence the conviction of the first Court or the acquittal of the Court of appeal is right, Welr II, 462; 17 C. 485. Under this section the District Magistrate is not a party entitled to appeal from an acquittal but the Local Government and the High Court is not entitled to act under S. 439, *infra*, as a Court of revision upon a report of the District Magistrate, and set aside an order of acquittal, 38 M. 1028 at 1031. In an appeal from an acquittal under this section the High Court cannot interfere unless the judgment of the Court below is wrong and perverse or without jurisdiction and based upon obvious errors in procedure, 18 C.W.N. 666, 26 Cr. L.J. 1141-88 Ind. Cas. 453. The High Court is very reluctant to interfere with an acquittal and will not do so unless the necessity is clearly made out. 26 Cr. L.J. 1028 (2)-87 Ind. Cas. 916 (2); 26 Cr. L.J. 337-85 Ind. Cas. 641. It is not because a Judge or a Magistrate has taken a view of the case in which the Government does not coincide and has acquitted the accused that an appeal from his decision must necessarily prevail, or that the High Court should be called upon to disturb the ordinary course of justice by putting in force the arbitrary powers conferred on the High Court by this section. The doing so must be limited to those instances in which the lower Court has so obstinately blundered and gone wrong as to produce a result mischievous at once to the administration of justice and the interest of the public, 4 A. 148; 9 A. 528 (F.B.); 16 A. 212; 26 M. 1; 19 Cr. L.J. 987-48 Ind. Cas. 167; 14 Cr. L.J. 525-20 Ind. Cas. 1005; 12 Cr. L.J. 384-11 Ind. Cas. 132; 18 C.W.N. 668-15 Cr. L.J. 160-22 Ind. Cas. 736; 16 Cr. L.J. 529-29 Ind. Cas. 687. Where in a trial of two accused jointly one is acquitted and the other convicted, on appeal by the convicted accused, the appellate Court is not justified in pronouncing its opinion on the correctness of the acquittal of the other accused in the absence of an appeal against acquittal by Government and such expression of opinion should not be

allowed to remain on record, 25 Cr. L.J. 1235-82 Ind. Cas. 173. In an appeal from an acquittal of a specific offence the accused cannot be convicted on appeal of an offence entirely different from that charged against him, 12 Cr. L.J. 73-9 Ind. Cas. 436 following 19 B. 51. In an appeal under this section the High Court is a Court of appeal on facts as well as the law, 9 C.L.J. 278-10 Cr. L.J. 399-4 Ind. Cas. 124.

LOCAL GOVERNMENT MAY DIRECT THE PUBLIC PROSECUTOR TO PRESENT AN APPEAL TO THE HIGH COURT.—The right of preferring an appeal against acquittal is peculiar to India alone of all His Majesty's Dominions. The power of appealing is given only to the Local Government. A private party cannot appeal or invoke the aid of the High Court under this section, 7 M. 213 and the reasons for this are to safeguard the liberty of the subject from the vindictiveness of a private prosecution by insisting that the authority who should decide whether an appeal should be filed be the highest authority in each Province, viz., the Local Government. 17 Cr. L.J. 91. The High Court has no authority to entertain an appeal against acquittal except upon an appeal by the Local Government concerned, 19 W.R. (Cr.) 55; 6 C.L.R. 245; 1 A. 139 (F.B.); 15 M. 363. The right conferred on the Local Government is in the widest terms and without any limitation, 36 M. 1028 at 1034; 2 C. 278, and the High Court will not interfere on the mere reference of the District Magistrate when the Government has a distinct right of appeal under this section, 36 M. 1028; 15 M. 36. This section lays down that the Local Government may direct the Public Prosecutor to present an appeal to the High Court. The direction may be given to a Public Prosecutor defined in S. 4 (1) (d) *supra* in a letter whereby he is appointed as such, but it does not follow that the mere fact that a person has been appointed to present an appeal to the High Court from an order of acquittal involves his appointment as Public Prosecutor for the purpose of the case. In a case of this description where the liberty of the subject is involved, the statute must be strictly construed and full compliance with the provisions is required. The Legal Remembrancer of Bengal is a Public Prosecutor within the meaning of this section, 46 C. 554; 18 C.W.N. 279-18 C.L.J. 519 at 521. But an appeal preferred by the Deputy Legal Remembrancer of Bengal on behalf of the Government of Behar and Orissa under this section was held incompetent and was dismissed on that ground, 18 C.W.N. 279-18 C.L.J. 519. By specially giving a right of appeal, against an acquittal to the Local Government, the Legislature has indicated that private complainants have not the right and the High Court will not interfere in cases of acquittals in revision, as such a course would practically mean giving the private party a right of appeal, 7 C. 447; 14 M. 363, where the High Court declined to hear Counsel who appeared to support a revision against acquittal at the instance of a private party. See 42 C. 612 where all the decisions of the various High Courts are considered. It is only this section that provides for appeals against orders of acquittal, and that requires that such an appeal shall lie (1) directed by Government, (2) presented to the High Court, 7 M. 213 at 214. When the trial is by a jury, this section is intended by S. 418 and S. 423 (2) to questions of law only, 10 C. 1029, but there is nothing to preclude the High Court from entertaining a revision against acquittal at the instance of a private party and unless very exceptional grounds are shown the High Court will not interfere in revision. Where the Government appeals against an acquittal, it is for the Crown to begin and satisfy the Court that there is a case calling upon the accused for an answer, 20 W.R. (Cr.) 83, and the High Court ought not to interfere with an acquittal by the lower Court, which had the witnesses before it and arrived at conclusions of fact, unless the lower Court was clearly wrong and the judgment perverse and based on obvious errors of procedure, 16 Cr. L.J. 529; 4 A. 148; 9 A. 528; 16 A. 212; 20 A. 459. An appeal under this section must be considered on its merits just like any other appeal. The *onus* is on the appellant and such *onus* is all the heavier, if the judgment appealed from is one which after giving due weight to the evidence on record gives the benefit of reasonable doubt to the accused, 47 A. 306. In principle appeal from an acquittal stands on the same footing as an appeal from a conviction. Both are governed by the same rules and subject to the same limitation, 21 A. 122; 35 A. 168; 17 C. 465; 20 C.W.N. 128; 38 M. 1028; 25 Cr. L.J. 786-81 Ind. Cas. 306. Where a Magistrate misapprehended the provision of law and without recording any evidence, but

relying on a local investigation held by him acquitted the accused, the order of acquittal was set aside as one made without jurisdiction, 39 C. 931. Where a Sessions Judge declines to try a case for want of jurisdiction there is no appeal against his order under this section but a revision may lie against the order, 35 A. 118. When in an appeal against several persons the High Court issued warrants against the accused, but they could not be found, the acquittal was set aside by the High Court in the exercise of its Revisional jurisdiction, 37 A. 419.

ORIGINAL OR APPELLATE ORDER OF ACQUITTAL PASSED BY ANY COURT.—

An acquittal passed by any Court, for instance by a third-class Magistrate, can be interfered with only by the High Court on appeal preferred to it by the Local Government. No other authority is competent to set aside the order of acquittal however erroneous or illegal the order may be. An appellate judgment by which a conviction had, is set aside, is an order of acquittal. The acquittal need not be an absolute acquittal. For example, if an accused is charged under S. 302, I.P.C., but convicted under S. 304, I.P.C., this will not prevent the High Court on an appeal by the Local Government finding the accused guilty under S. 302, I.P.C., 2 C. 273. The expression "appellate order of acquittal" was held to include all judgments of an Appellate Court by which a conviction is set aside. It is not open to the Local Government under this section to appeal to the High Court on the ground that a Sessions Judge illegally refused to add a new charge, 16 B. 414, see also 26 M. 1. When a case is withdrawn by the Public Prosecutor in the Sessions Court acting under S. 494, *infra*, no doubt there is an acquittal, if a charge has been framed, but the Government has no right of appeal from such an acquittal, 18 M.L.J. (ah. n.) 57. See the new S. 449 (2) which provides for an appeal from order of acquittal passed by the High Court in the exercise of its original criminal jurisdiction under Chapter XXXIII, *infra*, by the Local Government as in this section. The order of a Sessions Judge under S. 406, *supra*, discharging a person under security under S. 188 is not an original or appellate order of acquittal within this section and the Local Government has no right of appeal against such an order but may move the High Court in revision. 27 Cr. L.J. 626—93 Ind. Gas. 402 following 21 A. 107; 23 A. 135; 36 A. 147.

LIMITATION FOR APPEALS.—Under this section the time allowed for appeal is six months from the date of the judgment appealed against, under Art. 157, Sch. II of the Limitation Act.

As to arrest of accused in appeal from acquittal, see S. 427 *infra*. In capital cases it is undesirable that the prisoner's fate should be discussed while he remains at large, 9 A. 828 (F.B.). As to powers of the High Court in appeals against the acquittal, see S. 439 (1) (a) *infra*.

418. (1) An appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal shall lie on a matter of law only.

(2) *Notwithstanding anything contained in sub-section (1) or in section 423, sub-section (2), when, in the case of a trial by jury, any person is sentenced to death, any other person convicted in the same trial with the person so sentenced may appeal on a matter of fact as well as a matter of law.*

Explanation.—The alleged severity of a sentence shall, for the purposes of this section be deemed to be a matter of law.

AMENDMENT.—Sub-section (2) is new; it provides that when in the case of a trial by jury, one person is sentenced to death and another to a lesser punishment, the accused sentenced to a lesser punishment may appeal on a matter of fact as well as on a matter of law. This is intended to remove the anomaly which existed, that the High Court acting

under S. 374 could consider the facts of the case as regards the former accused but on an appeal from the other accused could only interfere on a point of law.

OBJECT OF THE SECTION.—This section applies to appeals against acquittals as well as convictions, see 10 C. 1029. The object of the section in jury trials is to prevent the High Court from going into the evidence and deciding the question whether the conviction is right. In such a case the High Court will be substituting its own decision for the verdict of the jury, who have an opportunity of watching the demeanour of the witnesses and weighing their evidence, 21 C. 935. But this section does not control the powers of the High Court to go into facts in a case referred to it under S. 307, *supra*, 9 A. 320.

SUB SECTION (1).—Every appeal petition should state distinctly in what respect the law has been contravened, and it is not for the Court to hunt through the records and find out any illegality that may have arisen. But it is for the parties who appeal to point out wherein there has been a departure from the law, and unless this is done the appeal should be rejected, 1 W.R. (Cr.) 21. Ordinarily an appeal lies on matters of fact as well as on matters of law, but when the trial is by a jury then this section enacts that the appeal shall lie only on matter of law "*where the trial was by jury*". Do these words mean "*Where the trial should have been by jury*" or "*where the trial in fact was by a jury*"? The words are the clearest answer to the question; they relate to what actually occurred, not to what should have occurred. An adoption of a rival view would lead to the result that a reversal of the condition would leave an accused who is wrongly tried with assessors without any right of appeal, though the scheme of the Code shows that in the view of the Legislature it is less advantageous to an accused to be tried with the aid of assessors than by a jury, 25 B. 680 at 688; 23 B. 696; 25 C. 555. When the trial was in fact by a jury, the appeal shall lie on a matter of law only. But where the appeal has been entertained the powers of the appellate Court are those laid down in S. 423, *infra*. As a matter of practice the proper course when a verdict is set aside on the ground of misdirection is to direct a retrial. It is only in special cases as where the accused has been harassed by repeated trials or where the evidence is so clearly insufficient or incredible that no jury could reasonably convict, that an appellate Court would be justified in acquitting, 27 Cr. L.J. 785-95 Ind. Cas. 385. It is evident that in this section the Legislature deliberately used the words "*trial was by a jury*" instead of "*offence triable by jury*" as in S. 536, *infra*. Where a Judge admitted the statement made by a witness to the police which had only a remote bearing on the question for consideration, it was held, the admission of such evidence could not have affected the verdict of the jury which could not be set aside on that ground alone, 32 C.L.J. 528. Trial by jury is regarded as a privilege carrying with it certain liabilities. If an offence triable by jury is tried with assessors, then, provided the objection is taken before the Court records its finding, the trial will be invalid, but the converse is different. If the accused obtains a privilege, it is not presumed that he will take an objection, 25 B. 680 at 691. See also, 27 Cr. L.J. 1100 at 1103-97 Ind. Cas. 384. When an accused is tried by a jury in a case triable by assessors, he loses one right, *vis*, a right of appeal on matters of fact, but he gains another instead, *vis*, the privilege of being tried by a jury which is as valuable, if not more valuable than the other rights. This is rendered clear by the language of S. 536, *infra*. *Ibid.*, 693. When an accused is tried by a jury and convicted of a minor offence as permitted by S. 238 *supra* the appeal does not lie on facts under this section and the provisions of S. 269 (3) has no application, 27 Bom. L.R. 1416-27 Cr. L.J. 650-94 Ind. Cas. 602. See also 26 M. 243, where *Bhashyam Ayyangar, J.*, held that where the trial was in fact by a jury and the jury returned a verdict of guilty of a minor offence which is triable by assessors, an appeal will lie from such judgment only on a point of law, but *Beneon, J.*, took a different view and held that the verdict of the jury was treated by the Judge as opinion of assessors and an appeal lay on facts also.

The High Court cannot interfere with a verdict of a jury when the Judge has refused to make a reference to the High Court under S. 307 *supra*, 4 M.L.T. 483; 13 M. 343; 14 M. 86.

APPEAL SHALL LIE ON MATTERS OF LAW ONLY.—In cases where the accused is tried with the aid of a jury, an appeal under this section lies on matters of law only and the appellate Court has no power to go into questions of fact. The section says that an appeal from an acquittal by a jury shall lie, that is, shall be based and supported, on a matter of

law only. If an erroneous verdict on a matter of fact is alleged that will not support such an appeal, but if there is an error in law the appeal will lie. That is all that the section means. It does not prohibit the Court, in case where an appeal lies on a question of law, from deciding questions of fact which other sections, viz., Ss. 417, 423, and 537 of the Code, require the Court to decide in order to do justice in the case, 25 M. 1 at 13. See also 25 C. 711. The petition of appeal should state distinctly in what respect the law has been contravened, 1 W. R. (Cr.) 21. Admissibility of evidence is a point of law, 2 B. 61. Misdirection to the jury is a question of law, 25 C. 230; 21 C. 955; 15 C.W.N. 431; 27 B. 626. Non-direction on a point of prime importance telling in favour of the accused is a point of law, 27 B. 634 at 651. Conviction based on no evidence is a point of law, 15 W.R. (Cr.) 46; 16 W.R. (Cr.) 19 and the explanation to the section makes the alleged severity of sentence a point of law.

SUB SECTION (2) is new and the decisions in 2 G.W.N. 49; 11 B.L.R. 14, are no longer law. The anomaly which existed in the law has been removed by this new sub-section by allowing a right of appeal on facts to a person jointly tried and convicted and sentenced to a lesser punishment along with another who has been sentenced to death.

419. Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of the charge recorded under section 367.

SCOPE OF THE SECTION.—This section prescribes the form of the petition of appeal which is to be presented to the appellate Court so as to give to the appellate Court jurisdiction to deal with the matter. This section is applicable to jail appeals presented under S. 420, *infra*, which deals with the mode of presentation of such appeals. An appeal petition need not be verified, 12 M. 451. Every appeal petition should state distinctly in what respect the law has been contravened and it is not for the court to hunt through the records and find out any illegality that may have arisen. It is for the appellant to point out wherein there has been a departure from the law. 1 W. R. (Cr.) 21. A petition containing scandalous allegations against the convicting Magistrate need not be entertained, but must be returned for expunging the offending portions of it, 15 B. 488. For a proper presentation of an appeal no *vakalat* need be filed, but a memo of appearance is sufficient, 45 M.L.J. 683; [1926] Pat. 123—27 Cr. L.J. 666—94 Ind. Cas. 714.

APPEAL MAY BE PRESENTED BY APPELLANT OR HIS PLEADER.—The word "presented" evidently means that such petition should be delivered to the proper officer of the Court either by the appellant or his pleader, Weir II 470 or a pleader's clerk, 20 M. 87. 21 M. 114, or by the Public Prosecutor, 39 M. 827, but it cannot be presented through post, 15 M 127; Weir II, 467; Ratanlal 469. It is not a due presentation of an appeal when the petition is deposited to a box kept for the convenience of the parties within the precincts of the Court, 19 M. 354. A petition signed by a pleader duly authorised may be actually presented to the Court by the clerk of such pleader, 20 M. 87; 21 M. 114; Weir II, 470 and such presentation is actual presentation by the pleader, but when a petition signed by the pleader is handed over by a person who is not a clerk of the pleader and over whose conduct he has no control is not a valid presentation, 21 M. 114. For proper presentation of an appeal there is no necessity to file a *Vakalat* and a memo of appearance is sufficient, 45 M L J. 683 following 5 M L T. 290. See R. 161 Criminal Rules of Practice. But now a rule has been made that a pleader appearing for a complainant must file a *Vakalat* as also in cases in which a pleader appears for parties other than an accused person. But the Patna High Court has ruled in [1926] Pat. 123—27 Cr. L.J. 666—94 Ind. Cas. 714, that the Criminal Procedure Code unlike the Civil Procedure Code no where prescribes the mode of appointment of pleaders and there is no authority for the proposition that in criminal cases a pleader must file a *vakalatnamah* to enable him to present an application or appeal on behalf of his client and to act for him.

Art. 10 of Sch. II of the Court Fees Act prescribes a fee for *vakalats* when presented to any Criminal Court including a High Court. This merely means that when an authority is filed such authority must be stamped and does not make it necessary that a *vakalatnamah* must be filed.

SHALL UNLESS THE COURT OTHERWISE DIRECTS BE ACCOMPANIED BY A COPY OF JUDGMENT, ETC.—The appellate Court is given a wide discretion to receive an appeal petition not accompanied by a copy of the judgment or order appealed against. Where a copy of the judgment was presented with the appeal petition of one of the accused but no copy of the same judgment accompanied the appeal petition of the other accused and the Magistrate refused to receive the appeals, and when subsequently presented with copies of judgments, were dismissed as time-barred, it was held that the Magistrate should have exercised the discretion given to him and admitted the appeals and the order of dismissal was set aside, 5 Bom. L. R. 704.

A COPY OF HEADS OF CHARGE TO JURY.—In cases tried by jury, the charge to the jury is under S. 371 (1), *supra*, equivalent to a judgment, 13 W.R. (Cr.) 80.

420. If the appellant is in jail, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the jail, who shall thereupon forward such petition and copies to the proper Appellate Court.

Procedure when appellant in jail,

SCOPE OF THE SECTION.—S. 419 is the general section embracing the case of all appellants whether in jail or not, and there is nothing in this section to indicate that S. 419 was to deprive the appellant who is in jail of the opportunity of being heard on his appeal. Therefore even when an appellant is in jail, reasonable notice should be given to him, or his pleader, to enable him to have a reasonable opportunity of being heard, *Weir II*, 472. This section is not derogatory of the rule laid down in S. 419. The latter section applies as much to a prisoner in jail as to any other appellant, and requires that the petition shall be in a particular form, while this section is concerned with the question of presentation of appeal from jail, 13 A. 171. But it was held in 27 Cr. L. J. 933—98 Ind. Cas. 889; that when an accused person is in jail and makes his petition of appeal through the jailor, it is clear that the proviso to S. 419, *supra*, which is confined solely to an appellant who presents his appeal in person or through his pleader, cannot apply, and the law does not require notice to be given to an appellant actually in prison, under this section which would be useless. If an appellant has a pleader or is able to appear in person he may be able to give further arguments. But if he is in jail and cannot afford a pleader then issuing a notice to him is not necessary because he cannot give any further information to the Court and therefore the practice of the Court in summarily dismissing such appeals when occasion arises is a correct procedure. Facilities should be given to prisoners in jail by the officer in charge of the jail to enable them to prepare their appeal petitions. 13 W.R. (Cr.) 69.

MAY PRESENT PETITION ON APPEAL.—This section deals with the mode of presentation of an appeal when the accused is in jail. The petition must comply with the provisions of the previous section. For the purposes of limitation a presentation of an appeal to the officer in charge of the jail is equivalent to a presentation to the Court, 9 M. 238.

FORWARD PETITION TO APPELLATE COURT.—The Appellate Court is bound to give notice to the appellant in jail and to give him an opportunity to show cause. The accused in jail may be sent for from the jail to explain any difficulty in his case under appeal. The Appellate Court cannot dismiss an appeal without perusing the records of the case, 13 A. 171 (F.B.). But see 27 Cr. L. J. 933—98 Ind. Cas. 889.

421. (1) On receiving the petition and copy under section 419 or section 420, the Appellate Court shall peruse the same, and, if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily :

Summary dismissal of appeal.

Provided that 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.

(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.

NO SUFFICIENT GROUNDS FOR INTERFERING.—The appellant is bound to show that there is sufficient ground for interfering with the conviction. He is not in the same position before the Appellate Court as he was before the trial Court, 5 A. 385. See also 17 C. 435 ; 23 C. 347 ; If the Court finds no sufficient grounds for interference it may dismiss the appeal summarily.

MAY DISMISS THE APPEAL SUMMARILY.—This power of Court to dismiss the appeal summarily under this sub-section is quite different from a dismissal of a criminal appeal under S. 423, *infra*, in which case the appeal is disposed of after a trial on the merits. A criminal appeal cannot be dismissed for default without being considered on the merits, 27 C.W.N. 947 ; 46 M. 382. An appeal ought not to be summarily dismissed merely because the appellate Court thinks the matter is a mere trifle, Ratanlal, 978, although it may be summarily dismissed under this section if there is no sufficient ground for interference, 12 Cr. L.J. 481=12 Ind. Cas. 89 ; 12 C.W.N. 238 ; Ratanlal 563 and 739. It is settled law that a Court of appeal dismissing an appeal is not bound to write a judgment as defined in S. 367, *supra*, but it is advisable that it should give reasons for rejecting the appeal in view of the possibility of its order being challenged by an application for revision by the High Court, 26 A. 495 ; 14 A.L.J. 448 ; 17 A. 241 ; 32 C. 178 ; 25 Cr. L.J. 1287=82 Ind. C. 165 ; 26 Cr. L.J. 4=83 Ind. Cas. 484 ; 11 Cr. L.J. 621=8 Ind. Cas. 379. The word " summarily " ordinarily means in an informal manner and without delay of formal proceedings, and an appellate Court is entitled to reject an appeal without recording a formal judgment or giving reasons for such rejection, 20 B. 540 ; 21 C. 92 ; 22 C. 241 ; Weir II, 473 ; 27 Cr. L.J. 23=91 Ind. Cas. 85. A Court disposing of an appeal under this section should either expressly state that it has dealt with the appeal under this section or the judgment should notice though but concisely what objections were urged and how they were disposed of, 32 C. 178. An order summarily dismissing an appeal is final and cannot be reviewed, 4 B. 101 ; 19 B. 732. Where a petition of appeal submitted through the Superintendent of the jail in which the appellant was confined was considered and rejected by a Judge of the High Court under this section, it is not open to the appellant thereafter to present through Counsel a fresh appeal petition, 41 A. 759 where 19 B. 732 and 17 Cr. L.J. 483=36 Ind. Cas. 133 is followed. When the appellate Court does not proceed under this section by summarily rejecting the appeal it is bound to act in accordance with the provisions of Ss. 422 and 423, *infra*, 15 Cr. L.J. 687=25 Ind. Cas. 995. A pleader presenting a criminal appeal cannot be said to be guilty of professional misconduct merely because he is not prepared to argue the appeal as the time of presentation of the appeal, 48 M. 385.

NO APPEAL SHALL BE DISMISSED UNLESS REASONABLE OPPORTUNITY OF BEING HEARD IS HAD.—This proviso does not mention anything about jail appeals coming under S. 420, *supra* and therefore no notice and opportunity of being heard is to be given in such appeals. There is no such omission in S. 422, *infra* or in S. 423, (1) *infra*. But as a matter of practice, jail appeals are posted for dismissal before the Court, and the name of the appellant is called out, when he is actually in jail in most cases, before dismissing the appeal summarily. See 27 Cr. L.J. 933=96 Ind. Cas. 389. This section lays down that the appellant or his pleader shall have a reasonable opportunity of being heard in support of

the appeal which must be taken to include the possible right of reply to the point raised by the Crown, 38 C. 307. If the Court desires to hear the appellant under this section before admitting the appeal, he should be given a reasonable notice, 35 C. 335. Where a Magistrate called upon a pleader who presented an appeal to argue it at once and on the pleader expressing his inability to do so, prayed for a short adjournment to enable him to acquaint himself with the evidence in the case, and the Magistrate rejected the appeal under this section, it was held that no reasonable opportunity of being heard was offered under this section 7 Bom. L.R. 89 ; 35 C. 335 ; 29 Ind. Cas. 656 ; 6 M.L.T. 309 ; 20 Cr. L.J. 271—50 Ind. Cas 31 ; 38 C. 337 ; 16 Cr. L.J. 538—29 Ind. Cas. 685. A criminal appeal should not be heard at the time of the presentation of the papers even for the purpose of dismissal under this section. The posting for the purpose of hearing under this section must be special posting, after a reasonable time, not less than a week. This is the practice of the High Court and ought to be the practice of the moffussil Courts, 43 M. 335. Where an appeal memorandum signed by a pleader is presented to a Magistrate by the party in person and the Magistrate rejected the appeal summarily under this section, it was held that no reasonable opportunity was given to the pleader to appear and argue the appeal and the order was set aside, 29 M. 236. The language of this section requires a reasonable opportunity to be given to the appellant of being heard in support of his appeal. If no such opportunity is given, the Court has no jurisdiction to dismiss the appeal, and when an appeal is so dismissed, the Court has inherent power to order its being reheard after giving a reasonable opportunity to the appellant, 26 Cr. L.J. 1169—88 Ind. Cas. 893 where 23 M.L.J. 371—(1912) M.W.N. 982—12 M.L.T. 350 is referred to. If questions of fact are to be argued in the appeal, the appeal ought not to be dismissed under this section without sending for the records of the lower Court, 43 M. 335 following 29 M. 236. It is well known that a memorandum of appeal containing all possible grounds (some of which may be untenable) can be drafted by a mere perusal of the judgment and without the use of the depositions, whereas for arguing the questions of fact the depositions have to be carefully studied, 43 M. 335. But where an appeal and a bail petition were presented by a pleader and the Magistrate heard the pleader in support of both and when dismissing the bail application called for the records from the lower Court and dismissed the appeal summarily after receipt of the records without hearing the pleader, it was held that the Magistrate though not bound to hear the pleader on receipt of the records yet he might have in the exercise of his discretion, allowed another opportunity to him to argue the appeal with reference to the records, 3 Cr. L. Rev. 128. A general notice that appeals will be heard for admission only the next Court day after presentation is not a sufficient compliance with law, 5 M. 11 ; 35 C. 335 ; 43 M. 335. Where a jail appeal was filed, but before it was disposed of, another appeal petition is presented by a pleader, the Court was not competent to dismiss the jail appeal summarily but should hear the appellant's pleader before rejecting the appeal, 1906 A.W.N. 203 ; 17 A. 241 (F.B.). When in ignorance of the fact that a convicted accused has preferred an appeal through a practitioner, the Sessions Judge rejected an appeal subsequently preferred by the accused from jail, it was held that the dismissal through mistake is no dismissal and the appeal presented by the practitioner cannot be disposed of without hearing him under this section. 28 Cr. L.J. 1621—80 Ind. Cas. 917. But where jail appeals from convicted persons were pending in the Sessions Court an appeal petition on behalf of the same persons was filed through a mukhtar and the jail appeals were summarily rejected by the Judge in ignorance of the fact that the latter appeal in which Counsel was to be heard, was pending, it was held that the Sessions Judge has no power to set aside his own order dismissing the jail appeals, but the High Court alone has power to do so in its revisional jurisdiction and the High Court directed the Judge to rehear the appeals after giving the Counsel an opportunity of being heard, 23 A.L.J. 1081. A jail appeal once dismissed under this section, the matter cannot be re-opened by an appeal presented through Counsel, 25 Cr. L.J. 1313—82 Ind. Cas. 545.

SUB-SECTION (2).—There is a discretion given to the Court to call for the records. The appellant has no right to ask the Court to send for the records. Rejection of the appeal summarily without sending for the records is a course which though legal is ordinarily very inconvenient. The words "shall not be bound to do so" show that the Legislature contemplates dismissal of appeals as a rule without perusing all or any part of the

proceedings of the lower Court, 1883 A.W.N. 145. Where the grounds of appeal disclose the reasons for discrediting the prosecution witnesses, the Appellate Court ought to call for the records and satisfy itself that the conviction is right, before dismissing the appeal summarily, 29 M. 236 followed in 48 M. 235. When the question involved in the appeal is one of fact, and the judgment of the Court below is plain and clear, calling for records would be mere waste of time. But when a point of law is raised in the appeal memorandum which on the face of it is not without substance, it is not proper to reject the appeal summarily without calling for records, 3 Pat. L.J. 389=19 Cr. L.J. 209=48 Ind. Cas. 785. After the records were sent for and received the appellate Court should hear the pleader, and should not dismiss the appeal summarily without hearing him. 42 C.L.J. 551 and 554.

422. If the Appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the Local Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal ;

and, in cases of appeals under section 417, the Appellate Court shall cause a like notice to be given to the accused.

Once an appeal is accepted the appellate Court is bound to proceed under this section. The appeal which has to be heard in accordance with this section is the whole appeal ; consequently all the grounds taken in the appeal petition are open for consideration at the final hearing, and the appellant cannot be restricted to any select ground out of those specified in his petition. A restrictive order for admission, *vis.*, on some grounds taken, is clearly not contemplated by this section and must be deemed to be *ultra vires*. Ratanlal 826. The appeal that has to be heard is the whole appeal and not merely a portion of it, *e.g.*, the question of sentence only however convenient and practical that occurs may be is not warranted, 4 Pat. 254 ; 41 C. 406 at 410 ; 15 C.W.N. 921. See also 13 Bom. L.R. 550=11 Ind. Cas. 615.

SHALL CAUSE NOTICE TO BE GIVEN TO APPELLANT OR HIS PLEADER.—

Notice is obligatory, Weir II, 475. Hearing an appeal without notice either to the appellant or his pleader is illegal, 9 Cr. L.J. 553=2 Ind. Cas. 247. The fact that the pleader for the appellant was present at the time when the appeal is admitted does not relieve the Court from the necessity of giving notice to the appellant or his pleader as to the day fixed for the hearing and the place of hearing, unless the attention of the pleader is specially directed to them by the Court. The object of giving notice is to give precise information to the appellant as to the time and place of hearing. Notice is the warning to a party to a *lis* to enable him to resist a possible result, *vis.*, not merely information that that which is threatened will or may possibly happen in a matter in which he is concerned, but also that he can avoid such results if he takes proper measures to do so, 13 A. 171 at 180, 184. In the case of an appeal against acquittal under S. 417, *supra*, notice is to be given to the acquitted accused. Every endeavour should be made to effect personal service, 1882 A.W.N. 470 ; 37 A. 419.

TO SUCH OFFICER AS THE LOCAL GOVERNMENT MAY APPOINT IN THIS BEHALF.—This section provides for a notice of appeal to the officer appointed by the Local Government, but it does not say that others are not to have notice. The section imposes a necessary condition but does not override the principle of natural justice "*Audí alteram partem*," 88 M. 1091 at 1095. A mere omission to serve notice of appeal on a District Magistrate as provided by this section is nothing more than an irregularity and does not make the proceedings in appeal, *ab initio* void, 6 Cr. L. Rev. 21, but see *contra*, (1915) M.W.N. 534=16 Cr. L.J. 736=31 Ind. Cas. 176 and 27 Cr. L.J. 1086=37 Ind. Cas. 82, where it was held that failure to issue notice is an illegality and the order passed on appeal was held bad. The

omission to send a notice of appeal though undoubtedly irregular will not afford a ground to interfere in revision by the High Court at the instance of the complainant against an order of acquittal when as a matter of fact no objection is raised by the District Magistrate to the proceedings in the appellate Court, 26 Cr. L.J. 751—88 Ind. Cas. 287 where 24 Bom. L.R. 1150—24 Cr. L.J. 700—73 Ind. Cas. 812 is referred to. Where no notice of appeal was given to the Prosecuting Inspector under the section and the accused was acquitted, the complainant is not entitled to have the acquittal set aside by the High Court in revision when such revision is opposed by the Government, 4 Cr. L. Rev. 320. A complainant cannot claim as of right to be heard in an appeal from a conviction. The matter is in the discretion of the appellate Court, 7 M.H.C.R. Appx. 42. In appeals against orders awarding compensation under S. 250 *supra* there are a number of cases on the question whether the accused to whom the compensation is awarded is entitled to have notice. In 29 M. 187 it was held that on the principle that no order to the prejudice of a party is to be made without notice to him, the order of compensation was wrong and was set aside for want of notice to the accused, but this decision was distinguished in 33 M. 89, where it was held that notice to the accused was desirable, but the law does not render it absolutely essential, and want of notice to the accused is no ground for interference in revision especially when notice was given to the officer appointed by Government and he failed to appear. But it was held in 27 M.L.J. 629, that the person to whom notice of appeal should go in a compensation appeal is the District Magistrate and want of notice to the District Magistrate is not a ground for setting aside the order passed on appeal at the instance of the accused when the District Magistrate who had notice took no steps in the matter for that purpose. See 38 M. 1091 where it was held after a consideration of all the above rulings that in appeals from compensation orders under S. 250, *supra*, notice should ordinarily be given to the accused as this section does not override the principle of natural justice, and the accused in whose favour the compensation order is passed is entitled to be heard in support of the order but failure to give notice will not necessarily render the proceedings of the Court illegal. In Madras, the officer appointed by the Local Government is the Public Prosecutor in case of appeals to the Sessions Court and to the High Court—*Fort St. George Gazette*, 1887, Pt. I, p. 80. In Bengal, the Legal Remembrancer is the Public Prosecutor for the High Court, and in other cases rule is issued to the District Magistrate, 7 C.W.N. 80. In Bombay, the District Magistrate should be served with notice. The fact that notice of appeal was not served either on the complainant or on the officer appointed under this section is no ground for interfering in revision with an order of acquittal at the instance of a private party where no injustice had been occasioned and where the lower Court in a very full judgment had dealt with the question involved from various standpoints. 20 L.W. 327.

TIME AND PLACE AT WHICH APPEAL WILL BE HEARD.—The particular date should be specified in the notice. A District Magistrate directed that a particular appeal will be heard in the month of January without specifying any particular date, and it was heard and dismissed on the 6th of January. The appellant had no information as to any particular date of hearing and when he appeared in Court he learnt that the appeal had been dismissed and could not be re-heard. It was held by the High Court that the appellant should have been informed as to the particular date of hearing, and the Magistrate was directed to re-hear the appeal. 1881 A.W.N. 46. Disposal of an appeal before the date fixed for hearing is a material error in procedure. *Welz II*, 475. When the notice specifies a particular place the appeal should not be heard in a different place without fresh notice as to change of place. 2 Cr. L.J. 86.

423. (1) The Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears and the Public Prosecutor, if he appears, and, in case of an appeal under section 417, the accused

Powers of Appellate Court in disposing of appeal.

if he appears the 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 acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried 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, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (2) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce the sentence, or (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, but, subject to the provisions of section 106, sub-section (3), not so as to enhance 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.

(2) Nothing herein contained shall authorise the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him.

SCOPE OF THE SECTION.—This section does not confer any right of appeal. It only lays down the powers of an appellate Court when a right of appeal is allowed by other provisions of the Code. S. 404 *supra* enacts the general rule—no appeal shall lie except as provided for, and Ss. 405 to 416 *supra* provide *inter alia* for appeals in certain cases but not in any case of acquittal, and S. 417 *supra* provides for appeals against orders of acquittal and enacts that the appeal shall lie at the direction of Government and should be presented to the High Court, 7 M. 218 at 214. A Court of appeal under this Code is not a mere Court of error, but the Court as a Court of appeal is enjoined by S. 597 *infra* and S. 167, Indian Evidence Act, not to reverse any finding or sentence passed by a Court of competent jurisdiction on account of any error, omission, irregularity, or improper admission or rejection of evidence unless in its judgment such error, omission or irregularity has in fact occasioned a failure of justice, or unless independently of the evidence objected to and admitted, it ought to have varied the decision. 24 M. 523 at 541. It is a rule underlying the whole fabric of appellate jurisdiction that the power of an appellate Court is measured by the power of the Court from whose judgment or order the appeal is preferred and to do that which the subordinate Court should have but has not done or caused it to be done and nothing more. An appellate Court cannot on appeal pass a sentence which the trial court was not competent to pass. All jurisdiction starts with the trial Court and remains a constant factor throughout. All subsequent stages of the proceeding are governed by it. An appellate Court while altering a sentence into one of fine cannot inflict a fine beyond the maximum which could have been imposed by the trial Court. The substitution of fine for imprisonment is a merciful commutation and does not constitute an enhancement, 12 Cr. L.J. 444—11 Ind. Cas. 788. The powers conferred by this section on a Court of appeal are not to be used in such a way as to spring up a new case upon the accused without giving him any notice of the charge he has to meet. 16 Cr. L.J. 899—30 Ind. Cas. 451 ; nor is it entitled while setting aside the conviction for one offence to convict the accused for another offence not charged in the trial court

21 L.W. 520 = 26 Cr. L.J. 1036 = 87 Ind. Cas. 324. Where an accused person was charged and convicted of an offence under S. 452, I. P. C., it is not open to the appellate Court on appeal to convert such a conviction into one under a Special Act, such as the Arms Act, and convict him under S. 19 (e) of the said Act. Such a conviction is illegal as the accused was not charged with that offence and had no opportunity of meeting it, 4 Rang. 355. A criminal appeal under this section cannot be dismissed by the Court for default of appearance of the appellant which does not relieve the Court of the imperative duties of perusing the records and rendering judgment in accordance with the provisions of Ss. 367 and 424, *infra*, 46 M. 382; 50 B. 873 following Ratanlal 593 and 13 A. 171; 27 Cr. L.J. 1167 = 97 Ind. Cas. 731; 80 C. 972; 12 Cr. L.J. 481 = 12 Ind. Cas. 89; 12 C.W. N. 248; 9 Cr. L.J. 853 = 2 Ind. Cas. 247; 24 Cr. L.J. 475 = 72 Ind. Cas. 891. The fact that an appeal has been admitted will not preclude the Court from dealing with the question whether an appeal lay or not, 40 C. 631. Where after the presentation of an appeal, the records are sent for and a date is fixed for hearing the Court has no power to dismiss the appeal for non-appearance of pleader, as under the provisions of this section it was incumbent on the Magistrate to go through the records and dispose of the appeal on the merits, 27 C.W.N. 947. Even though no one may appear in a criminal appeal, it is the duty of the criminal court to examine the matter and to come to some sort of decision of the merits, 24 Cr. L.J. 89 = 71 Ind. Cas. 217. The sound rule to apply in trying a criminal appeal where questions of a disputed fact are in issue is to consider whether the conviction is right, and in this respect a criminal appeal differs from a civil one, in which the Court must be convinced before reversing finding of fact by the lower Court that the finding is wrong, 11 C.L.R. 25. When the law allows an appeal the appellant is entitled to have from the Court of appeal an explicit opinion of the questions of fact involved in the case and the Court of appeal should take its own view of the evidence after perusal of the records, 39 C.L.J. 117 = 25 Cr. L.J. 1034 = 81 Ind. Cas. 820. It is not necessary in criminal cases that the appellant should clearly establish that the order of the lower Court was wrong, 23 C. 347. When an appeal is so dismissed the Magistrate was directed to restore it to file, and dispose of it according to law, 9 Cr. L.J. 553 = 2 Ind. Cas. 247; 1 Bom. L.R. 225. The judgment of an appellate Court ought not to be read in connection with or as supplementary to the judgment of the Court of first instance; it should be quite independent and stand by itself, 35 C. 138. An appellate Court is not bound to hear the complainant in a criminal appeal. This is left to the discretion of the appellate Court, 7 M.H.C.R. Appx. 42, but it will do well to hear the pleader appointed by the complainant when the Public Prosecutor does not appear to support the order appealed against, Weir II, 476. The powers of an Appellate Court are laid down exhaustively by this section. It is not illegal for an appellate Court when setting aside the proceedings of the lower Court to leave it to the subordinate Court's discretion to re-try the accused, 46 C. 212; 33 C. 192. S 345 (6) permits a composition of a case after conviction and during the pendency of an appeal in the appellate Court. A criminal appeal is a continuation of the criminal case and except so far as there is a provision to the contrary the appellant has the privilege of the accused and cannot be punished for making false statements in his appeal petition which under the Code does not require to be verified, 12 M. 451 at 453. 7 Lah. 158. An appellate Court cannot decline to interfere on appeal simply because that in its opinion the matter is a mere trifle. It is bound to hear the appeal and to find whether the conviction is legal or not, Ratanlal, 978. With regard to the function of a Court of appeal in relation to the trial Court on questions of fact the weighty observations of Lindley, M.R., in 1901 A.C. 73 ought to be borne in mind. "Even where the appeal turns on a question of fact the court of appeal has to bear in mind that its duty is to re-hear the case, and the court must re-consider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it, and not shrinking from over-ruling it if on full consideration the court comes to the conclusion that the judgment is wrong. When, as often happens much turns on the relative credibility of witnesses, who have been examined and cross-examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when

the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of appeal always is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstances quite apart from the manner and demeanour which may shew whether a statement is credible or not and these circumstances may warrant the Court in differing from the judge even on a question of fact turning on the credibility of witnesses whom the Court has not seen." See 1923 A.C. 253 ; 39 B. 386 (P.C.). See also the observation of Lord Dunedin in 17 L.W. 1 (P.C.)=31 M.L.T. 307=27 C.W.N. 414. "There are two ways in which one may approach the question of credibility. When the question is whether a witness is speaking the truth or not light is thrown upon it by the demeanour of that witness in the box, by the manner in which he answers questions, and by how he seems to be affected by the questions that are put to him and so on. No doubt, there the trial Judge has an advantage which cannot possibly be shared by any appellate Court. But when the views upon credibility are founded upon argumentative inferences from facts which are not disputed, then the Court of appeal is really in just as good a situation as a judge of the first instance."

SHALL THEN SEND FOR THE RECORD OF THE CASE.—The use of the word "then" clearly indicates that any power conferred by this section can be used only after the proceedings have reached the stage at which this section becomes applicable, *viz.*, after the appeal has been admitted and after notice under S. 429 has been given, 25 Cr. L.J. 89=71 Ind. Cas. 217.

IF SUCH RECORD IS NOT ALREADY IN COURT.—Sub-section (2) of S. 421 says that before dismissing an appeal summarily the Court may call for the records of the case, but it shall not be bound to do so. But after admission of the appeal the Court is bound to send for the record if such record is not already called for by the Court at an earlier stage under S. 421 (2) ; after calling for the records and fixing a date for hearing the appeal cannot be dismissed for default of appearance of pleader, 27 C.W.N. 947. See 46 M. 382 ; 50 B. 673 ; 50 C. 972.

AFTER HEARING APPELLANT OR HIS PLEADER IF HE APPEARS.—There must be sufficient notice of the date and place of hearing and an order dismissing an appeal for want of appearance or acquitting the appellants when there was no sufficient notice or no notice at all is illegal and cannot stand. 22 Bom. L.R. 188=21 Cr. L.J. 373=58 Ind. Cas. 853 ; 27 Cr. L.J. 1086=97 Ind. Cas. 62. The Court is bound to hear the appellant or his pleader if he is present before the Court. If after due notice nobody appears there is nothing in the Code to prevent the appellate Court from disposing of the appeal on the merits after perusing the records, 13 A. 171 (F.B.), 50 C. 972 ; but the appeal cannot be dismissed for default of appearance, 50 B. 673 ; 27 C.W.N. 947 ; 46 M. 382. The Code does not permit the dismissal of an appeal upon the ground that the appellant does not appear to support it. 9 Cr. L.J. 553=2 Ind. Cas. 247 ; 12 Cr. L.J. 481=12 Ind. Cas. 89 ; 14 Cr. L.J. 182=12 Ind. Cas. 182 ; 24 Cr. L.J. 475=72 Ind. Cas. 891 ; 27 Cr. L.J. 1167=97 Ind. Cas. 751. For definition of the word "pleader," see S. 4 (1) (r), *supra*. It was held in 38 C. 307 that an appellant has a right of reply if the Crown had been heard even in cases falling under S. 421, *supra*, and therefore as to the right of reply in a case under this section there is no doubt whatever. When the appellant is represented by a pleader who has no proper vakalat the proper course is to adjourn the hearing of the appeal and thus afford the appellant an opportunity of being represented, 21 Cr. L.J. 413=56 Ind. Cas. 61 ; but no vakalat is required to appear for an accused, [1926] Pat. 125=27 Cr. L.J. 866=94 Ind. Cas. 713 ; 45 M.L.J. 683.

THE PUBLIC PROSECUTOR IF HE APPEARS.—It is not in every criminal appeal the Public Prosecutor will be instructed by the District Magistrate to appear. A complainant cannot claim as of right to be heard in an appeal from a conviction. The matter is in the discretion of the appellate Court, 7 M.H.C.R. Appx. 42, but if after notice the Public Prosecutor does not appear it is open to an appellate Court to hear a pleader privately instructed to support a prosecution and to do so would generally be discreet on the part of the Court, *Weir II*, 476. The chief reason for not permitting the pleader instructed by the complainant to be heard is that he may desire to press unduly a line of argument which would not commend itself as the proper one to a District Magistrate who is only to see that justice is vindicated. The only persons who can be heard in an appeal are those mentioned in this

section and not the complainant when the question is whether the conviction is right or not, 30 C. 159 at 163.

IN CASE OF APPEAL UNDER S. 417, THE ACCUSED IF HE APPEARS.—S. 427 says that when an appeal is presented under S. 417, *supra*, the High Court may issue a warrant for the arrest of the accused for his being brought before it or any subordinate Court and the Court before which the accused is brought may commit him to prison pending the disposal of the appeal or admit him to bail. If the accused is committed to prison he cannot possibly appear before the High Court and even if he is on bail, many an accused find it difficult to be present in the High Court at the time of hearing. He can always be represented by a pleader who is entitled to be heard in support of the order of acquittal before the High Court. As a matter of practice the High Court now engages a pleader, if an accused does not retain one, to defend the accused in all cases of acquittal.

DISMISS THE APPEAL IF NO SUFFICIENT GROUND FOR INTERFERING.—An appellant is not in the same favourable position before an appellate Court as he was before the trial Court and before he could succeed in his appeal he must satisfy the appellate Court that there is sufficient ground for interfering with the conviction, and if no sufficient ground is shown, it is the duty of the appellate Court not to interfere but to dismiss the appeal, 3 A. 386. The real test for the interference by the appellate Court is, can the appellate Court say that the decision of the lower Court is wrong, 19 B. 749 at 763, but if the appellate Court had any doubt that the conviction was right and any doubt as to the commission of the offence charged, it is bound to acquit the accused in spite of what the original Court had said or done, 23 C. 347; 11 C.L.R. 25. In appeals against acquittal the High Court ought not to interfere unless the lower Court has so blundered and gone wrong as to produce a result mischievous at once to the administration of justice and the interests of the public, 3 A. 133; 3 A. 52; 16 A. 212, or unless the Judge was clearly wrong, and the judgment either perverse or based on errors of procedure, 16 Cr. L.J. 829. There is no real distinction between a right of appeal from an order of acquittal and one against conviction. In both cases the appellant has to satisfy the High Court that there does exist some good and strong ground apparent upon the record for interfering. 20 A. 459; 19 B. 81; 17 C. 485. The High Court ought not to interfere with an acquittal unless the lower Court which had the witnesses before it and arrived at conclusions of fact with this great advantage in its favour had clearly gone wrong and its judgment was either perverse or based on obvious error of procedure, 29 Ind. Cas. 657 at 658. When once an appeal is dismissed, the High Court has no power to review its own order confirming the conviction and sentence, 35 A. 155. The only remedy is to refer the matter to Local Government under Chapter XXIX of the Code. See S. 370, *supra*.

SUB-SECTION (1) (a).—This section deals with the powers of the High Court in appeals against acquittal. When after an illegal trial contravening the provisions of S. 233, *supra*, the accused is acquitted and an appeal against such acquittal is preferred the High Court cannot itself convict the accused but can only direct a re-trial. The Court however may refuse to direct a re-trial having regard to the length of time that had elapsed from the date of the alleged offence, 29 M.L.J. 101 (F.B.)—(1918) M.W.N. 804—18 M.L.T. 95—16 Cr. L.J. 538—30 Ind. Cas. 145. There is no distinction in the Code between the right of appeal against conviction and an acquittal, both being governed by the same rules being subject to the same limitation, 17 C. 435; 30 A. 459; 26 M.L.J. 160; 38 M. 1023 at 1032-1034; 36 A. 168; 26 C.W.N. 128; 17 Cr.L.J. 9—32 Ind. Cas. 137. No Court other than a High Court is empowered to entertain an appeal from an acquittal. See S. 417, *supra*. This sub-section applies only to the High Court and to no other Court, 7 M. 213; 20 C. 633; 24 C. 528; 23 M. 225. The powers conferred by this sub-section are of a very exceptional nature and the High Court ought to be satisfied that exceptional grounds exist for setting aside an order of acquittal.

REVERSE SUCH ORDER AND DIRECT FURTHER INQUIRY.—The High Court alone can when reversing the order of acquittal direct further inquiry. A further inquiry cannot be ordered in the case of an order of dismissal or discharge, 27 C. 125. A Sessions Judge has no jurisdiction to interfere with an order of acquittal by a Magistrate, 23 M. 225; 20 C. 633; 3 C.W.N. colv1. The power to alter a finding is not expressly mentioned in sub-section (a) as in sub-section (b), which deals with appeals from conviction. The word

"reverse" evidently means "to set aside," "to make null" and when reversing the order the Court may order further inquiry or retrial instead of altering the finding, 26 M. 1 at 15.

ORDER THE ACCUSED BE RETRIED OR COMMITTED FOR TRIAL.—It is not illegal for an appellate Court when quashing the proceedings of the lower Court to leave it to the latter's discretion to re-try the accused and such an order cannot be construed as an acquittal disentitling the lower Court from re-trying the accused, 27 Cr. L.J. 733=95 Ind. Cas. 61. When an appellate Court in appeal sets aside a conviction and the High Court is of opinion that the acquittal of the lower Court is unsustainable the proper procedure in revision is to set aside the acquittal and direct a re-hearing of the appeal and not to order a re-trial of the whole case, 27 Cr. L.J. 854=95 Ind. Cas. 234. There is a strong principle that a man ought not to be tried a second time for the same offence unless there are very grave reasons for doing so. The power to order retrial should be exercised sparingly bearing in mind this principle, 13 A.L.J. 477=16 Cr. L.J. 433=29 Ind. Cas. 65. When no evidence sufficient to sustain a conviction exists on record the appellate Court is not justified in sending back the case for re-trial under this section, 28 M.L.J. 379. The Court also will refuse to direct a retrial having regard to the length of time that had elapsed from the date of the alleged offence, 29 M.L.J. 101 (F.B.)=(1915) M.W.N. 804=18 M.L.T. 95=16 Cr. L.J. 593=28 Ind. Cas. 145. It is open to the High Court under this clause in an appeal from an acquittal to reverse such order and to order the accused to be re-tried, but where there was no legal trial before the original Court there was no legal acquittal and therefore there is neither an appeal against acquittal nor an acquittal for the High Court to reverse, and the question whether the accused should be legally tried is a question not for judicial decision but for the consideration of the authorities with whom it rests to proceed with the prosecution, 29 B. 449 at 467. No appellate Court other than the High Court is empowered to direct the accused to be committed for trial as no appellate Court other than the High Court could set aside an order of acquittal, 26 M. 478, but any appellate Court in hearing an appeal from a conviction could order commitment under clause (b) of this sub-section and no preliminary inquiry is necessary before such a commitment, Weir II, 479; Weir II, 484.

OR FIND ACCUSED GUILTY AND PASS SENTENCE.—The High Court in an appeal against acquittal under S. 417 is empowered to find the accused guilty of the offence charged and acquitted by the trial Court and passes sentence on the accused according to law. But it is not clear whether the High Court could find the accused guilty of an offence with which the accused was not charged. In 7 N.W.P.H.C.R. 126 the accused was acquitted on appeal from conviction by the Sessions Court for an offence under S. 409, I.P.C., but the facts proved constituted the offence of criminal breach of trust under S. 406, I.P.C.; the High Court on appeal by Government ordered a retrial with the remark that the charge was not framed with sufficient precision. When there is only one charge and the accused was acquitted there is no difficulty whatever, but when there are more charges than one and the accused was acquitted of some of the charges and convicted of the others the question arises whether in an appeal from the conviction he could be convicted of those offences for which he was acquitted without preferring an appeal from such acquittal. The latest authorities are against permitting a conviction for offences for which the accused was acquitted, See notes under clause 1 (b).

SUB-SECTION (1) (b).—This clause deals with the powers of an Appellate Court in an appeal from a conviction. First it may revise the finding and sentence and acquit or discharge the accused, or order him to be tried by a Court of competent jurisdiction subordinate to such Appellate Court, or direct the accused to be committed for trial. In an appeal preferred against a conviction by one of the accused the appellate Court cannot disturb the order of acquittal passed against his co-accused. The powers of the appellate Court under this section are distinct and different as regards the appeal from a conviction and one from an acquittal and so long as the acquittal passed by a competent Court stands, the Court before which the order of acquittal is produced, is not entitled to impeach it on the ground that the presiding officer was disqualified, S. 556, *infra*, 8 A.L.J. 1129=12 Cr. L.J. 375=12 Ind. Cas. 839. Under this sub-section the appellate Court is not entitled to call for findings but, it may, if it thinks fit, call for further evidence, 2 Cr. L. Rev. 347; 4 Cr. L. Rev. 272.

ORDER HIM TO BE RE-TRIED.—An appellate Court has full discretion in the matter of ordering a re-trial. A re-trial may be ordered (1) when the original trial is void for want of jurisdiction or misjoinder, (2) when the inquiry has obviously been superficial and material witnesses have not been examined. It should not be ordered for enabling the prosecution to fill up in the evidence when it had ample opportunities to do so, 11 Cr. L.J. 684—8 Ind. Cas. 594; 36 M. 487; 7 W.R. (Cr.) 3. Ordinarily, the power to order retrial should not be invoked when setting aside a conviction for illegality or want of jurisdiction; for in such a case proceedings may be taken again independently of such order, 12 C.W.N. 248. Before directing a re-trial the appellate Court is bound to consider the evidence already recorded and see what possible object could be served by a fresh trial, Weir II, 48; 28 C. 104. An appellate Court should not order a re-trial on the sole ground that some additional witnesses ought to have been examined for the prosecution, if as a matter of fact the pleader who conducted the prosecution had exercised a proper discretion in not calling these witnesses, 31 C. 710. Where a trial is invalid on legal grounds and an irregularity committed by the lower Court has occasioned a failure of justice, a re-trial may be ordered, 28 C. 63; 8 C.L.J. 59. The re-trial may be held by any Court of competent jurisdiction subordinate to such appellate Court. Power is given by the section to direct a re-trial by a Court of competent jurisdiction subordinate to the appellate Court. Where a Sessions Judge on an appeal from an Assistant Sessions Judge sets aside the conviction and directed a re-trial, before himself, holding that the Legislature must have overlooked the possibility of an appeal from the Assistant Sessions Judge to the Sessions Judge and therefore he has taken it on himself to do what he thinks the Legislature ought to have done it was held that the order of the Judge was clearly illegal being based on a speculation of his own as to the intention of the Legislature. The High Court further remarked that the Judge may possibly have arrived at the result he desired by directing a re-trial before the Assistant Sessions Judge and then transferring the case to his own file under S. 528, *infra*. 27 Cr. L.J. 785—95 Ind. Cas. 385. The provisions of this clause do not preclude an appellate Court when reversing the finding and sentence under appeal, instead of directing a re-trial, from itself trying the accused if the offence is one ordinarily triable by it, 30 M. 228; Weir II, 481. But see 21 C. 255 and Ratanlal 982. When a re-trial is ordered the whole case is re-opened and the accused must be tried again on all the charges originally framed having regard to the provisions of this section, and the provisions of S. 403, *supra* cannot apply, 30 C. 163 at 167. When a case is directed to be re-tried by the appellate Court on the basis of certain findings of fact the trying Court cannot go behind those findings of fact when re-trying the accused, 15 Cr. L.J. 619—25 Ind. Cas. 627. It is not illegal for an appellate Court when quashing the proceedings of the lower Court to leave it to the latter's discretion to re-try the accused and such an order cannot be construed as an acquittal dis-entitling the lower Court from re-trying the accused, 27 Cr. L.J. 733—95 Ind. Cas. 61.

OR COMMITTED FOR TRIAL.—If a Sessions Court as an appellate Court thinks that the case ought to be re-tried by the Court of Session it ought to set aside the conviction and order a commitment under this clause, 13 A.L.J. 477; 15 A. 205. This sub-section does not authorise a Sessions Court to commit a case to itself, but only empowers it to direct a competent Court to commit, 1807 A.W.N. 178; 22 C. 50. The power to direct a committal is not confined to cases exclusively triable by a Court of Session, 23 C. 350; 27 C. 172; 16 B. 580. The power of ordering a new trial merely for the purpose of enhancing the punishment ought to be exercised very sparingly, 13 A.L.J. 477 at 478; 24 M. 675. No preliminary inquiry is needed before the appellate Court orders committal, Weir II, 479 and 484. When the High Court bearing an appeal from a conviction finds that the illegality committed by the lower Court (a special Magistrate under the Malabar Ordinance) vitiates the conviction and sets aside the same, it can commit the accused for re-trial on the same charges by a Sessions Court, when the Court of the Special Judge has ceased to exist, 18 L.W. 889.

ALTER THE FINDING MAINTAINING THE SENTENCE.—The word "alter" means substitute one for another and "alter the finding maintaining the sentence" means reverse the finding on which the conviction is based, and do not empower the appellate tribunal (or at any rate an appellate tribunal other than the High Court) to reverse or set aside an

acquittal, 26 M. 478 at 480. The High Court when hearing an appeal against a conviction may under this clause alter the finding and then as a Court of revision may, under S. 499 *infra*, enhance the sentence so as to make it appropriate to the altered finding. The prohibition in sub-section (4) of S. 499, *infra*, refers to a case where a trial has ended in a complete acquittal and not to a case where the trial has ended in a conviction (say for culpable homicide or grievous hurt when charged for murder), but where the Court has wrongly applied the law or has wrongly found some of the facts not proved and has, in consequence, held that the conviction should be under some section of the Code other than the section properly applicable, as any other construction would be inconsistent with the power to alter the "finding" given to the Court as a Court of revision by virtue of its power to exercise the power conferred on a Court of appeal by this clause. The terms of a statute should not be so construed as to involve an inconsistency between its different parts, 37 M. 119 at 123, 124. Where a prisoner appeals and the High Court takes action under S. 499 *infra* it has power to alter an acquittal of murder into a conviction thereof because in such a case the High Court will be acting under this section and S. 499 *supra*, 1 Rang. 435 at 435 following 37 M. 119 and distinguishing 44 A. 332 on the ground that in the latter case there was no appeal by the accused and the High Court was merely acting in revision but the Madras High Court has recently *dissented* from 37 M. 119 and followed 44 A. 332. See 23 L.W. (Sh. n.) 6 ; 2 Pat. 708 at 711. The finding which an appellate Court may alter under this clause may relate either to an offence with which the accused is apparently charged in the lower Court or to one of which he might be convicted under Ss. 237 and 238 *supra* without a distinct charge. Abetment of an offence is not a minor offence and it can come under S. 237 only if there is no element in the abetment which is not included in the charge and therefore an appellate Court has no power to convict an appellant of abetment of the offence when acquitting him on the main charge and such a conviction is illegal, 27 Cr. L.J. 1118-97 Ind. Cas. 430. In cases not falling under Ss. 237 and 238, *supra* the accused cannot be convicted of an offence with which he was not charged in the lower Court, where however he has been charged and the lower Court has recorded a finding of acquittal on such charge, the appellate Court can alter the finding and there is obviously no injustice in doing so, 35 M. 243 at 243-24 M. 543 ; 16 A.L.J. 918-20 Cr. L.J. 22-48 Ind. Cas. 502-27 Cr. L.J. 901-96 Ind. Cas. 213-33 M. 264. See also 23 C. 975 ; 27 C. 172 ; 34 C. 325 ; 41 C. 749 ; but there is only one restriction on the powers of the appellate Court (except the High Court) it cannot enhance the sentence under appeal, 23 C. 975 ; 15 A. 20 ; Weir II, 485 ; alteration will be permissible only so far as it affects the portion of the order adverse to the accused and cannot include the direction of inquiry into new and distinct matter which had hitherto been neglected, 2 Cr. L. Rev. 85 at 88. An appellate Court is not competent to alter a charge under S. 376, I.P.O., into one under S. 366, I.P.O., as the charge under the latter section involves different elements and different questions of fact. In such a case the appellate Court is not entitled to call upon the accused to plead to the charge, examine him, allow him to adduce evidence and then convict him. The proper procedure is to order a re-trial, 3 Rang. 68. See also 23 A.L.J. 924-26 Cr. L.J. 1494-90 Ind. Cas. 450. The offence must be one for which the accused was charged or might have been charged in the trial, and when setting aside a conviction for murder on appeal, the High Court cannot alter the conviction to one of dishonestly receiving stolen property as the accused was never charged with that offence and it was not a cognate offence, 20 A. 107. The appellate Court is not empowered to alter the conviction so as to find the accused guilty of a more serious charge than that with which he was charged and tried as such a course would be improper and unfair, 6 C.L.R. 427 ; 25 C. 863. If the accused has been prejudiced by the omission to prove the altered charge and if the defence might have been different had the altered charge been framed in the first Court the appellate Court should not exercise its power to alter the finding, 30 C. 288 ; (1916) M.W.N. 287-20 Cr. L.J. 780-53 Ind. Cas. 620. The appellate Court cannot alter the finding of the lower Court to hold the appellant guilty of an offence of which he has been acquitted by that Court maintaining the sentence, 23 C. 975 ; 27 C. 172 ; Weir II, 415 ; 3 Pat. L.J. 855 ; 41 C. 350. But see 26 M. 478. nor can the appellate Court convict the accused of an offence which the first Court was not competent to try, 7 A. 414 (F.B.), similarly where the two offences are entirely of a different character and in making his defence on the first charge the accused

could not be regarded as pleading to the altered charge, the appellate Court should not convict the accused under this clause, 3 C.W.N. 367. Where the two charges (alteration from S. 376 to S. 366, I.P.C.) involve different elements and different questions of facts, the power of altering the finding should not be exercised, 3 Bom. L.R. 130. Where the appellate Court finds a different common object for an unlawful assembly from that charged, it amounts to a different finding of fact from that to which the accused were called upon to plead and to defend themselves at the trial, 27 C. 990; 33 C. 295. A conviction cannot be altered from S. 147 to S. 323, I.P.C., where there was no charge under the latter section and the common object charged did not specify that it was to cause hurt, 38 C. 293. A conviction under Ss. 147 and 323, I.P.C. cannot be altered on appeal into one under S. 160, I.P.C., without a proper charge being framed, and the accused tried again on the latter charge. It is not a case where an accused who is charged with a major offence is convicted of a minor offence when the major offence is not proved. The offence under S. 160, I.P.C., is different from those under Ss. 147 and 323, I.P.C., for under the former section, to establish an offence of affray it must be shown that the fight took place in a public place and that there was a disturbance of the public peace, 47 M. 61 where 19 A.L.J. 487 is not followed, See 30 C.W.N. 528—28 Cr. L.J. 1018—87 Ind. Cas. 842 where 30 C. 288 and 18 C.W.N. 1274, are followed. An appellate Court cannot so alter a charge as to make it necessary for an accused person to meet an absolutely different case from that charged in the lower Court, 23 A.L.J. 924. An appellate Court cannot alter a finding into one of abetment of the offence for which the appellant has been convicted, 33 M. 264; 11 B.H.C.R. 230, see also 15 L.W. 883—(1922) M.W.N. 482; 1921 Pat. 95; 13 Cr. L.J. 203 and 223; 25 Bom. L.R. 328—25 Cr. L.J. 1138—81 Ind. Cas. 951; 25 Cr. L.J. 1292. Nor can an appellate Court alter a conviction under S. 359, I.P.C., to one under S. 189, I.P.C., (1912) M.W.N. 1110. A Sessions Judge when upholding the conviction and sentence of the first Court has no power to set aside the acquittal for some other offence which is not a case of altering the conviction within this section, 37 C.L.J. 409. It is not a proper way of dealing with a case on appeal under this clause by convicting the accused for an offence which did not form the subject-matter of the complaint more particularly when the appellate Court has found that all the other matters complained of were either false or unproved, 3 C.W.N. 296. The appellate Court under this clause has power to alter the finding in order to legalise the sentence passed by the Court of first instance, 3 Cr. L.J. 48.

REDUCE THE SENTENCE.—When the Court of first instance had no jurisdiction to try the case the appellate Court when hearing an appeal from the conviction could not proceed with the appeal on the merits, with a view that in the event of its deciding that the offence has been made out to the reduction of the sentence passed on the accused by the Magistrate to one which the Magistrate was competent to pass under the Code. The only course left open to the appellate Court in such a case is to set aside the conviction and sentence and to send back the case for fresh disposal according to law, 4 A. 141. When the Court of first instance convicts a person for two offences but passes only a single sentence for both the offences, the appellate Court when acquitting the accused of one of the offences is bound to reduce the sentence and cannot maintain the sentence in its entirety which amounts to an enhancement of sentence. If the appellate Court thinks in such a case the sentence ought not to be reduced it should refer the matter to the High Court for enhancement, 30 M. 48; 22 B. 760; 24 C. 316; Weir II, 487 A.; 8 M.L.T. 117—11 Cr. L.J. 483—7 Ind. Cas. 415.

ALTER THE NATURE OF THE SENTENCE BUT NOT SO AS TO ENHANCE THE SAME.—As a general rule, an appellate Court has no power to enhance the sentence in appeal. The High Court alone in the exercise of its revisional jurisdiction is empowered to enhance the sentence, altering a sentence of fine into one of imprisonment is not permitted by this section, as such a course is an enhancement of sentence, 18 A. 301; 18 B. 751. It is impossible to lay down any general rule to determine what is or what is not an enhancement of sentence when only a portion of the sentence is altered to a punishment of lesser degree of severity, 27 C. 173. In a criminal appeal it is desirable that the High Court should first deal with the appeal on its merits and then it might consider or not whether a notice to enhance the sentence should be issued under S. 499, *infra*, 49 B. 350. The question whether the sentence has been enhanced by the appellate Court is a question of fact in each particular case; 23 A.

497. In each case the Court has to consider what is the effect of the alteration. Where the appellate Court altered a conviction of one month's imprisonment and a fine of rupees five into one of three days, imprisonment and a fine of rupees, one hundred and in default of payment of fine to a further term of one month's imprisonment, it was held that in the absence of any evidence that the accused was unable to pay the fine or regarded the sentence passed on appeal as more severe, it could not be said that the sentence had been enhanced, 36 A. 433, but the Madras High Court held in 30 M. 103 (F.B.) that when the aggregate amount of imprisonment which the accused might have to undergo even in default of payment of fine does not exceed the total amount of imprisonment which the accused might have to undergo under the order of the trying Magistrate, there was no enhancement of sentence. See also 23 B. 439, but these decisions, it was pointed out in 35 A. 485, overlooked the fact that a sentence of a fine is not wiped out by serving the alternative sentence of imprisonment but is still liable to be enforced under the process of Court. But the new proviso added to sub-section (1) of S. 386 *surpa* says that if the offender had undergone the whole of such imprisonment in default, no Court shall issue a warrant for the levy of the fine unless for special reasons, and therefore the chief reason given in 36 A. 433 does not hold good. A sentence of fine is always considered lighter than a sentence of imprisonment, 23 B. 439. The power of appellate Court to alter sentence must be measured by those of the trial Court. When on appeal from conviction by a second-class Magistrate of three months' imprisonment, the appellate Court altered the sentence to one of rupees four hundred fine, such alteration was held illegal, 45 A. 594; 12 Cr. L.J. 444; 25 Cr. L.J. 1186=82 Ind. Cas. 50. The imposition of solitary confinement is an enhancement even though the sentence is reduced, 1887 A.W.N. 170. Alteration of a sentence of two months imprisonment plus a fine of rupees fifty or in default one month's further imprisonment to six weeks' imprisonment and fine of rupees two hundred or in default to further imprisonment for six weeks is an enhancement. The alteration means that while the original sentence was practically three months and rupees fifty fine, the altered sentence is equal to three months and rupees two hundred fine, 27 Cr. L.J. 812=95 Ind. Cas. 476. Whipping is generally looked upon as a more degrading punishment than imprisonment, but it does not necessarily follow that the substitution of rigorous imprisonment for whipping would not under any circumstances amount to an enhancement. A poor wretch who has a large family to support might prefer to be left off with a few stripes instead of being incarcerated in jail for any lengthened period of time, but the Court is bound to show satisfactorily that it is not really enhancing before it undertakes to substitute the one punishment for the other without his consent. The Legislature has not supplied us with any *data* from which the comparative severity of the two sentences can be determined and it is therefore impossible to say how many stripes would be equivalent to a sentence of rigorous imprisonment for a given period of time. There is no legal or rational standard of comparison of any kind whatever, and, in the absence of such a standard, the Court has no power to take it for granted that a sentence of twenty stripes is equivalent to one of rigorous imprisonment for three months, 6 B.L.R. Appx. 25 at 26-27. An appellate Court has no power to alter the sentence of an accused who has not appealed and whose sentence is not open to appeal or to revise it, 8 M.H.C.R. (Appx.) vii. An appellate Court when hearing an appeal by some of the accused cannot pass any order with regard to an accused who has not appealed. The only course open to it if it is of opinion that the lower Court's judgment or order should be varied, altered or set aside in favour of one who has not appealed is to refer the case to the High Court under S. 438, *infra*.

An order by the appellate Court as to payment of costs under S. 31 of the Court Fees Act is not an enhancement as it forms no part of the penalty or sentence passed in the case, 29 M. 188, and it was held in 31 M. 547 that the Appellate Court is not competent in an appeal from a conviction to set aside an order as to payment of costs made under S. 31 of the Court Fees Act.

SUBJECT TO THE PROVISIONS OF S. 105 (3).—This provision empowering the appellate Court to direct the accused to furnish security for keeping the peace when confirming the conviction was introduced in the Code of 1898 and such an order does not amount to an enhancement of sentence. The appellate Court must find the accused guilty of an

offence specified in S. 106, *supra*, 29 C. 393. See S. 415 *infra* which provides the addition of an order directing a convicted person to find security to keep the peace does not make the sentence passed appealable, if the sentence is not otherwise appealable as such an order is evidently thought to be no part of the sentence passed.

SUB-SECTION (1) (d); CONSEQUENTIAL OR INCIDENTAL ORDERS.—This clause was introduced for the first time in the Code of 1898. It empowers an appellate Court to make any consequential or incidental order that may be just or proper; but it does not empower the appellate Court to make any order which may be held to have some sort of connection with the appeal before it, which it may think just or proper. For example power to excuse delay in the presentation of an appeal is not a consequential or incidental order. The application of this section must be taken as legitimate only after the preliminary stages indicated in Ss. 421 and 422, *supra*, have been passed, *i.e.*, after the appeal has been admitted and after the notice referred to in S. 422, *supra* has been given, 24 Cr. L.J. 89-71. Ind. Cas. 317. The expression "makes any incidental or consequential order" cannot be considered so liberally as to embrace any and every ancillary order which is capable of being described as incidental or consequential. Otherwise an appellate Court, affirming, for instance, a conviction for kidnapping a woman, might add and enforce a direction that the offender should pay her by way of maintenance a monthly allowance. This can hardly be. Orders within the purview of this provision must fall under one or other of two heads: (i) orders which follow as a matter of course, being necessary complements to the main order passed, without which the latter would be incomplete or ineffective, *e.g.*, directions as to refund of fines from acquitted appellants, (ii) orders which though ancillary in character require more than the support of the criminal Court's inherent jurisdiction and could not be passed without express authority, *e.g.*, an order for compensation for having preferred a false and vexatious complaint under S. 250, *supra*, 39 C. 137 (F.B.) at 181-182. The award of costs cannot be regarded as incidental or consequential to the disposal of a revision petition against an order under S. 145, *supra* within the meaning of this sub-section, because it does not necessarily follow from an order passed in revision, 48 M. 262 (F.B.) following 39 C. 137. Appointing a receiver pending a criminal revision case against an order under S. 145, *supra* cannot be said to be an incidental or consequential order under this sub-section, 49 M. L. J. 593-22 L.W. 723-(1925) M.W.N. 773-27 Cr. L.J. 126-31 Ind. Cas. 702. An appellate Court has power under this clause to set aside an order requiring security to keep the peace made by the Court of first instance as an incidental order even when upholding the conviction, 30 C. 101. When the conviction is set aside the bond taken becomes void, S. 106 (2). It is a little curious that S. 106 (3) speaks of the power of the appellate Court to pass an order under this section when hearing an appeal, but makes no mention of the power to set aside such an order passed by the Court of first instance. An appellate Court is not competent to pass an order under S. 250, *supra* when setting aside a conviction. The words "the Magistrate by whom the case is heard" occurring in that section cannot refer to an appellate Court but has reference only to an original Court, 39 C. 137; 28 A. 525. Orders for restoration of property under Ss. 517 to 521, *infra* are consequential or incidental orders within the clause, 36 C. 44; 27 A. 315; 18 C.W.N. 939 at 962. And this power is now expressly given by clause (3) of S. 522, *infra* and the decisions in, 39 C. 1080 and 137, which took a different view are no longer law. The appellate Court when hearing an appeal from a conviction is competent under this clause to suspend the sentence passed by the lower Court and in lieu thereof make an order under S. 552, *infra* provided it is satisfied that the case is a fit one to be dealt with under that section, 24 A. 306; 29 M. 567; 2 Bom. L.R. 817. An order for confiscation under the Indian Forest Act, is not within this clause and an appellate Court cannot pass an order for confiscation, 27 C. 450; 4 A. 417. Under this clause the High Court has no power to direct a subordinate Court to expunge or otherwise deal with certain passages appearing in a judgment of the lower Court, Weir JJ, 534. The making of an order under S. 31 of the Court Fees Act by the appellate Court comes within this clause and does not ordinarily amount to an enhancement of sentence, and such an order does not form part of the sentence, though the amount is recoverable as if it were a fine, (1924) M.W.N. 489. An erroneous order under S. 31 of the Court Fees Act directing the accused to pay costs as to Court fee stamps, the offence being not a cognizable one, can be

rectified by the appellate Court if no appeal lies, by the High Court in revision, 25 Cr. L.J. 568-81 Ind. Cas. 86.

SUB-SECTION (2).—This sub-section deals with appeals from the verdict of jury. The High Court is not entitled to alter or reverse the verdict of a jury unless it is of opinion that the verdict is erroneous for reasons set forth in this sub-section, 32 M. 179, but the exercise of the powers by the High Court should be used only sparingly, 10 Bom. L.R. 555.

UNLESS IT IS OF OPINION THAT SUCH VERDICT IS ERRONEOUS.—The term "verdict" means the entire verdict on all the charges framed in the course of the trial for various offences as provided by S. 236, *supra*, and is not limited to a verdict on a particular charge on which the accused is convicted, and he has appealed against such conviction, 22 C. 377; 1 Cr. L.J. 932. The word "erroneous" is not to be read as meaning wrong on the facts. It must rather be read in connection with the words that follow as meaning that the verdict has been vitiated and rendered bad or defective by reason of a misdirection or a misunderstanding of the law. The appellate Court cannot reverse the verdict of a jury unless there is any misdirection by the Judge or any misunderstanding on the part of the jury of the law as laid down by him. Then only can the verdict be said to be tainted with error in the process by which it has been arrived at. It throws upon the appellate Court the duty of ascertaining whether the process or method which the Judge directed the jury to follow as to the acceptance or disregarding the evidence or as to the view taken of the law was erroneous on any material point, but not the duty of determining for itself whether the verdict, as a conclusion of fact was right or wrong, 21 C. 955 at 977. To justify the reversal of a unanimous verdict of a jury on the ground of misdirection it must be shown that the verdict has occasioned a failure of justice, that the verdict was due to misdirection, and that apart from this the jury would not have come to the same conclusion, 24 Cr. L.J. 143-71 Ind. Cas. 367. In the absence of any provision in the Indian Statute Law, the English rule of repugnancy or contradiction on the face of the record in the verdict of a jury, is not by itself sufficient to ensure the quashing of a conviction and the technicalities which are borrowed from English law and founded on ideas as to the sacred character of the verdict of a jury whose findings of fact are unknown cannot be imported so as to give such a character which by the express provisions of law does not attach to the jury verdicts in India, 41 C. 390 *followed in* 32 C. 112; 41 C. 734 at 761. The appellate Court is not bound to go through the facts and find for itself whether the verdict is actually erroneous on fact, 25 C. 230. For the proper exercise of the function by the High Court the Judge should record his heads of charge to the jury and should not merely write a judgment as it would be impossible to say from it how the case has been left for the decision of the jury, *Weir II*, 499.

OWING TO A MISDIRECTION BY THE JUDGE.—S. 297, *supra* enacts that the Judge shall sum up the evidence for the prosecution and defence, and lay down the law for the guidance of the jury. The word "misdirection" thus includes not only an error in laying down the law by which the jury are to be guided but also an error in summing up the evidence; for a defective summing up of the evidence is as much an infringement of S. 297 as an error in laying down the law and is a mistake of law. A non-direction may amount to misdirection if it is on a point of prime importance telling in favour of the accused, 27 B. 634 at 651; 4 Bom. L.R. 683. The following omissions were held to amount to misdirection:—(1) omission to direct jury to give benefit of doubt to the accused, 1 M.L.T. 350; (2) omission to call specific attention to the defence evidence, 35 C. 531; 18 M.L.J. 631; 4 C.W.N. 195; 11 C. 10; (3) omission to state the defence of each accused, 30 C. 822; 4 C.W.N. 198; 7 C. 42; 29 C. 782; 39 M. 44; 18 M.L.J. 250; (4) omission to state that it was unsafe to convict on retracted confession unless corroborated by independent evidence, *Weir II*, 501 and 510; 21 M. 83; 28 M. 88; 18 M.L.J. 250; (5) omission to point out essential elements of the offence charged, 1 C.W.N. 301; 25 C. 711; 35 C. 281; *Weir II*, 493 and 519. Wrongly placing the onus of proof on the accused by taking an erroneous view of the law is a misdirection, 4 C.W.N. 576. An expression of opinion by the Judge on various questions of fact without telling the jury that they are the sole judges of fact is a misdirection, 35 C. 531; similarly asking the jury to consider the effect of a document not proved is a misdirection, 26 C. 49; 27 B. 626. So also

telling the jury that they may use as evidence against the accused a statement made behind his back and not tested by cross-examination, 18 M.L.J. 66 and 280.

Where a misdirection has been made out, the real test for applying S. 537, *infra*, is whether the accused has been really prejudiced by such misdirection and when there is prejudice, a re-trial will be ordered, 5 B.H.C.R. (Cr. Ca.) 88; 6 B.H.C.R. (Cr. Ca.) 47; 10 B.H.C.R. 397; 18 M.L.J. 86 and 280; 5 Bom. L.R. 207; 4 C.W.N. 576; 13 C.W.N. 493; 27 Cr. L.J. 785—95 Ind. Cas. 385. Where there was a misjoinder of charges and the charge to the jury did not set out the facts of the case and the nature of the evidence for the prosecution and defence, a re-trial was ordered as the High Court was of opinion that the case ought to be investigated by a jury, 30 C. 822; but if the Court is of opinion that the evidence would not warrant a conviction, it would be useless to send back the case for a new trial in order that a new jury may have the opportunity of convicting on the evidence upon a proper summing up, 29 C. 782; 5 W.R. (Cr.) 80. When a verdict is set aside on the ground of misdirection, as a matter of practice the proper course is not to acquit the accused but to direct a re-trial. It is only in special circumstances, as where the accused has been harassed by repeated trials or where the evidence is so clearly insufficient or incredible that no jury could reasonably convict, that an appellate Court would be justified in acquitting the accused on the ground of misdirection, 27 Cr. L.J. 785—95 Ind. Cas. 385.

OR TO A MISUNDERSTANDING ON THE PART OF JURY OF THE LAW AS LAID DOWN BY THE JUDGE.—It is submitted that it is not clear how such misunderstanding on the part of the jury as to the law laid down by the Judge is to be ascertained. When on account of the jury misunderstanding the law, a wrong verdict is delivered, it can be corrected only by the Judge disagreeing with the jury and referring the case to the High Court under S. 307, *supra*, which alone can deal with the matter effectively, 28 B. 412.

SUB-SECTION (2) does not in any way affect the power of the Court to deal with the sentence. It only affects the power to “reverse or alter” where the Court is of opinion that the verdict is erroneous owing to misdirection or misunderstanding of the law by the jury. Where the verdict of the jury is set aside by the High Court as illegal, a fresh trial will be ordered, 46 C. 213. This sub-section only applies if it becomes necessary to consider whether the verdict of the jury was erroneous owing to a misdirection by the Judge. It does not narrow down S. 418, *supra*, which allows an appeal in a jury trial on a question of law. It there has been no trial in fact because such trial was illegal it must be set aside for that reason only and no question arises as regards any misdirection affecting the jury’s verdict. This is the law in England and this has been consistently followed in India, S. 537 (c) is clear on this point and S. 537 cannot apply to provisions of the law as to empanelling of a jury when they are violated. 27 Cr. L.J. 783—95 Ind. Cas. 393 where 25 A. 211 is followed.

424. The rules contained in Chapter XXVI as to the judgment of
 Judgments of sub-ordinate Appellate Courts, a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any Appellate Court other than a High Court :

Provided that, unless the Appellate Court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered.

SCOPE OF THE SECTION.—The provisions of this section read with S. 367 are imperative and should be complied with in such a manner as to indicate clearly that the evidence has been gone into and tested, extrinsically as well as intrinsically and the appellate Court has arrived at an independent opinion for itself. Its judgment should not appear to be in the nature of a supplement to the judgment of the trial Court but should be adequate in itself to enable the High Court to dispose of the petition in revision without the necessity of going through the trial record, 1 Rang. 801; 35 C. 133; 25 Cr. L.J. 413—76 Ind. Cas. 177; 25 Cr. L.J. 236—76 Ind. Cas. 710. This section lays down what an appellate judgment ought to contain.

The rules laid down in Chapter XXVI as to judgments of Courts of original jurisdiction are made applicable so far as may be practicable to the judgment of an appellate Court other than the High Court.

RULES CONTAINED IN CHAPTER XXVI.—See Ss. 366 to 375 which deal with judgments of the trial Court.

SO FAR AS MAY BE PRACTICABLE.—It is rather difficult to lay down rules with precision as to the particulars which an appellate judgment should contain so as to comply with the requirements of law. See 19 A. 506.

JUDGMENT OF APPELLATE COURT.—This section read with S. 367 lays down what the contents of a judgment of a subordinate appellate Court should be where the law allows an appeal, the appellant is entitled to have from the Court of appeal, that has to deal with it, its explicit opinion on the questions of fact involved in the case and the Court of appeal should take its own view of the evidence after perusing the record. The judgment of the Court of appeal should be such that the High Court as a Court of revision, might on looking into the judgment, be in a position to judge for itself what the case was and how the Court of appeal considered the evidence as bearing on the guilt or innocence of the individual accused before the latter affirmed the judgment of the trial Court, 39 C.L.J. 117=25 Cr. L.J. 1044=81 Ind. Cas. 820; 25 Cr. L.J. 901=81 Ind. Cas. 437. No judgment which purports to dispose of an appeal under the preceding section is a legal judgment unless it contains at least (i) the point or points for determination raised by the memorandum of appeal; (ii) the decision thereon; and (iii) reasons for the decision, 18 Cr. L.J. 559=15 Ind. Cas. 975; 14 Cr. L.J. 570=21 Ind. Cas. 170; 37 C. 194; 24 A.L.J. 318; 17 Bom. L.R. 1085; 27 Cr. L.J. 343=92 Ind. Cas. 855. The judgment should show on the face of it that the Appellate Court has applied its mind to the consideration of the evidence on the record, and the pleas raised by the appellant, both in the Court below and in his memorandum of appeal, 38 A. 393 at 394. An appellate judgment cannot be read in connection with and as supplementary to the judgment of the Court of first instance. It must be quite independent and stand by itself. The judgment should show on the face of it that the case of each accused has been considered and reasons should be given to indicate that the Court directed judicial attention to the case of each accused, 35 C. 138. In the case of a joint trial, the judgment of an appellate Court, dealing with the case of several accused should show on the face of it that the case of each accused has been taken into consideration and should state reasons as far as may be necessary, to show, that the appellate Court had devoted judicial attention to the case of each accused. 39 C.L.J. 117=35 C. 138; 22 C. 241; 16 Cr. L.J. 496=29 Ind. Cas. 326. An appellate judgment must be a self-contained document and cannot be read in connection with and as supplementary to the judgment of the trial Court. It must indicate that the Court had applied its mind to the case of each of the accused and to the defence set up by him. 25 Cr. L.J. 113=76 Ind. Cas. 177; 13 Cr. L.J. 559; 23 Cr. L.J. 9; 2 Cr. L. Rev. 91; 35 C. 138; 20 C.W.N. 1296; (1918) M.W.N. 129. Where there are several accused and the judgment of the Magistrate though it deals fairly with the case of the prosecution as a whole does not give satisfactory reasons for accepting it against individual accused separately, the judgment ought to be set aside and the Magistrate directed to restore the appeal to file and dispose of it according to law, after hearing fresh arguments as to the complicity of each individual accused, 2 L.W. 958=6 Cr. L. Rev. 438=16 Cr. L.J. 735=31 Ind. Cas. 735. See also 6 Cr. L. Rev. 434=29 Ind. Cas. 336; 22 C. 241. The provisions of this section read with S. 367 (6), *supra*, are applicable to orders under S. 123 (3) in security cases, 37 C. 91. It is the duty of the appellate Court in every case to examine for itself the evidence and to give the accused person the benefit of a reasonable doubt which it may entertain after such examination and it is also its duty to arrive at an independent opinion as to the weight of evidence, Weir II, 535 and 536; 22 C. 241. It is the duty of the appellate Court to notice briefly but clearly the objections urged on appeal and how they are disposed of besides stating the points for determination, the decisions thereon and the reasons for such decision, 32 C. 178; 7 M.L.T. 182. It is difficult to lay down any rule with precision in order to determine what judgment of an appellate Court complies with and what judgment does not comply with the requirements of this Code. The object, no doubt, of the

Legislature in formulating rules as to judgments was partly to insure that a Criminal Court should consider the case before it, in its different bearings and should on such consideration arrive at definite conclusions and also another object may have been, that the judgment should show that in fact the Criminal Court had considered the evidence in a case of first instance or in a case of appeal and had found, in case of a conviction, that the facts proved to the satisfaction of the Court brought an offence home to the person whom the Court convicted, 19 A. 508 (F.B.) followed in 24 A.L.J. 318; 10 A.L.J. 335. When an appellate Magistrate after hearing the parties passed the order "appeal dismissed under S. 423, C. Cr. P." it was held that the judgment did not fulfil the conditions of this section and S. 537, *infra* could not cure such a defect as it was not a case of omission or irregularity in the judgment but the absence of a judgment, 17 Bom. L.R. 881. A recital of facts preceding an offence without a discussion of the evidence and without considering the essential points as to the ownership of the thing stolen and the possibility of the accused having acted in good faith does not satisfy the requirements of this section, (1912) M.W.N. 831—12 M.L.T. 335—13 Cr. L.J. 712—16 Ind. Cas. 520. When an appellate judgment merely stated "after reading the evidence and hearing the learned Counsel for the appellant and the learned Government Pleader, I am convinced the Deputy Magistrate has decided the case rightly", it was held that it was not a proper judgment, 23 C. 420. For similar cases see 11 C. 448; 13 C. 110; 1 C.W.N. 169; Weir II, 536; 1 Bom. L.R. 428; 15 B. 11. A humorous judgment is not necessarily bad, 11 Ind. Cas. 1000. When there is no proper judgment as required by this section the High Court will direct a re-hearing of the appeal by the appellate Court, 16 B. 11; 35 C. 138; 7 C.W.N. 30; 11 C. 449; 13 C. 110; 22 C. 241. Where in a criminal appeal there are a number of appellants it is the duty of the Court to consider the case of each separately having regard to the charges against him, the special evidence directed against him, and his particular defenses if any, and omission so to consider the case against each individual accused separately would vitiate the judgment, 48 M.L.J. 504—26 Cr. L.J. 1089—68 Ind. Cas. 177 where 2 L.W. 938 and 1918 M.W.N. 129 are followed. When an appellate Court has signed the judgment it has no power to re-hear the appeal even in cases where a pleader appearing for the appellant was not heard and he requested the Court for an opportunity of being heard, [1928] Patna 237.

OTHER THAN THE HIGH COURT.—The Chartered High Courts are not governed by the rules contained in Chapter XXVI and by the provisions of this section as to the recording of judgments.

THE PROVISIO, enacts that the accused shall not be brought up or required to attend to hear judgment delivered unless the Court otherwise directs.

425. (1) Whenever a case is decided on appeal by the High Court under this Chapter, it shall certify its judgment or order to the Court by which the finding, sentence or order appealed against was recorded or passed. If the finding, sentence or order was recorded or passed by a Magistrate other than the District Magistrate, the certificate shall be sent through the District Magistrate.

(2) The Court to which the High Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or order of the High Court, and, if necessary, the record shall be amended in accordance therewith.

This section provides that in cases decided by the High Court under this Chapter, the High Court shall certify its judgment or order to the lower Court concerned and the lower Court shall thereupon make such orders as are conformable to the judgment of the High Court, and, if necessary, the record shall be amended in accordance with the judgment or order of the High Court.

426. (1) Pending any appeal by a convicted person, the appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond.

Suspension of sentence pending appeal. Release of appellant on bail.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.

(3) When the appellant is ultimately sentenced to imprisonment, penal servitude or transportation, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

SCOPE OF THE SECTION.—This section empowers the High Court and the appellate Court to order the suspension of sentence pending an appeal and to release the appellant on bail if he is in confinement. When bail is granted by the High Court pending an appeal and the Magistrate receives reliable information thereof such as by a telegram sent by accused's Counsel, the Magistrate is bound to act on it immediately though he had not received the High Court's order. In the particular case their Lordships of the High Court further remarked that they must lay down most stringently that all bail orders must be issued on the very day on which they are pronounced by the Judges irrespective of the written order on record. 38 C. 293 where 2 C.W.N. 498 is followed. When an appellate court or a court hearing a revision admits the appellant or the applicant to bail, or orders that a fine should not be paid up until the disposal of the case, it thereby orders suspension of sentence, 22 A.L.J. 1103. A Sessions Judge has no authority to suspend the sentence in the absence of an appeal to him, 5 M.H.C.R. (Appx.) 1. Nor has he authority to suspend his own sentence, 4 M.H.C.R. (Appx.) 1; 12 W.R. (Cr.) 47. When a Sessions Judge so suspended the operation of a sentence passed by a second class Magistrate, it was held that his action was illegal and that the time during which the sentence was so illegally suspended could not be excluded under this section in computing the term of the sentence even though the result of such illegality had been that the accused had escaped a considerable portion of the sentence of rigorous imprisonment passed on them. The High Court in setting aside the illegal order of the Sessions Judge has no power to enhance the punishment unless it was shown that the original sentence passed was inadequate, Weir II, 535. Under this section a Sessions Judge has no power to pass an order that the prisoner who had been tried, convicted and sentenced in due course of law by a subordinate Court should be treated as an under-trial prisoner pending the disposal of the appeal. An order for detention in the Reformatory School in lieu of a sentence of imprisonment passed on an accused person is not a sentence within the meaning of this section, and the order of the Sessions Judge purporting to suspend the sentence would not prevent the carrying out of the order of detention, 16 Cr. L.J. 184—27 Ind. Cas. 198. A Sessions Judge has power under S. 498, *infra*, to release a convicted person on bail whether an appeal has been preferred to him or not. When refusing bail the Sessions Judge may suspend the sentence of the appellant pending his appeal. 3 W.R. (Cr.) 57. Where an appellant is released on bail by the High Court pending an appeal thereto, the bond should be for the appearance of the appellant before the Magistrate and not for his appearance in the High Court to answer the charge. 1885 A.W.N. 44.

SUB-SECTION (2).—The High Court alone is empowered to suspend the sentence even though the appeal has been preferred by the convicted person to a Court subordinate thereto.

Of course S. 498 empowers the High Court in any case whether there be an appeal from conviction or not to direct that any person be released on bail. The power of the High Court to grant bail under this sub-section is undoubted, but it will only interfere with the discretion exercised by the Sessions Judge in refusing bail, if that discretion was manifestly wrong or if, in fact, no real discretion has been exercised. As pointed out in 37 C. 412, although the High Court has unfettered powers to grant bail, yet in exercising these powers, the High Court ought to have regard to the limitations imposed on lower Courts in this connection in the case of persons actually convicted the principle which will necessarily guide the Court in granting bail is whether there are reasonable grounds for believing that the applicants committed the offence in question. 27 Cr. L.J. 319—92 Ind. Cas. 703.

STAYING EXECUTION OF SENTENCE OF DEATH PENDING APPEAL TO PRIVY COUNCIL.—With regard to staying execution of the sentence of death, their Lordships of the Privy Council are unable to interfere. The Privy Council is not a Court of Criminal appeal. The tendering of advice to His Majesty as to the exercise of His Prerogative of Pardon is a matter for the Executive Government and is outside their Lordships province. It is, of course, open to the convicted person's advisers to notify to the Government of India that an appeal to the Privy Council is pending. The Government of India will no doubt give due weight to the fact and consider the circumstances. But their Lordships do not think it necessary to express any opinion as to whether the sentence ought to be suspended. 32 C. 739 at 741.

427. When an appeal is presented under section 417, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal, or admit him to bail.

Arrest of accused
in appeal from
acquittal.

This section provides that the High Court may issue a warrant for the arrest of the accused when an appeal against acquittal has been presented to it under S. 417, *supra*. It is generally undesirable that the prisoner's fate should be discussed while he remained at large more especially in capital cases where the Government should apply for an arrest of the accused under this section, 9 A. 528 at 529; 1 C. 231. The admission of an appeal under S. 417, *supra*, has the effect of revising the proceedings against the accused who has been acquitted and the arrest of such person pending the appeal could be ordered under this section, 2 A. 340 (F.B.). The accused when arrested and brought before the High Court or any Court subordinate to it may be committed to prison pending the disposal of the appeal or he may be released on bail. When the person so arrested is convicted by the High Court the sentence will run not from the date of arrest but only from the actual date of committal to jail after conviction, 6 C.L.R. 349 at 352.

428. (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

Appellate Court
may take further
evidence or direct it
to be taken.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken; but such evidence shall not be taken in the presence of jurors or assessors.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV as if it were an inquiry.

SCOPE AND OBJECT OF THE SECTION.—The object of the section is to prevent a guilty man's escape through some carelessness or ignorance of the Magistrate or the vindication of a wrongfully accused person's innocence where through carelessness or ignorance he has omitted to record something to elucidate the truth, 18 W.R. (Cr.) 31; 26 Cr. L.J. 1171=88 Ind. Cas. 898. This section gives the appellate Court a wide discretion. All that is necessary is that an appellate Court when directing the taking of further evidence should record its reasons. The intention of the Legislature is to empower the appellate Court to see that justice is done between the prosecutor and the person prosecuted and if the appellate Court finds that certain evidence is necessary in order to enable it to give a correct finding it would be justified in taking action under this section, 7 Lah. 148. Where a Sessions Judge failed to exercise his discretion by bringing on record certain statements of witnesses before the committing Magistrate as evidence and the appellate Court on appeal is of opinion that those statements are material for the disposal of the appeal, the appellate Court under this section may direct the Sessions Judge to bring upon the record those statements of witnesses after giving notice to the accused as required by sub-section (3) of this section, 27 Cr. L.J. 813=95 Ind. Cas. 477. The powers conferred by this section on the appellate Court are not intended to be exercised in cases in which the prosecution having had ample opportunities to produce evidence have done so and that entire evidence falls short of sustaining the charge, 36 M. 437—*per Sundara Aiyar, J.* The discretion to be exercised by the appellate Court is not an arbitrary discretion, as is shown by the provision "it shall record its reasons," but it should not be exercised especially against the accused when the prosecution fails on the evidence on record, 42 M. 885—*per Sadasiva Aiyar, J.* It would not be creditable to the administration of justice that a conviction on a charge, if otherwise sustainable, should be upset owing to a misconception on the part of the prosecution as to the proper mode of proving a statutory requisite not affecting the merits, a misconception shared by the trial Court. The appellate Court when it has the statutory power to prevent such miscarriage by directing fresh evidence to be taken it should act under this section—*per Wallis, C.J.*, in 32 M. 888. This section does not empower the appellate Court to call for a fresh finding from the Subordinate Magistrate, 4 Cr. L. Rev. 272; 2 Cr. L. Rev. 347. The appellate Court will not, except in very exceptional circumstances, direct that further inquiry should be made or that additional evidence should be taken, 28 C.L.J. 473; 8 A. 217 at 221. This section does not empower the appellate Court so to act in a case where there is no evidence legally capable of sustaining the charge but contemplates a further inquiry by taking additional evidence to be directed by the appellate Court when the conviction by the lower Court has been based upon some evidence which might legally support it, but which, in the opinion of the appellate Court, is not quite satisfactory, 9 B.L.R. Appx. 81 at 82; 22 M.L.J. 73 at 82. This section does not empower an appellate Court to call for a fresh finding from the subordinate Court after taking further evidence and the appellate Court cannot act on such fresh finding, (1914) M.W. N. 778=16 Cr. L.J. 79=25 Ind. Cas. 671; 9 M.L.T. 406=10 Ind. Cas. 280; 1 Pat. L.J. 99; 3 C.L.J. 303. This section does not warrant an appellate Court sending a case to the police for investigation when the case has been originally taken cognizance of on a complaint to the Court, 1900 A.W.N. 130.

IN DEALING WITH ANY APPEAL UNDER THIS CHAPTER.—The power to take or call for further evidence given by this section is expressly limited to appeals under Chapter XXXI of the Code. This section allows additional evidence to be admitted in appeals against acquittals as well as in appeals against convictions although cases in which this power is exercised will naturally be rare, 25 M.L.J. 160,

THE APPELLATE COURT IF IT THINKS ADDITIONAL EVIDENCE TO BE NECESSARY.—This section requires that the appellate Court should consider additional evidence to be *necessary*. The word 'necessary' does not import that it should be possible to pronounce judgment without additional evidence. There is no restriction in the language of the section either as to the nature of the evidence or that it is to be taken for the prosecution only to be invoked when formal proof is necessary in the prosecution evidence and the power of the appellate Court is not necessarily restricted to order re-trial in such a case, 25 Cr. L.J. 401—77 Ind. Cas. 481. The language seems to indicate cases where there being already evidence on the record, the Court considers it to be unsatisfactory or where the evidence on record leaves the Court in such a state of doubt that it considers it *necessary* to enable it to decide the case to have further evidence. The *necessity* must be determined on the facts of each case, 22 M.L.J. 73; 18 Bom. L.R. 789. It is better to take action under this section when the appellate Court finds that certain witnesses, who ought to have been examined by the lower Court, have not been examined, 31 C. 710. To prevent a miscarriage of justice, the appellate Court should take action under this section to supply a defect in formal proof, 42 M. 885. This section does not apply to orders passed under S. 125 as they are neither appellate nor revisional, 20 Cr. L.J. 221—49 Ind. Cas. 781; 32 C. 948.

SHALL RECORD ITS REASONS.—The power cannot be exercised arbitrarily; the appellate Court is bound to record its reasons and when it failed to do so the conviction had was set aside, 8 M.L.T. 418; 8 M.L.T. 428—(1910) M.W.N. 829—11 Cr. L.J. 733. In 9 M.L.T. 408—10 Ind. Cas. 290 it was held that this was only an irregularity cured by S. 537, *infra*, but the conviction was set aside on another illegality which the Magistrate had committed.

MAY EITHER TAKE SUCH EVIDENCE ITSELF OR DIRECT IT TO BE TAKEN.—The appellate Court when dealing with an appeal may direct the additional evidence to be taken by the lower Court or may itself record such evidence, 6 C.L.J. 251 at 252. But if an appellate Court finds an imperative provision of law, *e.g.*, the examination of the accused under S. 342, *supra*, has not been complied with, the proper procedure is to set aside the conviction and sentence and remand the case to the trial Court to comply with the provisions of law and deal with the case on the merits, 40 C.L.J. 319—28 Cr. L.J. 313—84 Ind. Cas. 457; 51 C 933. An appellate Court should not refer to evidence which did not form part of the record of the proceedings before the trial Court, 8 M.L.T. 81—11 Cr. L.J. 221—6 Ind. Cas. 12. When on appeal from a conviction by a Deputy Magistrate the Sessions Court got additional evidence taken and on a consideration of such evidence confirmed the conviction and dismissed the appeal it was held that there was no further right of appeal, 27 C. 372.

SUB-SECTION (2).—The Court or Magistrate taking additional evidence is to merely certify such evidence to the appellate Court. The Court or Magistrate has no power to express any opinion on it or to record any finding or judgment which is the function of the appellate Court, 3 B.L.R. (Ap. Cr) 62, but the Court or Magistrate is competent to act under S. 479, *infra* if an offence against public justice as is described under S. 195, *supra* is committed by a witness whose evidence is on record, 6 B.L.R. 698 (F.B.)—15 W.R. (Cr.) 64.

SUB-SECTION (3).—Unless the appellate Court otherwise directs, the presence of the accused or his pleader is necessary when additional evidence is recorded. In 24 M. 523 the High Court took additional evidence in the absence of the accused when hearing appeal from a conviction had by the Sessions Court. Additional evidence under this section shall not be taken in the presence of the jurors or assessors. This is the only case where a Court of Sessions is authorised to record evidence in the absence of the jury or assessors. 15 A 136.

429. When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge of the same Court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Procedure where Judges of Court of Appeal are equally divided.

SCOPE OF THE SECTION.—Two points are worthy of note in connection with this section...*first*, that what is laid before another Judge is the case, and, *secondly*, that the judgment or order follows such opinion delivered by such Judge. When in a trial of two or more prisoners, with regard to one of whom, the Judges composing the Court of appeal are agreed in their opinions while as regards the other, the judges may be equally divided in opinion, in such a contingency it is quite possible to maintain the view that, upon a reasonable interpretation of the term "case," what has to be laid before another judge is the case of the prisoner as to whom the judges are equally divided in opinion. In a case where the Judges are equally divided in opinion upon the question of guilt of one accused person, though upon certain aspects of the case they may be agreed on their view, in such a contingency, what is laid before another Judge is not the point or points upon which the Judges are equally divided in opinion but the "case." This obviously means that, so far as a particular accused is concerned, the whole case is laid before the third Judge, and it is his duty to consider all the points involved, before he delivers his opinion upon the case. The judgment or order follows such opinion which need not necessarily be the opinion of the majority of the three Judges; for instance at the original hearing of the appeal one Judge may consider the prisoner not guilty, another Judge may consider him guilty under one section of the Indian Penal Code and liable to be punished in a certain way; the third Judge may find him guilty under a different section and pass such sentence as he thinks fit. It is this last opinion which prevails subject to the provisions of S. 377, *supra* in the case of confirmation of sentence of death, 38 C. 202 at 208-9; See also 27 M. 271.

EQUALLY DIVIDED IN OPINION.—The Judges may be equally divided in their opinions on a point of law or on the merits of the case. S. 36 of the Letters Patent which lays down that the opinion of the senior Judge will prevail has no application to a case falling under this section. Difference of opinion between Judges hearing a reference under section 307, *supra* will be governed by this section, 15 B. 452 at 475; 27 C. 501 and 892. S. 36 of the Letters Patent applies to a case under S. 107, Government of India Act, 21 Cr. L.J. 25-54 Ind. Cas. 169; see also 47 C. 438.

THE CASE SHALL BE LAID BEFORE ANOTHER JUDGE.—An amendment was proposed to hear the case before the two Judges who differed, with another Judge constituting a Bench of three Judges; but it was not accepted. The whole case is to be considered by a third Judge on all the points involved and it will be according to the opinion of such Judge the judgment will follow, 38 C. 202; 18 C.W.N. 18; 21 Cr. L.J. 547-56 Ind. Cas. 851, but the third Judge should not differ on point of agreement between the two differing Judges. The third Judge before whom the case is to be laid is not bound to hear the pleaders; the wording of the section is "*such hearing if any as he thinks fit*"; but as a matter of practice full arguments are heard especially in *Referred Trials*. Under this section, the third Judge before whom the case is laid is required to deliver his opinion and the judgment or order shall follow such opinion. That does not enable the Judge to refer the point involved in the case to a Full Bench. References to the Full Bench are made under the appellate side rules by a Division Bench and the third Judge sitting alone cannot be said to be a Division Bench, 29 C.W.N. 475-41 C.L.J. 357-28 Cr. L.J. 915-86 Ind. Cas. 279. The third Judge may, if he thinks fit, place the matter before the Chief Justice with a request to refer the case to a Full Bench.

Finality of orders on appeal.

430. 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.

A judgment can be said to be final when it cannot be set aside or interfered with by any Court or authority on appeal or otherwise, 12 C. 538. S. 417 deals with appeals against acquittal by Government and Chapter XXXII deals with reference and revision. Where a Sessions Judge wrongly dismissed an appeal as barred by limitation, but on discovering his error admitted the appeal and acquitted the accused it was held the acquittal was without jurisdiction, the first order dismissing the appeal being final and not open to review, 19 E.

432. A case which has been dismissed for default of appearance is final and cannot be re-opened, 10 C.L.J.'80; 44 A. 759; 4 B. 101, but a Court is not entitled to dismiss an appeal for default of appearance, 46 M. 382; 50 C 972; 50 B 673; 13 A 121; 27 C.W.N. 947. The power of the High Court to report any particular case to the Local Government when the High Court cannot interfere in appeal or revision, remains other remedies being barred by statute, 17 Cr L.J. 231=34 Ind. Cas. 647.

431. Every appeal under section 417 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.

Abatement of appeals,

SCOPE OF THE SECTION.—This section applies only to appeals and appeals by Government against acquittal under S. 417, *supra*, and they finally abate on the death of the accused. An appeal by a convicted person abates on his death and his legal representatives cannot continue the appeal, 2 B. 564. The exception is an appeal from a sentence of fine where the estate of the deceased is affected and there is no abatement in such case.

SHALL FINALLY ABATE ON DEATH OF ACCUSED.—In a case where two persons are convicted by a Court of Session for breach of trust and sentenced to rigorous imprisonment for one year and a fine of rupees one thousand and both appealed to the High Court, but during the pendency of the appeal one of the appellants died, the High Court reversed the conviction of the other appellants, and no order was passed in the case of the dead appellant. On an application by a nephew of the deceased appellant, for a reversal of his conviction, it was held, that the appeal had abated on the death of the appellant and the remedy of his representative was to apply to the Government, 19 B. 714; Ratanlal 707.

EXCEPT IN APPEALS FROM A SENTENCE OF FINE.—These words were introduced in the Code of 1898 to meet the decision in, 19 B. 714 which held that an appeal from a sentence of fine abates by the death of the appellant. In the case of a sentence of fine the appeal does not abate by reason of the death of the appellant because it is a matter which affects his estate. The object of this provision is obviously to prevent the estate of the deceased being damaged. The principle of this section applies to revisions also, but such application for revision will not abate on the death of the petitioner in cases of sentence of fine,

CHAPTER XXXII.

OF REFERENCE AND REVISION.

SCOPE OF THE CHAPTER.—The Court acting under this chapter of "Reference and Revision" is not bound to interfere. It has got a wide discretion. The expressions used are "if he thinks fit" in its discretion "may"; all of which denote that the Court is given a wide discretion in the matter which must be exercised with great circumspection in each individual case.

432. A Presidency Magistrate may, if he thinks fit, refer for the opinion of the High Court any question of law which arises in the hearing of any case pending before him, or may give judgment in any such case subject to the decision of the High Court on such reference and, pending such decision, may either commit the accused to jail, or release him on bail to appear for judgment when called upon.

Reference by Presidency Magistrate to High Court.

ANY PRESIDENCY MAGISTRATE.—This section deals with references by Presidency Magistrates to the High Court. Other Magistrates are not competent to refer questions of law which may arise before them for decision to the High Court,

MAY REFER ANY QUESTION OF LAW.—A reference can be made for the opinion of the High Court only on any question of law which arises in the hearing of the case pending before the Magistrate. He cannot make a reference under this section 'before the hearing of the case', 1 Bom L.R. 521, and except in a case where there is a valid reference under this section the High Court cannot and will not express an opinion upon any question unless it is brought before it by way of revision, 9 Cr. L.J. 248.—reference must be on a question of law only and the High Court will only deal with the particular point or points of law stated for its opinion but not with the facts of the case nor with any objection as to the validity of the proceedings referred, 33 C. 193 ; Ratanlal 539 and 538 and the point of law must arise at the hearing of the particular case and not before such hearing, 1 Bom.L.R. 521. On a reference by a Presidency Magistrate under this section it is for the prosecution to begin, 19 C. 350. The order of the High Court on a reference under this section is conclusive both as to the merits of the case and to the amount of punishment, 1890 A.W.N. 225.

433. (1) When a question has been so referred, the High Court shall pass such order thereon as it thinks fit, and shall cause a copy of such order to be sent to the Magistrate by whom the reference was made, who shall dispose of the case conformably to the said order.

Disposal of case according to decision of High Court.

Direction as to costs.

(2) The High Court may direct by whom the costs of such reference shall be paid.

This section provides for an order directing costs to be paid by a party, not usually, made in criminal cases. The word used is "may" and the Court has a discretion in the matter of awarding costs.

The High Court has no power to review an order passed by itself on a reference under this section, and where the Magistrate does not dispose of the case conformably to the Order of the High Court, the accused may bring up the matter on appeal against the decision of the Magistrate under S. 411, *supra*, Ratanlal 225.

434. (1) When any person has, in a trial before a Judges of a High Court consisting of more Judges than one and acting in the exercise of its original criminal jurisdiction, been convicted of an offence, the Judge, if he thinks fit, may reserve and refer for the decision of a Court consisting of two or more Judges of such Court any question of law which has arisen in the course of the trial of such person, and the determination of which would affect the event of the trial.

Power to reserve questions arising in original jurisdiction of High Court.

Procedure when question reserved.

(2) If the Judge reserves any such question, the person convicted shall, pending the decision thereon, be remanded to jail, or, if the Judge thinks fit, be admitted to bail ; and the High Court shall have power to review the case or such part of it as may be necessary, and finally determine such question, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment or order as the High Court thinks fit.

SCOPE OF THE SECTION.—It is discretionary with a Judge to refer for decision any question of law. He is not bound to refer; the words 'if he thinks fit, may reserve and refer' make this clear. The judge cannot postpone conviction and sentence. The High Court under sub-section (2) is empowered to review the case and alter the sentence passed and to pass such judgment or order as it thinks fit such as convicting or acquitting the accused or ordering a re-trial.

MAY RESERVE ANY QUESTION.—This section refers only to a trial before a Judge of the High Court acting in the exercise of its original criminal jurisdiction. It is in the discretion of the Judge whether or not he will reserve a point of law for the opinion of the High Court consisting of two or more Judges, 10 B.H.C.R. 75, but he is at liberty to refuse any application to him to reserve any point, 22 B. 112. The powers of the Judge cannot in any way be controlled by a Bench or a Full Bench of the Court and no appeal or revision lies against the order of the Judge, and except on a reference under this section the proceedings of the Judge cannot be revised. See 14 C. 42 (F.B.) A point of law cannot be referred under this section to a Full Bench before the accused is called upon to plead even if the presiding Judge wished it, 28 C. 211 at 214; 5 C.W.N. 169.

HIGH COURT SHALL HAVE POWER TO REVIEW.—The High Court under this section is empowered to review the whole case and dispose of the case finally. It can determine whether the admission of rejected evidence would have affected the result of the trial, 1 C. 207; 2 B. 61. The High Court in 17 C. 642 went into the merits of the case and quashed the conviction. See also 4 C.W.N. 433; 32 B. 111. Mere appreciation of evidence is not one of law coming under this section, 4 Bom. L.R. 686. The power which the High Court exercises under this section is that of review as expressly stated in this section and the Court as a Court of Reference and Revision and is treated as such, as appears from the heading of Chapter XXXII of the Code, 8 B. 200 at 211. The Legislature has not conferred on the High Court in express words the power of reviewing its judgment in all criminal cases as it has done in civil cases, 48 M. 332. The provisions of S. 369 so far as they affect a High Court apply merely to questions of law arising in its original criminal jurisdiction and which are reserved and are subsequently disposed of under the provisions of S. 434 and the corresponding provisions of the Letters Patent, 7 A. 672 at 674. See the new amendment of S. 369, *supra*, and 48 M. 332 at 305.

435. (1) The High Court or any Sessions Judge or District Magistrate, or any Sub-divisional Magistrate empowered by the Local Government in this behalf, may call for and examine the record of any proceeding, before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose 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 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 any Sub-divisional Magistrate acting under sub-section (1) considers that any such finding, sentence or order is illegal or improper

Power to call for records of inferior Courts.

or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit to the District Magistrate.

(3) [Omitted by Act XVIII of 1923, S, 116.]

(4) If an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them.

EXTENT OF AMENDMENT.—Power is now expressly given in sub-section (1) to superior Courts when sending for records in any case to suspend the execution of sentence and also to release the accused on bail if he is in confinement, pending revision, and the new explanation added makes it clear that all Magistrates whether exercising original or appellate jurisdiction shall be inferior to the Sessions Judge. This removes the doubt which existed before, whether a District Magistrate when acting as an appellate Court was subordinate to the Sessions Judge for the purposes of this section, and is in accordance with the view in 3 A. 23. Sub-section (3) has now been omitted and orders under Ss. 143 and 144 and proceedings under Chapter XII and S. 176 like other orders passed under the Code are made revisable by the High Court. There is no longer any necessity to invoke the aid of the High Court under S. 107 of the Government of India Act, so far as these orders are concerned.

SCOPE AND OBJECT OF THE SECTION.—The language of this section is very general and gives power to superior Courts to send for the records of any case from inferior Courts for the purpose of satisfying themselves of the correctness, legality or propriety of any finding, sentence or order and as to the regularity of any proceeding in such subordinate Courts. It states the grounds and provides for the machinery for the exercise of the power which Ss. 436 and 439 confer, and this power may be exercised at all times and may be put in force in matters not merely coming before the Judge in Court, but also on matters coming to his knowledge, on reliable information, Weir II, 538. The object of the Legislature in enacting this section was to secure the setting right of a patent error or defect. In the absence of a well-founded suspicion or error it is inexpedient to scrutinise orders of discharge or other orders, which upon the face of them bear token of careful consideration, and appear to be good and lawful. This section does not give the High Court a roving commission either in the direction of stamping with approval the proceedings of a lower Court or in the direction of questioning about and looking to see if possibly, under a fair record, there was some trace of possible error, 1899 A.W.N. 135. This section deals with the grounds upon which revisional jurisdiction may ordinarily be exercised. It states expressly that every finding, sentence or order is liable to review, not only on the ground of illegality or irregularity but also on the ground of incorrectness, i. e., on the ground of its being wrong on the merits. S. 439, *infra*, is not to be read as independent of this section. This section states the grounds and provides the machinery for the exercise of the powers which, Ss. 436 to 439 confer on the revision Courts, 15 Cr. L.J. 217=22 Ind. Cas. 1001. This section does not deal merely with the finding, sentence or order, but with proceedings generally and the power of the High Court extends to calling for and examining the record of any proceeding for the purpose of satisfying itself as to the regularity of such proceedings. 37 M. 722. The High Court will not ordinarily interfere in proceedings before a Magistrate by directing him to admit certain documents in evidence when he refused to receive them as evidence. The proper remedy is for the party to get an order for further enquiry or a retrial from the proper Court after the termination of the proceedings, 1 Cr. L. Rev. 201. The finding of the inferior Court should be accepted unless there is any error of law or procedure vitiating the finding or unless there are any special circumstances apparent on the record to show that in arriving at its conclusion of fact the lower Court has misappreciated evidence, 9 Bom. L. R. 1385. Where there is a misreading of the documentary evidence and fundamental errors in principle which vitiates the conduct and disposal of the case, the case comes within the purview of this section, 28 B. 479. Under this section the High Court is given very extensive powers to call for and examine proceedings of inferior Criminal Courts, if necessary for it is brought to its notice in any manner. But before doing so it would have to be satisfied that there are *a priori*

grounds for apprehending a miscarriage of justice, 20 A.L.J. 909. The Madras High Court by its circular order has called special attention of the Sessions Judges and District Magistrates to the following points in exercising powers of revision under this section:—(1) The rash issue of process. (2) The dealing with disputed claims of right under colour of a charge of criminal trespass or mischief and conviction is had without a finding of a criminal intent. (3) Indiscreet and excessive fines. (4) Light punishments in cases requiring severe punishments which ought to have been sent up to superior Courts. (5) The imposition of heavy fines in addition to imprisonment to extend the term of imprisonment beyond the jurisdiction of Magistrates. (6) Demanding excessive bail or excessive security (7) Unnecessary delay in the trial of cases. The provisions are not exhaustive of the powers of the High Court, *s. g.*, power to issue a *writ of certiorari* possessed by the Supreme Court cannot be said to have been taken away, 43 M. 146 (P.C.); 39 M. 1164 (F.B.).

HIGH COURT, SESSIONS JUDGE OR DISTRICT MAGISTRATE.—The High Court, Sessions Judges and District Magistrates have co-ordinate powers under this section, but the powers of Sessions Judges and District Magistrates are only limited powers. Except when exercising powers under §s. 436 and 437, they can only report for the orders of the High Court under §. 438. The High Court does not generally entertain an application for revision in cases where the Sessions Judge or the District Magistrate having concurrent jurisdiction has not been moved first, 36 C. 633; 14 C. 887; 28 A. 288; 30 A. 116; 3 Pat. L.J. 302; 19 Cr. L.J. 126; 18 L.W. 851 following 43 A. 497 and 36 C. 633. But where such concurrent jurisdiction is not possessed, no such rule exists, 1887 A.W.N. 165; 1888 A.W.N. 132; 1890 A.W.N. 161; 14 C. 887. See also 27 Cr. L.J. 71—91 Ind. Cas. 247 where 36 C. 633; 48 C. 534 and 3 Pat. L.J. 302—19 Cr. L.J. 589—45 Ind. Cas. 397 are followed.

SUB-DIVISIONAL MAGISTRATES EMPOWERED.—All Sub-divisional Magistrates in Madras and the Punjab are empowered to act under this section. But sub-section (2) limits their power to reporting the case to the District Magistrate for orders, 7 M. 560.

MAY CALL FOR AND EXAMINE RECORDS OF ANY PROCEEDINGS.—Records may be called for at any stage of the case and proceedings revised by the High Court to prevent manifest and patent injustice, 19 C. 52; 22 C. 131; 25 C. 233; 26 C. 786; 38 C. 68, and even after a prisoner had served out his whole sentence, 7 A. 135. But there is no provision in the Code enabling a Judge to stop a trial already commenced and to refer to the High Court any questions of law arising on the merits of that case, Ratanlal 214. Revisional powers of superior Courts cannot be regarded as in any way impliedly restricting the jurisdiction conferred on Magistrates to inquire into offences, 29 M. 126 (F.B.). The High Court can interfere when it finds that the Court below has abused its discretion or failed to exercise a sound judicial discretion, 2 C. 110. The High Court has jurisdiction to interfere at any stage of the criminal proceedings if it considers that such interference is necessary in the interests of justice. No hard and fast rule can be laid down since it is impossible as well as undesirable to do so. 39 M. 561 at 564; 47 M. 722; 22 C. 131; 25 C. 233; 26 C. 786; 10 C.W.N. 322; 20 B. 543; 1892 A.W.N. 102; 14 A.L.J. 851; 16 A.L.J. 458; 67 Ind. Cas. 539; 21 Cr. L.J. 379; 25 Cr. L.J. 1258—82 Ind. Cas. 268; 24 Cr. L.J. 391—73 Ind. Cas. 325. It is a very sound general principle that parties should not be encouraged to resort to criminal Courts in cases in which the point of issue between them is one which can more appropriately be decided by a civil Court and the tendency on the part of litigants to do so should be checked by criminal Courts, which should be on their guard against lending their aid to such procedure. When the question between the parties was whether a decree against the complainant had been satisfied or not, by the transfer to the decree-holder of certain lands, the executing Court was the proper place for this matter to be decided, and a complaint of cheating ought not to be entertained when execution proceedings are pending before the civil Court and the order for the issue of warrant of arrest against the decree-holder was quashed by the High Court, 28 Cr. L.J. 287—84 Ind. Cas. 381 where 12 Cr. L.J. 39—8 Ind. Cas. 1161 is followed. Where the facts do not in any view constitute an offence the continuance of the trial is an abuse of process and it is the duty of the High Court to interfere, 52 C. 188 following 22 C. 131. An order under §. 86 *supra* refusing to release certain property from attachment is a proceeding within the meaning of this and §. 489 *infra*, and is subject to

the revisional jurisdiction of the High Court, 28 Cr. L.J. 82=76 Ind. Cas. 18. The Court has interfered on facts in the cases reported in, 28 B. 533; 8 Bom. L.R. 851; 9 Bom. L.R. 706. Where a Sessions Judge on his own motion called for records of an inferior Court and returned the same without interference he is not precluded subsequently from entertaining an application by a party to re-open the case and he cannot reject it for the reason that he had declined to interfere on his own motion. 16 Cr. L.J. 711=30 Ind. Cas. 999.

BEFORE ANY INFERIOR CRIMINAL COURT.—“Inferior” means statutorily incompetent to hold or exercise equal powers. There may be inferiority without subordination but there cannot be subordination without inferiority, as subordination means inferior in rank. 9 B. 100 at 103. The word “Inferior” in the section includes the word “subordinate” in S. 437, *infra*, 8 M. 18 (F.B.). The epithet “inferior” seems to have been simply used to avoid the use of *subordinate* on account of the special limitations of the latter word which would prevent Courts of Session from looking into certain cases beyond the line of subordination which yet may be properly examined for the purpose of an order under the following sections of the Code, 9 B. 100 at 103. Inferior criminal Court must mean inferior so far as regards the particular matter in respect of which the superior Court is asked to exercise its revisional jurisdiction, 10 C. 268 at 271. If there is no inferiority then there is no power of revision. A first-class Magistrate is inferior to the District Magistrate and to the Sessions Judge, 6 M.L.T. 157; 8 M. 18 (F.B.); 12 C. 473 (F.B.); 7 A. 833 (F.B.). But the expression “inferior Criminal Court” does not include a Civil or Revenue Court, 43 C. 777 (F.B.); 26 A. 249 (F.B.); see also 13 Bom. L.R. 970=13 Cr. L.J. 845=17 Ind. Cas. 717, where it was held that a District Registrar was not an inferior Criminal Court. It is only with regard to proceedings of *inferior Criminal Courts* that the High Court has jurisdiction under this section. If it is not so inferior, the High Court has no jurisdiction, 51 C. 460 at 468. See also 24 A.L.J. 217; 18 Cr. L.J. 217. When a Magistrate hears an appeal under the provisions of the Bombay District Municipalities Act, S. 86, he is merely an appellate authority having jurisdiction given by the Act to deal with the question of civil liability, and is therefore not an inferior criminal Court subject to the revisional jurisdiction of the High Court under this section and therefore the High Court has no power to revise the order of the Magistrate, 27 Cr. L.J. 1127=97 Ind. Cas. 617 where 9 Bom. L.R. 1347=6 Cr. L.J. 425 is followed. The High Court when acting under this section can send for only the record of an inferior criminal Court but not the record of a Civil or Revenue Court under this section and has no authority to interfere in revision with orders passed by such courts. The Code classifies criminal Courts in S. 6 *supra* and a Civil or Revenue Court cannot possibly come within this classification. 15 Cr. L.J. 217=22 Ind. Cas. 1001.

SITUATE WITHIN LOCAL LIMITS OF ITS OR HIS JURISDICTION.—The word “situate” means fixed or located. When referred to the Court it must be taken to mean the place where the Court *ordinarily* sits, 30 M. 136 at 137. A Sessions Judge or District Magistrate cannot have revisional jurisdiction outside the limits of his division or district.

FOR THE PURPOSE OF SATISFYING ITSELF.—This section confers on certain superior judicial officers power to send for records of subordinate Courts for the purpose of satisfying themselves as to the correctness, legality or propriety of their proceedings. But this section confers no power to correct the errors etc., which power is expressly given by the succeeding section of the Code. The power herein given is to point out the errors etc., to subordinate Courts for their future guidance. In exercising the power under this section the judicial officers specified herein are not entitled to take further evidence themselves. 3 Bom. L.R. 677.

CORRECTNESS, LEGALITY OR PROPRIETY OF ANY FINDING, SENTENCE OR ORDER.—This section applies not only when the order is incorrect or illegal but also when it is improper as violating the principles of natural justice, 33 M. 1091. The High Court can call for the records to satisfy itself of the correctness and propriety of proceedings of the Magistrates. The controlling power of revision of the High Court is a discretionary power which should be fairly exercised according to exigencies of each case. The infliction of an inadequate punishment is undoubtedly an impropriety which the jurisdiction in revision is intended to remedy, 16 B. 530 at 533. No restriction is placed by this section upon the grounds

on which the Sessions Judge may order further inquiry. If misappreciation of evidence has led to the passing of an incorrect or improper order of discharge such an order can undoubtedly be revised under this section, 32 M. 214 where 15 M. 334 was followed. The High Court can interfere on facts to prevent miscarriage of justice and to correct manifest errors, 17 C.W.N. 379; 12 Ind. Cas. 998; 82 C. 180; 15 C. 608 (F.B.); 15 M.L.T. 200; 18 M.L.J. 57; 28 B. 533; 9 B.L.R. 385. The High Court's power can be exercised not only when inferior Courts act without jurisdiction, but also when they commit illegality or material irregularity, 21 Cr. L.J. 25—54 Ind. Cas. 169.

REGULARITY OF ANY PROCEEDING OF SUCH INFERIOR COURT.—These words are very general and wide and empowers the calling of records for revision. The power to call for records is no longer restricted to judicial proceedings, *Welf II, 538*. The words are wide enough to empower the High Court to revise an order made by a Magistrate under S. 517, *infra*. The High Court has also power to revise orders under S. 514, or orders by District Magistrates under S. 515, *infra*, and may also reduce the forfeiture under S. 517, *infra*. Orders under Ss. 143, 144 and proceedings under Chapter XII and S. 176 are now made revisable. Sessions Judges and District Magistrates may now call for records under S. 145 and also proceedings under S. 176, which relate to inquiries by Magistrates as to cause of death. This section does not apply to proceedings under S. 195, *supra*, as that section is self-contained, 44 C. 816. The High Court cannot interfere by a writ of *certiorari* with the ministerial acts of all inferior tribunals under this section, 39 M. 1164 (F.B.).

MAY DIRECT SUSPENSION OF SENTENCE AND RELEASE ON BAIL.—Power to suspend sentence and to release accused on bail pending revision are now expressly provided for.

EXPLANATION TO SUB-SECTION (1).—This explanation newly added makes a District Magistrate exercising original or appellate jurisdiction inferior to the Sessions Judge who has therefore jurisdiction to call for the records and make a reference to the High Courts, 23 A.L.J. 834; 28 Cr. L.J. 1282—89 Ind. Cas. 146.

SUB-SECTION (2).—A Sub-divisional Magistrate specially empowered, if he considers that the proceedings are irregular and the course open to him is to forward the records with such remarks thereon as he thinks fit, to the District Magistrate, who alone can act under Ss. 436, 437 or 438. The object of the sub-section is to avoid a conflict of orders of District Magistrate and the Sessions Judge, and the words "further application" in this sub-section mean any other application in respect of the order in question made by the inferior Criminal Court, 1 Cr. L. Rev. 389; the principle underlying this is that there should be no judicial action by any inferior Court by way of criticism of its superior Court, 22 A.L.J. 772 at 776.

SUB-SECTION (3).—Has been repealed now and thereby extending the revisional jurisdiction of the High Court with regard to orders under S. 144, Chapter XII and S. 176 *supra*.

SUB-SECTION (3).—This sub-section applies to all cases in which the District Magistrate has taken or refused to take action, 14 Cr. L.J. 134—18 Ind. Cas. 886. The Sessions Judge and the District Magistrate have co-ordinate jurisdiction. If an application is made to either of them no further application shall be entertained by the other of them and in practice an express statement is required to be made in the application itself to the effect that no similar application has been presented to the other of them. After a Sessions Judge has refused to take action it is not competent to a District Magistrate to entertain an application under this section, 26 M. 477; 21 Cr. L.J. 81, but where a Sessions Judge directed the committal to the Court of Session of an accused who was discharged by an inferior Magistrate when the District Magistrate during the pendency of the inquiry before the inferior Magistrate had refused to do so, it was held that the Sessions Judge's order was legal and no question of exercising co-ordinate jurisdiction arose in the case, 43 M. 820. A Sessions Judge cannot direct further inquiry under S. 436 after the District Magistrate has refused to do so, and *vice versa*, 22 C. 378; 28 C. 102; 26 M. 477; 17 M.L.J. 153—2 M.L.T. 24—5 Cr. L.J. 132. Under the explanation newly added a Sessions Judge is now empowered to refer the proceedings of the District Magistrate, appellate or original, to the High Court under S. 436, *infra*. The powers of the High Court are wide. Even though a Sessions Judge or District

Magistrate has refused to take action under this section the High Court is entitled to entertain an application and to grant relief in case it finds the order of the inferior Court is not correct, legal or proper. The Code does not empower a District Magistrate to question the decision of a Sessions Judge. It is no part of the duty of the District Magistrate to criticise the judicial decisions of the Sessions Judge, 41 B. 47; 23 C. 250; 18 C. 186; 23 M.L.J. 732; 28 A. 91; 36 A. 378; 24 A.L.J. 224. But if he considers that there has been a miscarriage of justice in proceedings before a Sessions Judge, he should communicate with the Public Prosecutor or move the Local Government for necessary action, but should not report the case to the High Court for necessary action under S. 438, *infra*, 9 A. 362; 12 A. 434; 15 M. 38; Welr II, 568 and 566; 24 A.L.J. 224 where 28 A. 91; 36 A. 378 and 41 B. 47 are followed.

HIGH COURT'S POWER TO STAY CRIMINAL PROCEEDINGS.—There is no statutory provision for staying criminal proceedings once started. The question is one of expediency and has to be decided on the merits of the particular case keeping in view the undesirability of the conflict of decisions and the necessity of protecting the accused from prejudice in the civil proceedings, 23 Cr. L. J. 3=69 Ind. Cas. 380. Criminal proceedings should not as a rule be stayed pending the decision of a civil Court in regard to the same subject-matter, but ordinarily it is not desirable that a criminal prosecution should go on if the parties to the two proceedings are the same, especially when the prosecution is a private prosecution and the questions to be decided in the two Courts are identical. It is open to the criminal Court having regard to the facts of each case to consider whether it is desirable that the proceedings before it should be stayed till the decision of the civil suit, or for a limited period. The High Court has stayed criminal proceedings in 30 M. 226; 31 M. 510; 23 C. 610; 4 Lab. L. J. 409; 23 Cr. L.J. 593=68 Ind. Cas. 819; 1 Pat. L.T. 697; 22 Cr. L.J. 489=62 Ind. Cas. 185; 21 Cr. L.J. 399=55 Ind. Cas. 1007; 18 A.L.J. 1011; 27 Cr.L.J. 1114=97 Ind. Cas. 425. Pendency of a civil appeal was held not to be a sufficient ground for stay of criminal proceedings, 43 A. 180. The High Court will not interfere with the right exercise of the discretion of the Magistrate who refuses to stay criminal proceedings, 21 Cr. L.J. 342=55 Ind. Cas. 678; 21 Cr. L J 383=55 Ind. Cas. 721.

436. On examining any record under section 435 or otherwise, the High Court or the Sessions Judge may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself make, or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under section 203 or sub-section (3) of section 204 or into the case of any person accused of an offence who has been discharged.

Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made.

AMENDMENT.—By the amendment Ss. 436 and 437 have been interchanged. To meet the conflicting rulings as to the exact meaning and scope of the terms "accused person" the words "a person accused of an offence" have now been substituted. Some rulings of the High Courts like 20 C. 729; 30 C. 412; 36 C. 163; 23 C. 493; 27 C. 682; 16 B. 651; 33 M. 85, put a very strict interpretation upon the term and explained the term as meaning a person accused of an offence, while other rulings like 36 A. 147; 21 A. 107; 24 A. 148; 35 B. 401, included within the term "accused person" persons against whom proceedings were taken in any shape or form by a criminal Court acting judicially. The proviso is new and makes it obligatory on the Court to give an opportunity to the discharged person to show cause against the making of the order.

SCOPE AND OBJECT OF THE SECTION.—This section vests no absolute right in the superior Court to direct a further inquiry. The section is limited by the words "on examining any record under S. 435 or otherwise" and that section lays down that a Court may call for and examine any records for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order passed and as to the regularity of any proceeding of an inferior Court. If a Magistrate finds no illegality or impropriety or irregularity and nothing incorrect in the proceedings he is not entitled to set aside the discharge upon other grounds or on no ground at all, *e.g.*, on the opinion tendered to him by the Legal Remembrancer, 16 C.W.N. 1078=13 Cr. L.J. 764=17 Ind. Cas. 76. The powers with which the Magistrate or Sessions Judge is clothed are powers of revision, and in exercising those powers of revision the appellate Court has to see whether the evidence is of such a character that it is possible to come only to one conclusion upon it, namely, that the accused has been guilty. It may not be a question of perversity but it must be very near to it. The appellate Court must satisfy itself that there has been a miscarriage of justice, consequent upon the one-sided or perverse view taken by the trial Court, 10 L.W. 630 at 632; 44 A. 691; 1 Lah. 216. In cases where no fresh evidence is likely to be adduced on further inquiry the superior Court should hesitate before exercising its powers under this section unless there are palpable errors in the decision of the lower Court, 38 C. L.J. 206. Where a Magistrate after proper inquiry finds no case made out, the mere fact that the superior Court does not agree with that opinion is no reason to reopen the case by directing a further inquiry especially where no suggestion is made that any further evidence is available or should be taken, 24 Cr. L.J. 176=71 Ind. Cas. 528; 25 Cr. L.J. 66=75 Ind. Cas. 978; 26 Cr. L.J. 886=86 Ind. Cas. 832. The powers of the High Court and Sessions Judges and District Magistrates are co-extensive and are not limited in any way by this section. The Sessions Judge or District Magistrate cannot under this section himself frame a charge or order the subordinate Magistrate to frame a charge and try the accused, although the District Magistrate may under the latter part of the section make further inquiry himself and frame a charge in the course of the inquiry; the Sessions Judge or District Magistrate is not bound to refer to the High Court in cases of difference of opinion owing to mere misappreciation of evidence but would be justified in ordering a re-consideration of the same evidence, 32 M. 220 (F.B.); 6 M.L.T. 157=10 Cr. L.J. 218=3 Ind. Cas. 29; 19 M.L.J. 137; 5 M.L.T. 282. There is little difference in substance between the case of a person who has been discharged after all the prosecution evidence has been taken and weighed by the Magistrate and that of a person who is acquitted after a charge has been framed. In the former case the Magistrate considers the prosecution evidence as so weak that there is nothing for the accused to meet and in latter case the evidence though sufficiently strong to call upon the accused to meet it has in his opinion been met by the defence. There is no reason why different tests should be applied in revision or why an accused should be in a worse position than one against whom it is strong enough to warrant a charge being framed, 35 M.L.J. 818 at 822. Further inquiry after a discharge is improper unless the order of discharge is manifestly perverse or foolish or based on a record of evidence obviously incomplete, 12 Cr. L.J. 364=11 Ind. Cas. 132. Once a District Magistrate has refused to interfere with an order of discharge under this section he cannot subsequently direct further inquiry under this section as such an order reversing the earlier order is prohibited by S. 309 *supra*, 13 Cr. L.J. 301=14 Ind. Cas. 765. It is not sufficient for a Court merely to say that the trial Court has not gone fully into the case and declare a further inquiry is necessary. Before ordering a further inquiry the Court of revision should state in what respect the trial Court's conclusions are either foolish or perverse or otherwise unsatisfactory, and if the case is sent back on the ground that the discharge has been made on incomplete record this should be stated, 26 Cr. L.J. 1393=89 Ind. Cas. 705, where 1 Lah. 216, is followed. It is not ordinarily desirable that in the order for further inquiry detailed examination of the evidence and elaborate reasons should be given. Enough should be said in the way of reasons to indicate how the order of discharge is incorrect on a point of law or fact or for want of complete inquiry, 19 Cr. L.J. 14=32 Ind. Cas. 326. The High Court will not as a rule order further inquiry after order of an discharge is made, unless the order of discharge is manifestly perverse or foolish or based upon an obviously incomplete record of evidence. The mere fact that it might take a different view of the evidence and of the probabilities of the case will not justify its interference.

21 Cr. L.J. 521=56 Ind. Cas. 777; 25 Cr. L.J. 1028=81 Ind. Cas. 802; *Weir II*, 255; 26 Cr. L.J. 582=88 Ind. Cas. 725; 26 Cr. L.J. 1508=90 Ind. Cas. 292; 26 Cr. L.J. 1393=89 Ind. Cas. 705; 27 Cr. L.J. 885=94 Ind. Cas. 183; 27 Cr. L.J. 861=94 Ind. Cas. 709=27 Cr. L.J. 771=98 Ind. Cas. 307; 27 Cr. L.J. 1130=97 Ind. Cas. 650. To order a fresh inquiry against a discharged co-accused after examining and cross-examining him as a prosecution witness and thus gathering from his own mouth the evidence against him is contrary to the tradition of justice in criminal Courts, 25 Cr. L.J. 311=76 Ind. Cas. 1031.

The jurisdiction of the High Court, Court of Session and District Magistrate is very wide and the discretion thus conferred is a judicial discretion, 15 C. 608 at 622. But the provisions of this section do not apply to proceedings taken under Chapter VIII of the Code demanding security, 2 Rang. 30. A District Magistrate has therefore no power to direct further inquiry into case under S. 107, *supra* and the proper remedy open for him is to report the result of his examination to the High Court under S. 438, *infra*, 46 A. 235. See also 25 Cr. L.J. 679=81 Ind. Cas. 187. Further inquiry may be directed in case of discharge even where no fresh evidence is forthcoming, 14 M. 334. (F.B.); 9 A. 52 (F.B.); 13 B. 376; 21 A. 122; 12 C. 522; 10 C. 207; 15 C. 608; 25 Cr. L.J. 66. Further inquiry does not in all cases, mean taking additional evidence but may be rehearing and re-consideration of the evidence already taken, 26 Cr. L.J. 1537=90 Ind. Cas. 385. Material consideration when ordering further inquiry is the prospect of any public advantage from the case being reopened two years after the occurrence, 43 M.L.J. 558=16 L.W. 585. The exercise of revisional jurisdiction by the High Court is a matter of discretion and having regard to the length of time that elapsed between the dismissal of the appeal and the application for revision the High Court declined to hear the revision petition, 1907 A.W.N. 204=6 Cr. L.J. 153. It cannot be ordered in the bare possibility of an offence being disclosed on further evidence being taken. There must be something on record to indicate that such an offence was committed or there must be something to show that further evidence which was not taken and would support a charge for that offence is available, 43 M.L.J. 564=16 L.W. 494=(1922) M.W.N. 801. This section does not apply to an acquittal, 20 Cr. L.J. 826=51 Ind. Cas. 888; 2 C.L.J. 622. The power under this section should be sparingly used and with great circumspection, *Ratanlal* 328; 11 C.W.N. 173, especially when the questions raised are merely matters of fact, 9 A. 52 (F.B.). An order of discharge ought not to be set aside and further inquiry ordered if there is irregularity, illegality or impropriety in the proceedings and it should not be ordered in a case where Courts are liable to take different views of the evidence and of the probabilities especially where the Magistrate has disbelieved the evidence for the prosecution, 26 Cr. L.J. 1537=90 Ind. Cas. 385; 26 Cr. L.J. 1328=89 Ind. Cas. 272. Further inquiry does not mean proceeding on the evidence already taken: that evidence or other evidence, if there be any, should be taken *de novo* by the Magistrate who holds the further inquiry, 9 A.L.J. 310=13 Cr. L.J. 258=14 Ind. Cas. 607. See also 27 Cr. L.J. 1130=97 Ind. Cas. 650. A power to order what is practically a re-trial, to give a complainant another opportunity of re-examining his witnesses and adducing fresh evidence, ought not to be presumed as it is unjust to the accused and opens a wide door to perjury and corruption, 31 M. 133 at 138.

ON EXAMINING THE RECORD UNDER S. 435 OR OTHERWISE.—See commentary to S. 435 *supra*. The words "or otherwise" are significant. In every case of discharge some body must bring the matter to the notice of the superior Court as it cannot be supposed that it is aware of all orders of discharge passed by the Magistrates within its jurisdiction and there is nothing in the Code to limit the persons who can bring the matter to the notice of the superior Court. Thus it is immaterial how the facts were brought to the notice of the superior Court. When once it is brought to its notice it has ample power to deal with the matter. Where a complaint of Court made under S. 476 ended in a discharge, undoubtedly it is not the intention of the Legislature that a private party should not bring the order of discharge before the Sessions Judge. The Sessions Judge is empowered under S. 435 *supra* to call for the records in such a case if he is dissatisfied with the correctness, legality or propriety of the finding, and order a further inquiry under this section. 27 Cr. L.J. 1130=97 Ind. Cas. 650.

HIGH COURT OR SESSIONS JUDGE MAY DIRECT DISTRICT MAGISTRATE.—The High Court has concurrent jurisdiction with the Sessions Judge and District Magistrate. The

High Court is mentioned in this section for the obvious reason that though S. 439 *infra* gives the High Court all the powers of a Court of Appeal under S. 423 *supra*, the power mentioned in this section is not included in S. 435, 9 A. 52 at 55. This section does not authorise a Sessions Judge to direct further inquiry by a particular Magistrate, whether it be the Magistrate who originally discharged or any other Magistrate. Sessions Judges should conform to the language of the section in ordering further inquiry. The Legislature appears to have contemplated that the Magistrate of the District should exercise a discretion as to the selection of any Magistrate subordinate to him and this discretion seems to have been vested in the District Magistrate and not in the Sessions Judge, 10 C. 207 at 209. Where the dispute between the parties is of a civil nature further inquiry should not be ordered, 1 Bom. L.R. 852. So also where the nature of the case is such that Courts are liable to take different views on the evidence and probabilities of the case, 8 A.L.J. 45—12 Cr. L.J. 45—9 Ind. Cas. 274; 12 Cr. L.J. 110—9 Ind. Cas. 652. Again when the order of discharge is based on a consideration of the whole evidence and is not manifestly perverse or foolish it should not be set aside and further inquiry ordered, 16 Cr. L.J. 214—27 Ind. Cas. 838. But no Court can properly set aside an order of discharge without assigning solid and substantial reasons for so doing, 15 C. 608 at 621; 27 Cr. L.J. 728—95 Ind. Cas. 86; 32 C. 1090; 13 C.W.N. 76; (1914) M.W.N. 46 (s.c.) (1913) M.W.N. 638—14 Cr. L.J. 572—21 Ind. Cas. 172.

MAKE FURTHER INQUIRY.—A District Magistrate when exercising his revisional jurisdiction should ordinarily confine the exercise of his powers of interference on the grounds expressly specified in this chapter and should not take upon himself the duty of trying the accused himself although such a course would not be illegal, 27 Cr. L.J. 728—95 Ind. Cas. 86. The term "*further inquiry*" means an inquiry before the Magistrate preliminary to a trial which results in a charge or discharge and does not include a trial. The terms "*further inquiry*" "*fresh inquiry*" are used as meaning the same, 15 C. 608 at 620. The term may signify an inquiry in addition to that which has already been held, but may also signify a fresh consideration to the effect of the evidence already recorded and a reconsideration of that evidence. It does not imply that additional evidence must be forthcoming, 15 M. 334 (F.B.); 15 C. 608 (F.B.) 10 B. 121; 9 A.L.J. 310—13 Cr. L.J. 255—14 Ind. Cas. 607. Further inquiry cannot be ordered on the bare possibility of an offence being disclosed on further evidence being taken. There must be something to show that further evidence which was not taken which would support a charge is available, 43 M.L.J. 865. An order for further inquiry is proper where the revising authority finds on the facts that there were enough materials to warrant a conviction or to call upon the accused to enter on his defence. It is not correct to say that further inquiry cannot be ordered on the same facts as have been considered by the Magistrate and to do so will be putting the law too wide. The revising authority is to take into consideration the facts of the particular case before it and taking down any general rule guiding courts, in ordering further inquiry, is to stultify the language of the section itself, 26 Cr. L.J. 736—86 Ind. Cas. 224. When further inquiry is ordered and the case is made over to a subordinate Magistrate he is seized of the whole case and he is competent to hold the inquiry and dispose of the complaint by passing final orders thereon, either by dismissing it or putting the accused on his trial and convicting or acquitting him, 21 Cr. L.J. 594—57 Ind. Cas. 162; 27 C. 921; 39 C. 1031.

INTO ANY COMPLAINT DISMISSED UNDER S. 203.—Ss. 203 and 204 (3) are the only provisions enabling a Magistrate to dismiss a complaint. Where the accused were tried and convicted of mischief and the Sessions Judge being of opinion that the accused has been lightly dealt with by the Magistrate ordered a further inquiry against the accused and others for an offence under S. 144, I.P.C. (joining an unlawful assembly armed with deadly weapons) it was held that the order was without jurisdiction, as none of the accused had even been discharged of that offence nor was any complaint of such offence against them dismissed under S. 203 or 204 (3), *supra*, 27 C. 638. See also 5 C.W.N. 72. An order of dismissal under S. 203, should not be set aside by a District Magistrate on the mere ground that it is possible that on a further inquiry the accused may be convicted, 17 Cr. L.J. 408—35 Ind. Cas. 868. Material consideration when ordering a further inquiry is the prospect of any public advantage from the case being re-opened, 43 M.L.J. 553—16 L.W. 588. Dismissal of a complaint is no bar to a

rehearing of the same, 29 M. 126 (F.B.); 28 C. 652 (F.B.); 29 A. 7, even after the District Magistrate had refused to order further inquiry, 36 C. 415,

INTO THE CASE OF ANY PERSON.....DISCHARGED.—This section now contains the words "any person accused of an offence" instead of "any accused person" and hence it does not include persons against whom proceedings are taken under Chapter VIII of the Code, 2 Rang. 30 at 31. A person accused of an offence must be discharged by a Magistrate before action is taken under this section. It is not applicable to a case where a Magistrate refused to proceed against some of the persons accused of an offence before the police as they never had been before the Magistrate and had not therefore been discharged, 5 C.W.N. 488; 4 C.W.N. 232. There is no authority to direct further inquiry against a person against whom no process was issued, 39 C. 238. Where a case against a person who was absent at the trial of his co-accused was dismissed under S. 247, *supra* owing to the absence of the complainant no order could properly be passed under this section against the absent accused, 4 C.W.N. 338. A discharge by a Presidency Magistrate can be set aside by the High Court under this section and further inquiry could be ordered, 36 C. 994; 35 M.L.J. 518; 27 B. 84. The expression used in S. 436, *supra*, is improperly discharged but we find no such expression in this section.

PROVISO.—The proviso is new and has been enacted to meet the various rulings of the several High Courts as to the necessity of notice being given to the accused in case of discharge. The *Allahabad High Court* consistently held that notice was necessary, 9 A. 52 (F.B.); 20 A. 339; 25 A. 375; 35 A. 78; 40 A. 139 and 416. The *Calcutta and Patna High Courts* held that although notice was not imperative yet it was a matter of proper discretion of the Court to give notice, 15 C. 608 (F.B.); 29 C. 487; 32 C. 1090; 39 C. 238; 12 C.W.N. 822. The *Madras and Bombay High Courts* accepted the *Allahabad view*, 26 M. 41; 14 M. 334; see also 10 B. 131; 8 Bom. L.R. 694. See also 1 Lah 216. Where a District Magistrate acting under this section entertained a revision petition filed by the complainant against an order of discharge, making some of the accused only as parties and committed all the discharged accused including those who were not parties before him and who had no manner of notice of the revision petition, held that the order against those accused who were not parties was clearly wrong as they had no opportunity of showing cause why an order of commitment should not be made against them under this proviso and the order so far as they were concerned was set aside, 48 M. 874. But the High Courts have agreed that no notice will be necessary in the case of a dismissal under S. 203, 15 C. 608; 29 C. 487; 35 A. 78; 40 A. 138. This proviso cannot apply to a dismissal under S. 203, *supra*. Where no process is issued to the accused at all and he does not appear in Court and the complaint is dismissed summarily under S. 203, *supra*, the accused cannot be said to have been discharged. It is only after he has appeared in court and the evidence against him is found to be insufficient so as to make it unnecessary to call upon him to enter on his defence that he can be discharged. Before the amended Code, Courts were unanimous that in cases of the dismissal of a complaint under S. 203, *supra* notice was not necessary and the amendment left the ruling in 35 A. 78; 40 A. 138 untouched. 47 A. 722; 27 Cr. L.J. 302=92 Ind. Cas. 590. The dismissal of a complaint under S. 203 or under S. 204 (3), *supra* is before the appearance of an accused and no accused person can be said to be discharged when no process has been issued for his appearance. It is only when a Magistrate takes cognizance of an offence and is of opinion that there is sufficient ground for proceeding he issues a summons or a warrant for the accused's appearance. An accused person is said to be discharged when the case against him is thrown out under Ss. 209, 253 or 259, *supra* or when the Advocate-General enters a *nolle prosequi*, under S. 333, *supra*. The expression *person who has been discharged*, occurring herein refers to a person discharged under S. 209, 253, or 259. A person against whom no process is issued under S. 204, *supra*, is not a discharged person and therefore no notice is necessary to him when a District Magistrate, Sessions Judge, or the High Court directs a further inquiry into a complaint dismissed under S. 203 or S. 204 (3), *supra*, 51 M.L.J. 603 (F.B.)=24 L.W. 613 at 619 following 47 A. 722. But where a complaint dismissed under S. 203, *supra* after giving the accused an opportunity of being heard, an order directing further inquiry into the case under this section should not be made without giving notice to him, 27 C.W.N. 552=25 Cr. L.J. 140=76 Ind. Cas. 236. But this decision is of doubtful authority as there is no provision of law for

issuing such a notice before process is issued against the accused. See 51 M.L.J. 605 (F.B.)—23 L.W. 613. Where a complaint in a summary case is dismissed for default the order is one under S. 247, *supra*, and is tantamount to an acquittal and falls outside the purview of this section, 25 Cr. L.J. 359—77 Ind. Cas. 295.

REVISION.—The High Court will not entertain an application unless the lower Court have been first moved, 28 A. 268 ; 43 A. 497 ; 35 C. 643 ; 18 L.W. 681. As a matter of general principle reasons should be recorded to enable a superior Court to judge whether the judicial discretion has been properly exercised, 1890 A.W.N. 147 ; 13 C. 76. No Court can properly set aside an order of discharge without assigning solid and substantial reasons for doing so. An order of a Sessions Judge or District Magistrate setting aside an order of discharge is liable to be reviewed in its turn by the High Court as a Court of revision and if in any case an order of discharge had been set aside on insufficient grounds or that while there was good ground for setting it aside the lower Court had made an order inappropriate to the facts of the case it would be right in reversing the order, 15 C. 808 at 621 ; 27 Cr. L.J. 728—95 Ind. Cas. 58 ; 1913 M.W.N. 46 (n.c.) 1913 M.W.N. 638—14 Cr. L.J. 572—21 Ind. Cas. 172 ; 13 C.W.N. 76 ; 32 C. 1090. Where the accused was convicted under S. 196, I.P.C., but it appeared that on the findings an offence under S. 471, I.P.C., was committed, the High Court directed him in revision to be committed, to the Sessions, 30 C.W.N. 840. Where a Sessions Judge after going through the evidence carefully comes to the conclusion that the discharge by the Magistrate is perverse or manifestly opposed to the evidence on record and therefore orders a further inquiry into the case, his order directing a further inquiry cannot be said to be in itself illegal or improper and it could not be interfered with by the High Court in revision, 26 Cr. L.J. 959—87 Ind. Cas. 111.

437. When, on examining the record of any case under section 435 or otherwise, the Sessions Judge or District Magistrate considers that such case is triable exclusively by the Court of Session and that an accused person has been improperly discharged by the inferior Court, the Sessions Judge or District Magistrate may cause him to be arrested, and may thereupon, instead of directing a fresh inquiry, order him to be committed for trial upon the matter of which he has been, in the opinion of the Sessions Judge or District Magistrate, improperly discharged :

Power to order
commitment.

Provided as follows :—

(a) that the accused has had an opportunity of showing cause to such Judge or Magistrate why the commitment should not be made ;

(b) that, if such Judge or Magistrate thinks that the evidence shows that some other offence has been committed by the accused, such Judge or Magistrate may direct the inferior Court to inquire into such offence.

SCOPE OF THE SECTION.—This section imposes two conditions precedent to an order that accused persons shall be committed for trial. One condition is that the accused is triable exclusively by the Court of Session, the other is, that an accused person has been improperly discharged by an inferior Court. Action cannot be taken under this section when an accused person has not been actually discharged by the inferior Court and it is very undesirable that action should be taken under this section or S. 439 of the Code by directing a commitment of the accused in the midst of a trial before the inferior Court, 27 Cr. L.J. 417—93 Ind. Cas. 145. The mere fact that the superior Court may take a different view of

the evidence and the probabilities of the case will not justify its interference by setting aside the order of discharge, 25 Cr. L.J. 1026-81 Ind. Cas. 802 ; 26 Cr. L.J. 886-88 Ind. Cas. 522 ; Weir II, 255.

ON EXAMINING THE RECORD.—These words occur in Ss. 435 and 436, *supra* also, but the expression used in S. 439, *infra*, is "which otherwise comes to its knowledge." A Sessions Judge or District Magistrate must have the records before him when exercising powers under this section or Ss. 436 or 438, *infra*, but there is no such restriction imposed on the High Court when exercising powers of revision under S. 439, *infra*. See 30 C.W.N. 810 The High Court in revision can also direct the commitment of a case to the Court of Session. This section only empowers the Courts named therein to call for the records but, what they have to do after calling for the records and examining them is stated in Ss. 436 to 439 of the Code, 32 M. 220 at 222. A Sessions Judge or District Magistrate may set aside an order of discharge *suo motu*, 21 Cr. L.J. 91.—84 Ind. Cas. 491. Discretion given to a Sessions Judge by this section is very wide and he has to exercise that discretion and if he has exercised that discretion and has committed the accused to the Court of Session, the High Court should be slow to interfere, 13 A.L.J. 111 where 26 A. 584 is followed. But a District Magistrate cannot act *suo motu* when a Sessions Judge had previously refused to interfere with an order of discharge, 26 M. 477. Where a District Magistrate refused to call for records and commit to the sessions an accused person when the charge against him was still pending inquiry before an inferior Magistrate, that order is not an order refusing to revise an order of discharge and a Sessions Judge may act under this section and direct a commitment of the accused to the Court of Session after his discharge by the inferior Magistrate, 43 M. 330.

UNDER S. 435 OR OTHERWISE.—No indication is given of the ways otherwise than S. 435, where the records of the case is to be before the Court. The words "or otherwise" being words of general import following the words "under S. 435" must be construed according to the usual rule that they mean "not in any other way whatever" but "in any other way provided by the Code." For examples, in the case of an appeal, the appellate Court is empowered under S. 423 to send for the records and this would be a case in point. 10 C. 268 at 273. The reasons for exercising the powers under this section are reasons which should arise upon materials to be found on records before the Court and not upon any extraneous matter, 1890 A.W.N. 137. The power can also be exercised on matters coming to the knowledge of a judge on reliable information, e.g., information conveyed by the famine Commissioner. Weir II, 538. See also 2 M. 38.

CASE EXCLUSIVELY TRIABLE BY COURT OF SESSION.—The eighth column of Schedule II of the Code mentions what offences are exclusively triable by Court of Session. S. 435 gives power to call for records and this section empowers commitment only when the offence is triable exclusively by the Court of Session, 42 M. 561 at 563 ; 53 C. 615. The case must be exclusively triable by a Court of Session for a Sessions Judge to direct commitment even where a District Magistrate discharges the accused, 7 A. 852 ; 12 C. 473 ; 9 B. 100 ; 8 M. 18 ; 19 Cr. L.J. 801—46 Ind. Cas. 817. A case does not come within this section merely because a Magistrate is of opinion that the offence could not be adequately punished by him, 1908 A.W.N. 189—8 Cr. L.J. 37. A direction to commit the accused for trial in a case where the offence with which the accused was charged is not triable exclusively by the Court of Session is bad in law, 15 M.L.J. 373. Ratanlal 42 ; 20 C. 638. A direction by a Court of Session to a Magistrate to commit the accused to sessions for an offence under S. 471, I.P.C., was held to be beyond its powers under this section as the offence is not one exclusively triable by the Court of Session, 42 M. 561. But some meaning must be given for the word "considers" used in this section. If a superior Court considers that the case pointing to an offence triable exclusively by the Court of Session was inquired into by the lower Court and the accused discharged, then a commitment may be directed or at any rate a further inquiry under S. 436, *infra*, may be ordered. But if the offence which the superior Court thinks made out by the facts was not the subject of an inquiry at all in the lower Court, then no commitment can be ordered under this section and the only course open to the superior Magistrate is to set aside the discharge and direct a further inquiry into the case, It is competent to a Sessions Judge to convict a person on a charge not exclusively triable e.g.,

one under S. 427, I.P.O., if it is intimately connected with a charge exclusively triable by the Sessions Court, e.g. a charge under S. 436, I.P.O., and if it forms part of the same transaction (18 Bom. L.R. 80) but it is clear that the above requirements are not satisfied in a direction for commitment on a charge under S. 380, I.P.O., the offence thereunder being totally different from the category of offences under Ss. 427 and 436, I.P.O., 53 C. 645 at 649.

ACCUSED HAS BEEN IMPROPERLY DISCHARGED.—There must be an improper discharge and a commitment should not be ordered merely because the offence is exclusively triable by a Court of Session, Welr II, 280; 1 Pat. L.J. 97—35 Ind. Cas. 506. The fact that a superior Court might be disposed to take the view that the inferior Court discredited the prosecution evidence for insufficient reasons and discharged the accused is no ground for interference, Welr II, 255; 13 M.L.J. 57, but see 32 M. 220 (F.B.) where it was held that a misappreciation of evidence by the lower Court is a good ground for interference under this section. It is the duty of the superior Court under this section to consider all the grounds upon which the order of discharge has been passed including a consideration of the evidence which has not been believed or held to be insufficient to establish a *prima facie* case, 7 C.W. N. 77; 13 B. 376. This section contemplates a discharge of the accused only and not an acquittal of the offence, 20 C. 633; 23 M. 225. Where a Magistrate being of opinion that the facts did not disclose an offence exclusively triable by the Court of Session tried the accused for a minor charge and acquitted in spite of the prosecution pressing for the framing of a charge for the graver offence triable by the Court of Session, it was held that the Sessions Judge was entitled to direct a commitment under this section for the graver offence, 24 M. 136 (F.B.). The principle of this decision was explained in 41 M. 932 thus: The refusal of the Magistrate to frame a charge for the graver offence might be treated as an order of discharge in respect of that offence and this section would therefore give the Sessions Judge and District Magistrate power to direct the Magistrate to commit the accused to the Court of Session on the graver charge. But where the prosecution did not press for the framing of a charge for the graver offence and that offence was not even mentioned in the police charge-sheet on which the Sub-Magistrate took cognisance, the acquittal in such a case would be a bar to an order under this section, 41 M. 932 at 934. The acquittal of an accused on a charge framed does not necessarily imply that the Magistrate discharged him in respect of any other charge which might have been framed. The Magistrate must consciously do something or make some order which shows that in his opinion on the materials before him the accused should not be discharged for that offence—*Per Richardson, J.*, in 22 C.W. N. 117 following 23 M. 225 and 20 C. 633 and *distinguishing* 24 M. 136 (F.B.) but *Tuenon, J.*, took a different view and held that the order acquitting the accused of the minor offences was tantamount to an order discharging the accused of the graver offence and the fact that no charge was framed and the Magistrate was not asked to frame a charge under the graver section was immaterial.

INSTEAD OF DIRECTING A FRESH INQUIRY.—This refers to the power conferred on superior officers under S. 436, *supra*, to order further inquiry into a case of discharge. The power of a Sessions Judge or District Magistrate is not restricted to order a commitment of the accused in a case triable exclusively by a Court of Session, 15 C. 608. If the evidence on record is sufficient then the discharge may be set aside and a commitment may be ordered. If fresh evidence is available or the evidence on record established some other offence than the one with regard to which a discharge has been made, in such cases a further inquiry will be the proper order, 14 M. 334 at 337. When a further inquiry is ordered the discretion of the Subordinate Magistrate to commit or not to the Court of Session is not to be fettered, 15 M. 39.

UPON THE MATTER OF WHICH HE HAS BEEN DISCHARGED.—A commitment is to be upon the matter in respect of which there has been a discharge. This is in accordance with the decision in 19 W.R. (Cr.) 30. If the trial is to be on any other matter the power under S. 436, *supra*, or under proviso (b) of this section should be exercised.

ORDER HIM TO BE COMMITTED.—It is open to the superior Court to make a commitment itself or direct a subordinate Magistrate to make a commitment and there is

nothing to show that the commitment should be made by the discharging Magistrate only. The words "order him to be committed" in this section do not mean more than to pass an order for commitment, 31 M. 30. No intervention of a Magistrate is necessary, 10 B. 319.

PROVISO (a).—The accused must be given an opportunity to show cause and omission to do so vitiates the proceedings, 15 M.L.J. 373; 6 M. 372; 7 C. 662. The opportunity must be a reasonable opportunity, Ratanlal 588. The language of this proviso shows that the commitment may be made by the Sessions Judge or District Magistrate as the power happens to be exercised by the one or the other, 10 B. 319; 28 C. 397. An order of commitment made without affording the accused an opportunity to show cause is illegal and vitiates the proceedings. 14 Cr. L.J. 605=21 Ind. Cas. 477.

PROVISO (b).—This proviso refers to an inquiry into some offence other than the offence which was inquired into and which ended in a discharge. The Sessions Judge or District Magistrate is empowered to direct the Magistrate to inquire into this other offence.

REVISION.—An order of commitment made under this section, unlike an order under S. 213, *supra*, can be quashed by the High Court under Ss. 435 and 439 on points of law as well as on facts. S. 215, *supra*, empowers the High Court to quash commitment made under S. 213 only on a point of law. The High Court is entitled to go into facts as well as the law involved when called upon to revise an order of commitment under this section, 30 M. 224; 15 C. 608 at 821; 27 M. 83; 12 C.W.N. 117=6 C. L.J. 760; 25 Cr. L.J. 1089=81 Ind. Cas. 913; 7 C.W.N. 727=15 Cr. L.J. 373=23 Ind. Cas. 741. But the High Court should be most unwilling to interfere and should require strong grounds for setting aside an order of commitment made by a Sessions Judge to whom the widest discretion is given by this section, 26 A. 564; 13 A.L.J. 111=16 Cr. L.J. 139=27 Ind. Cas. 203.

438. (1) The Sessions Judge or District Magistrate may, if he thinks fit, on examining under section 435 or otherwise the record of any proceeding, report for the orders of the High Court the result of such examination, and, when such report contains a recommendation that a sentence be reversed or altered, may order that the execution of such sentence be suspended, and, if the accused is in confinement, that he be released on bail, or on his own bond.

(2) An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him *by or under any general or special order of the Sessions Judge.*

AMENDMENT.—In sub-section (2) the words "by or under the general or special order of the Sessions Judge" have been added. In addition to the Sessions Judge and District Magistrate an Additional Sessions Judge is also empowered to report under this section, but his powers are restricted to cases transferred to him by the Sessions Judge by special or general order.

SESSIONS JUDGE OR DISTRICT MAGISTRATE MAY REPORT.—The District Magistrate has two functions. (1) Head of the police responsible for the punishment of criminals. (2) Magistrate and as such subordinate to the Sessions Judge. In his capacity as head of the police he might well apply for revision of an inadequate sentence passed by the Sessions Judge. To allow a subordinate to get his superior's orders modified by applying to an authority superior to both, would be, in most cases improper. It was for that reason that High Courts have invariably refused to act on letters of reference from District Magistrates asking for revision of orders of the Sessions Judge. The proper course in such cases for the District Magistrate, is to move the Public Prosecutor, but that is not enough. The sanction

of the Local Government should also be obtained, not necessarily before filing such application, but before proceeding with it. The power of revision in such cases is useful and must be exercised to prevent judicial idiosyncrasies working harm, 26 Cr. L.J. 177-83 Ind. Cas. 881. This section authorises a District Magistrate to make reports to the High Court on examination of the records of the proceedings of inferior Criminal Courts, but such reports should only be made in cases where the proceedings are not in themselves the subject of a revision or appeal pending before him; his duty is therefore to pass a judicial order. This section is not intended to enable the District Magistrate to get the opinion of the High Court on a question of law arising in a case pending before him or to transfer the decision of a difficult case pending before him to the High Court, 3 Cr. L. Rev. 355-15 Cr. L.J. 472-24 Ind. Cas. 352. A District Magistrate has no power to question the propriety of a judgment or sentence passed by a Sessions Judge and to make a report to the High Court for orders under this section, 23 C. 250; 41 B. 47; 5 Lah. 11. It would be contrary to every principle to allow a District Magistrate to report against an order made by a Sessions Judge to whom he is subordinate. The words "or otherwise" occurring in this section were not intended to confer on a Magistrate the power to question the propriety of an order of a Sessions Judge, 28 A. 91; 27 Cr. L.J. 327-92 Ind. Cas. 743. The only way in which a District Magistrate could challenge the decision of a Sessions Judge is to communicate with the Public Prosecutor and it is open to the Public Prosecutor after receiving proper instructions from the Local Government to place the matter before the High Court on his own initiative, 23 C. 249; 18 C. 186; 6 C.L.J. 245; 35 A. 378; 41 B. 47; 27 Cr. L.J. 327-92 Ind. Cas. 743; 27 Cr. L.J. 430-93 Ind. Cas. 158; 23 M.L.J. 732-(1912) M.W.N. 812-12 M.L.T. 170-13 Cr. L.J. 715-16 Ind. Cas. 522; 6 Bom. L.R. 1099. But on the other hand the Sessions Judge is authorised to report for orders to the High Court the order of a District Magistrate, 3 Lah. 23; 26 M. 477, 17 M.L.J. 153. Where a Sessions Judge finds that a Magistrate empowered under S. 30, *supra*, has in fact tried a case which he is not competent to try he should report the case to the High Court for an order that the accused be committed to the Court of Session for trial, 27 Cr. L.J. 345-95 Ind. Cas. 766. A Sessions Judge ought not to refer a case for enhancement unless he has heard the appeal and come to the conclusion that the conviction is justified and then only he should make a reference under this section, 6 A.L.J. 421; 10 Cr. L.J. 27-2 Ind. Cas. 475. Reference for enhancement should be made promptly. The High Court declined to enhance the sentence nine months after conviction even though the sentence originally passed was inadequate, (1912) M.W.N. 50-13 Cr. L.J. 421-13 Ind. Cas. 777; see also 11 Cr. L.J. 99-4 Ind. Cas. 980; 21 Ind. Cas. 471. It is the duty of the High Court when a case is reported to it for enhancement of sentence to see whether on the record the sentence passed by the lower Court is clearly inadequate to the offence, 26 Cr. L.J. 821-85 Ind. Cas. 489. A District Magistrate is not competent to make a reference under this section for enhancing the sentence passed by a Sessions Judge, 25 Cr. L.J. 928-81 Ind. Cas. 544. Ordinarily the High Court will not entertain a reference the object of which is to have an order of acquittal passed by an inferior Court set aside, 5 Lah. 16. A District Magistrate making a reference to the High Court under this section has no power to take evidence and if he has power, it is only for the purpose of recommendation to the High Court and the evidence so recorded could not form the basis of an order by the High Court, For example, to award maintenance for children under S. 489, *infra*, 3 Cr. L. Rev. 430. When a revision petition filed by the accused was dismissed without notice to the public prosecutor that fact will not preclude a reference by the District Magistrate for enhancement of the sentence. The order passed dismissing the revision by the accused dealt with the legality of the conviction and could not be construed as an adjudication on the adequacy or otherwise of the sentence, 26 Cr. L.J. 533-85 Ind. Cas. 727. A Sessions Judge or a District Magistrate is not bound to refer every case in which he detects an error to the High Court. It is only discretionary, 23 W.R. (Cr.) 30. No report is to be made where the recommendation would be merely to alter the conviction of an offence into another cognate offence, 9 C. 847. A reference should not be made to the High Court under this section merely for obtaining the opinion of the High Court on a question of law especially when the referring officer does not really dissent from the conclusion of the trial Court, 47 A. 409. Nor can a report be made by a District Magistrate after taking fresh evidence, 12 A.L.J. 361. A District Magistrate is not competent to refer

to the High Court a point of law nor can he transfer the decision of a difficult case on his file to the High Court, 15 Cr. L.J. 472—24 Ind. Cas. 332. When there is an illegality the case should be reported to the High Court and it must be left to the High Court to determine whether the illegality requires correction, Weir II, 564. Cases of acquittal are not to be reported under this section to the High Court, 24 A. 345; 15 M. 36 and such a reference cannot be entertained by the High Court, 25 A. 128, where a reporting officer could himself dispose of the matter no report should be made to the High Court, Ratanlal 290. When reporting to the High Court there should be a definite recommendation by the reporting officer, 27 A. 25. A brief abstract of the case and the grounds on which the reference is made should be stated, 9 Cr. L.J. 502—2 Ind. Cas. 159. A reference should be made in the form prescribed by the High Court circulars, 30 C.W.N. 616.

FOR THE ORDERS OF THE HIGH COURT.—Where a sentence had already expired the High Court refused to pass orders on the reference remarking that it would not be to the advantage of the prisoner to do so, for, if the proceedings were quashed by the High Court the prisoner ran the risk of being tried again for the same offence, 24 W.R. (Cr.) 11.

THE RESULT OF SUCH EXAMINATION.—A District Magistrate while reporting to the High Court a case of acquittal expressed his opinion that the Magistrate had taken a grossly biased and distorted view of the case and did not honestly and impartially apply his mind to the actual evidence before him, the High Court held that it ought not to interfere in revision unless it had satisfied itself that the opinion of the District Magistrate was correct and that it would not be right for the High Court to take the expression of opinion of the District Magistrate and to rely upon that opinion without satisfying itself on the evidence and upon the conduct of the proceedings generally that the District Magistrate's opinion was right and refused to interfere holding that it ought not to interfere in revision at the instance of a private party without the intervention of the Local Government and on the ground that the High Court could not do so without practically hearing the whole case as an appeal, 24 C. 703 at 709. The High Court will have to go into the facts and circumstances before it interferes in revision under this section, 21 C.W.N. 230.

SUB-SECTION (2).—This sub-section deals with the powers of the Additional Sessions Judge to make a reference to the High Court under this section.

439. (1) In the case of any proceeding the record of which has been called for by itself or which has been reported for High Court's powers of revision, orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence; and when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

(2) No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under section 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court the accused has committed, than might have

been inflicted for such offence by a Presidency Magistrate or a Magistrate of the first class.

(4) Nothing in this section applies to an entry made under section 273, or shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

(5) Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.

(6) *Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-section (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction.*

AMENDMENT.—Sub-section (6) has been newly added enabling the accused to question the propriety of his conviction when a notice had been issued to him by the High Court for enhancement.

SCOPE OF THE SECTION.—The power of revision of the High Court under Ss. 435 and 439 of the Code refers to any proceeding before any interior Criminal Court situate within the local limits of the High Court's jurisdiction. The test is not the nature of the proceeding held by the Court, but the nature of the Court in which that proceeding is held. Proceedings of a civil nature may be held in a Criminal Court, as, for instance, applications for maintenance under S. 489 of the Code and these are subject to revision by the High Court, 43 B. 607 at 609. S. 435 and S. 439 must be read together, 15 C. 608 ; 27 B. 84 at 88. S. 435 authorises the High Court in revision to call for the records of interior Criminal Courts and Ss. 436 and 439 lay down the powers which the High Court may exercise in cases where the records have been called for or which have been reported for orders under S. 435. S. 435 states the grounds on which the powers under S. 439 could be exercised. Applications for revision in criminal cases stand on a fundamentally different footing from those in civil cases, where the High Court is bound by the rigid provisions of Civil Procedure Code to accept findings of fact arrived at by the lower Courts. In criminal cases there is no such statutory restriction as to the exercise of jurisdiction and in practice though the Court does not ordinarily interfere on questions of fact, still the High Court is competent to interfere in revision with a finding of fact when the occasion requires it and it will do so when it is satisfied that the finding of the lower Court is manifestly erroneous and a miscarriage of justice would result from it if left uncorrected, 17 C.W.N. 379—13 Cr. L.J. 897—17 Ind. Cas. 993 ; 16 C. L.J. 483. In the ordinary course of things, findings of fact are accepted by the revisional Courts as binding upon it. But revision would be an idle force if the Revisional Court had not the power, which has been exercised a hundred, possibly a thousand times throughout the High Courts in India to look into the evidence itself and see if those findings can be justified by what appears upon the record. A revisional Court does not decide the balance of credibility between two conflicting sets of witnesses or two conflicting issues of fact which is either perverse or has been arrived at contrary to well-established principles of law. Much injustice may be done by applying to criminal proceedings the precise and pedantic requirements of Civil Procedure. There is no such language as "pleadings" in a Criminal Court. 46 A. 64 ; 23 Cr. L.J. 1258—82 Ind. Cas. 266 ; 25 Cr. L.J. 1368—82 Ind. Cas. 760 ; 25 Cr. L.J. 438—77 Ind. Cas. 723. Ordinarily the High Court will not in revision go into facts in order to satisfy itself as to the correctness and propriety of the findings arrived at by the lower Court. But in exceptional cases it is not only open to the High Court to examine the evidence but it is its duty to do so as the High Court is not debarred from going into the evidence, 26 Cr. L.J. 113—83 Ind. Cas. 673 ; 26 Cr. L.J. 393—

83 Ind. Cas. 937. The circumstances which will justify the interference of the High Court have not been and cannot be laid down with precision, while the judges repeatedly held that only when exceptional grounds exist, the High Court ought to interfere. The decided cases show, that no hard and fast rule can be laid down, but when, in the interests of justice the High Court's intervention became necessary it was not refused, 47 M. 722. No useful purpose can be achieved by a critical examination of the judgments of Subordinate Courts and it is safer to ascertain a broad and comprehensive view of the facts and then to ascertain whether there has been a failure of justice. This was the course adopted in 2 C.L.J. 824. Where a discretion has been exercised by a Court of competent jurisdiction which is not on the face of it arbitrary, the practice of the High Court as a Court of revision is not to inquire into the reasons given by the lower Court to interfere in revision, 2 Pat. 708. Mere illegality of procedure of the lower Court is not a ground for interference under this section unless it is proved that the accused had suffered a hardship through such illegality, 27 Cr. L.J. 473=93 Ind. Cas. 699; 27 Cr. L.J. 727=85 Ind. Cas. 55. The High Court will not interfere in revision where the illegality in the trial is purely technical and has not prejudiced the petitioner. 27 Cr. L.J. 558=93 Ind. Cas. 1054. The High Court is not bound to interfere in revision with an order under S. 562, *infra*, even in a case where it is illegal, 27 Cr. L.J. 624=94 Ind. Cas. 368. The powers of the High Court under this section are wholly discretionary and in 28 B. 533 at 566, *Jenkins, C.J.*, observed thus: "If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion, and when it is argued that judicial decision has deprived us of the power that the Legislature has given us, recall the words of an eminent English Judge 'I desire to repeat' he said what I have said before, that this controlling power of this Court is a discretionary power and must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances which vary greatly. For myself I say emphatically that this discretion ought not to be crystallised as it would become in course of time, by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion, which the Legislature has committed to them. This discretion, like all other judicial discretions ought, so far as practicable, to be left untrammelled and free so as to be fairly exercised according to the exigencies of each case. These weighty words appear to me to breath the spirit that should guide us in the exercise of our discretionary power of revision. This may perhaps increase our responsibility and add to our labours, but no one would shrink the one or grudge the other". The power of revision is to be exercised in exceptional cases and as a last resort after all other available remedies have been exhausted. It is essentially a discretionary power of control not to be crystallised under hard and fast rules. But to be left untrammelled by the exigencies of each case, 32 C. 998; 9 Cr. L.J. 211=1 Ind. Cas. 238. See also 26 Cr. L. J. 468=85 Ind. Cas. 146 and 26 Cr. L.J. 1101=88 Ind. Cas. 189. Interference in revision in criminal cases is purely discretionary and the Court will refuse to interfere in belated applications for revision as the finality of criminal orders should not be left in doubt for a long time. 13 Cr. L.J. 531=15 Ind. Cas. 803. Although it has been the long practice of the High Court not to interfere on facts in revision yet it is not an absolute rule, 20 A.L.J. 276; 9 Bom. L.R. 706; 8 B. 197; 25 Cr. L.J. 1078=81 Ind. Cas. 897; 25 Cr. L.J. 278=76 Ind. Cas. 870; 25 Cr. L.J. 1026=81 Ind. Cas. 802; 24 Cr. L.J. 476=72 Ind. Cas. 892; 24 Cr. L.J. 203=71 Ind. Cas. 667; 26 Cr. L.J. 393=84 Ind. Cas. 937; 26 Cr. L.J. 527=85 Ind. Cas. 367; 22 L.W. 831. Objection as to the legality of a trial, e.g., misjoinder, can be raised in revision for the first time even though no objection was taken in the Courts below. If the trial is bad no question of prejudice arises and there is no obligation cast on an accused person when the trial is illegal to prove prejudice. 25 Cr. L.J. 807=81 Ind. Cas. 343. It is necessary in revision to see whether there has been any error in the law, any irregularity, any abuse or failure to exercise judicial discretion which would justify interference in revision. 23 A. 249. Ordinarily a finding of fact cannot be interfered with in revision. 14 Cr. L.J. 595=21 Ind. Cas. 467. Where the accused was convicted by a Magistrate of an offence when the facts proved disclosed the commission of an offence exclusively triable by a Court of Session, the High Court in revision set aside the conviction and directed a commitment. 30 C.W.N. 480 where 8 C. 717 is referred to.

Only in case of (1) of defective investigation, (2) of failure to consider important evidence, (3) of consideration of evidence from a wrong point of view, (4) of contravention of any express provision of law, (5) of conviction upon facts which will not support the same, will the revisionary powers of the High Court be exercised, 31 M. 133 at 135. Absence of evidence on record to support a conviction is a good ground for revision, 2 A.L.J. 53—2 Cr. L.J. 22 ; 11 Cr. L.J. 97—4 Ind. Cas. 978. Power of revision will be exercised when there is a mis-reading of the documentary evidence and the fundamental errors in principle which vitiates the conduct and disposal of the case, 28 B. 479 at 501. Powers of revision are to be exercised in exceptional cases and as the last resort when all other available remedies have been exhausted, 1884 A.W.N. 293 ; 22 C. 998 ; 28 B. 533. Great delay in applying to the High Court for revision will be a ground for not exercising the same, 8 A. 514, and in proper cases the High Court may exercise its powers of revision even after the expiry of the sentence, 7 A. 125. Once a revision petition is dismissed on the merits or for default, the rules of justice, equity and good conscience require that no other petition on the same matter should be entertained, (1915) M.W.N. 786—16 Cr. L.J. 697—30 Ind. Cas. 745 where 23 M.L.J. 371 is followed. The High Court rarely interferes in revision in pending cases except where it is *prima facie* vexatious and interference is clearly required to prevent abuse of process of Court, 9 Cr. L.J. 151—1 Ind. Cas. 83. If a charge is framed by the Magistrate where none should have been framed it might be said without violence to the language of the Code that the procedure is irregular and the High Court has power to interfere, 23 A.L.J. 21 ; 28 Cr. L. J. 748—85 Ind. Cas. 284 ; 39 M. 551. The High Court cannot interfere under this section with orders of Village Panchayat Courts established under Act II of 1920, but the remedy is under S. 107 of the Government of India Act under which the High Court can interfere in revision, (1923) M.W.N. 800. Where a youthful offender of fourteen and a half years was illegally sentenced to six months' rigorous imprisonment, under S. 411 I.P.C. and in lieu of this sentence the offender had been ordered to be detained in the Reformatory School, the High Court has jurisdiction in revision to interfere with the order of detention, 25 Cr. L. J. 1312—82 Ind. Cas. 480. It is very difficult for the High Court in revision under this section to interfere with orders passed under S. 110, *supra*. But when a person is sentenced to imprisonment for failure to furnish security the High Court has to be satisfied that the evidence is of such a character as will support an inference that it is necessary in the interests of public peace and security to send the person to prison or to bind him over, 22 A.L.J. 678—25 Cr. L. J. 1172—82 Ind. Cas. 35. It must be noticed that this section as amended makes no mention of S. 195, *supra*. Therefore the High Court will take a very wide view of its powers under this section and it would therefore be competent to revise an order made by an appellate authority directing the withdrawal of a complaint under S. 476B, *infra*. But such power will be exercised only in very exceptional cases, 48 B. 401. Where an Assistant Sessions Judge agreeing with the unanimous verdict of the jury convicts an accused person and on appeal to the Sessions Judge the conviction is confirmed on the ground that there was no misdirection by the trial Court, a revision does lie against the Sessions Judge's order and in revision the petitioner starts with a heavy *onus* on him to show that the Sessions Judge had decided wrongly. It is not the intention of the law that the revision should be heard by the High Court as an appeal ; if that were the case, there would be no object in giving a right of appeal to the Sessions Judge at all, [1923] Pat. 109. Ordinarily there is no justification for a superior Court to take up in revision interlocutory matters. There is no provision for an interlocutory appeal against a Magistrate's decision that he has jurisdiction to try a case, 27 Cr. L. J. 191—91 Ind. Cas. 1007. The High Court may interfere at any stage of the proceedings. In 22 C. 131 ; 26 C. 786 ; 39 M. 551 the High Court quashed the proceedings after a charge had been framed, while in 23 C. 68 ; 20 B. 543 ; 67 Ind. Cas. 589, the High Court interfered upon issue of summons to the accused. See also 47 M. 722 ; 25 C. 233 ; 1892 A.W.N. 102 ; 15 A.L.J. 331 ; 16 A.L.J. 458 ; 21 Cr. L.J. 379 ; 25 Cr. L.J. 1258—82 Ind. Cas. 255 ; 21 Cr. L.J. 591—73 Ind. Cas. 335 ; 24 Cr. L.J. 118—71 Ind. Cas. 246 ; 26 Cr. L.J. 421—85 Ind. Cas. 87 ; 26 Cr. L.J. 748—86 Ind. Cas. 284 ; 26 Cr. L.J. 1093—88 Ind. Cas. 181 ; 25 Cr. L.J. 1303—89 Ind. Cas. 247. The High Court has power to correct an erroneous order under S. 476 *infra* where it stated "sanction to prosecute Hugal" the High Court altered it into "make a complaint against" Hugal ; 27 Cr. L.J. 523—93 Ind. Cas. 987.

PROCEEDINGS.—The word "*Judicial*" had been properly omitted in the Code of 1887, and thereby widening the powers of revision of the High Court. The omission of sub-section (3) from S. 435, *supra*, has still more enlarged the powers of the High Court to revise practically all proceedings had under the Code.

RECORD HAS BEEN CALLED FOR BY ITSELF.—Power to call for records of inferior Courts is given specially by the provisions of S. 435, *supra*.

WHICH HAS BEEN REPORTED FOR ORDERS.—The report is made under S. 438, *supra*, by the Sessions Judge or by the District Magistrate and in special cases by the Additional Sessions Judges also.

WHICH OTHERWISE COMES TO ITS KNOWLEDGE.—The words are very wide and enable the High Court to exercise its revisional jurisdiction unlettered. The intention of the Legislature in framing this section is to make the terms thereof sufficiently wide and comprehensive to cover all cases which were not included in S. 436, where the words used are "or otherwise," 27 B. 84 at 87. A record may be before the High Court on appeal from a conviction and the High Court may and infrequently does act in revision, say, to enhance the sentence, without necessity of calling for the records of the case under S. 435 the *supra*. See also 13 Bom. L.R. 1185. Although this section gives the High Court power to call for cases not only in judicial information but also which comes to its knowledge, yet in most cases it is the right practice that the Judges should be moved in open Court; publicity is thus secured and a further hearing in open Court of the reason which moves the Government is thus afforded in the interests of the public order or a private party in his right. It is, therefore, desirable that such matters should be made in the required usual manner however wide the powers of Judges may be to interfere on knowledge or otherwise, 16 B. 580 at 582.

MAY IN ITS DISCRETION.—Interference is discretionary even where the Magistrate's order is illegal. The party aggrieved must show prejudice for the High Court to interfere in revision. See on this point the weighty observations of *Jenkins, C. J.*, in 28 B. 533 at 566 noted above at p. 600. The word "may" can only be used in the section and its use is not conclusive. 15 Cr. L.J. 285—23 Ind. Cas. 493.

EXERCISE ANY OF THE POWERS CONFERRED ON A COURT OF APPEAL.—S. 423 *supra* enumerates the powers of the appellate Court and in 6 A. 40 at 42 it was contended that those powers were confined to cases where there has been an acquittal or conviction, and there must be the same limitations to the High Court when it exercises the powers of revision under this section. This contention was overruled as this section mentions the words "*in the case of any proceeding*" which are wide and comprehensive enough to cover a case in which a man has been improperly discharged. The decision in 6 A. 40 was followed in 35 C. 994, where it was held that it was not necessary that there should be a right of appeal in order that the High Court may exercise its revisional powers conferred by this section. The High Court when exercising powers of revision is also entitled to make any amendment or any incidental or consequential order that may be just or proper as such a power is given to the appellate Court by S. 423 (1) (d), 27 A. 415; 36 C. 34; 5 C.L.J. 229. The High Court can under this section direct a committal of the accused to the Court of Session for an offence *prima facie* made out exclusively, triable by a Court of Session, when setting aside a conviction had, 30 C.W.N. 840 following 5 C. 717. It is contended that none of the sections specified in this section gives the High Court power to set aside or quash proceedings in a pending trial. The answer is simple. The sections dealing with the powers of a Court of appeal necessarily deal with those orders only, from which under the Code there is an appeal provided. With reference to such orders, the sections lay down the powers of a Court of appeal. *Ex hypothesis* the revisional powers of the High Court are invoked when no right of appeal exists and although in some cases, the High Court may by exercising the powers conferred on a Court of appeal be able to correct an error it does not follow, having regard to the variety of orders or proceedings which it may be called on to revise or deal with in its revisional jurisdiction, that, it can by exercising those powers only redress a wrong or do complete justice. In other words S. 439 does not say, that the High Court shall exercise only those powers that are conferred

on a Court of appeal. But on the other hand, it enacts that among the powers possessed by the High Court, are the powers confined on an appellate Court. Sections dealing with the powers of an appellate Court necessarily describe and define the powers of the Court, with reference to orders that are appealable. The Legislature in enumerating the powers of the Court of appeal had before its mind only a certain class of orders and in the nature of things that enumeration cannot be found complete or exhaustive, when the Court is called on to deal with orders of a different kind, orders not in the contemplation of the Legislature when it was defining the powers of a Court of appeal, 47 M. 722, at S. 426 deals with suspension of sentence pending appeal and releasing the appellant on bail. This power can be exercised in revision by the High Court. S. 427 refers to arrest of accused pending appeal against acquittal and S. 428 deals with power of taking further evidence or directing it to be taken by a Magistrate, S. 338 deals with power to direct tender of pardon to approver. These powers are expressly conferred on the High Court under this section. In cases of difference of opinion the procedure contained in S. 429, *vis.*, hearing before a third Judge, is made applicable.

REVISION AGAINST ACQUITTAL.—In 14 M. 363 the law is stated thus. An appeal against acquittal by way of revision is not contemplated by the Code, and should on public grounds be discouraged. In the case of an acquittal the law allows an appeal on behalf of the Local Government and the reason for such provision is obvious, but a private prosecutor should not be allowed to put the Court in motion to revise an acquittal deliberately arrived at by the lower Court and this has been consistently followed in 45 M. 913; 42 M. 109; 15 M.L.J. 225; 39 M. 505; 38 M. 1028; 20 Cr. L.J. 101; 42 C. 612; 25 A. 128; 24 A. 346; 21 Cr. L.J. 864; 38 C. 786; 5 Pat 25; 9 Bom. L.R. 156; 40 A. 84; (1915) M.W. N. 411—17 M.L.T. 457—16 Cr. L.J. 558—29 Ind. Cas. 830; 41 B. 560, 37 A. 409; 25 Cr. L.J. 1389—83 Ind. Cas. 349; 25 Cr. L.J. 1286—82 Ind. Cas. 274; 24 Cr. L.J. 17—71 Ind. Cas. 65; 24 Cr. L.J. 186—71 Ind. Cas. 602; 22 A.L.J. 820 at 822; 20 L.W. 327; 14 Cr.L.J. 177—49 Ind. Cas. 177; 27 Cr. L.J. 854—85 Ind. Cas. 934. The proper remedy for setting aside an acquittal is to approach the District Magistrate to move the Local Government to appeal against the acquittal under S. 417, *supra* and if he refuses to move in the matter then the party may seek remedy in the High Court in revision. 26 Cr. L.J. 98—83 Ind. Cas. 658; 26 Cr. L.J. 1598—90 Ind. Cas. 668; 26 Cr. L.J. 811—85 Ind. Cas. 258; 25 Cr. L.J. 816—88 Ind. Cas. 356; 26 Cr. L.J. 1248—89 Ind. Cas. 388; 27 Cr. L.J. 235—92 Ind. Cas. 219. When it interferes it can only order a new trial. When the offences are so essentially of a personal character and a failure of justice has been occasioned but the Local Government is loathe to appeal from such an acquittal, the matter being of no public interests, the High Court have entertained revision at the instance of private parties. When an acquittal was made without taking the evidence of witnesses present in Court but upon the result of a local inspection by the Magistrate, the acquittal was set aside, 39 C. 924. Similarly when the trial was wrongly held to be barred by the provisions of S. 403 *supra* the acquittal was interfered with, 12 Bom. L.R. 226; mere error of procedure by itself is no good ground for setting aside an acquittal. But if it is of a grave character and not mere error of improper admission of evidence it would afford a ground for interference. 25 Cr. L.J. 1286—82 Ind. Cas. 274; 25 Bom. L.R. 488—24 Cr. L.J. 784—73 Ind. Cas. 974. Errors of law committed by a Magistrate by which some inadmissible evidence was let in cannot afford sufficient grounds for interfering in revision against acquittal especially when such inadmissible evidence does not form a material portion of the facts relied on by the Magistrate for his conclusion. 3 Cr. L. Rex. 309.

MAY ENHANCE THE SENTENCE.—The High Court will be extremely reluctant to enhance the sentence passed by a Sessions Court except on very serious grounds, 26 Cr. L.J. 177—83 Ind. Cas. 861; 26 Cr. L.J. 1364—89 Ind. Cas. 452. A District Magistrate, a Sessions Judge or a Public Prosecutor may draw the attention of the High Court to a sentence with a view to its being enhanced; or the High Court can of its own motion send for the record and take action with a like object. If a private complainant considers the sentence unduly lenient, he may, draw the attention of the Government to the fact, 27 Cr. L.J. 818—95 Ind. Cas. 894. It has been the practice of the High Court that when an accused person

has completed his sentence of imprisonment not to enhance the sentence and send him back to jail in exceptional circumstances, 1 Lah. 453 ; 2 Cr. L. Rev. 389, after the lapse of say, nine months even in a case where the sentence is inadequate. 13 Cr. L. J. 121 = (1912) M. W. N. 50 = 13 Ind. Cas. 777. But it cannot be laid down as an invariable proposition that in no case can the High Court pass a substantive period of imprisonment if the accused has served out the sentence passed on him by the court below. When the accused was sentenced to a nominal sentence of one day's imprisonment which was served out at the end of the day's sitting, such a practice would not prevent the High Court from passing a substantive term of imprisonment in a suitable case and the High Court in the particular case sentenced the accused to six months' imprisonment in addition to the sentence already served out. 27 Cr. L. J. 557 = 93 Ind. Cas. 1053 where 56 Ind. Cas. 861 is distinguished. The High Court alone has got under the Code the power to enhance the sentence in revision; power to enhance the sentence is expressly given in this section while this power is expressly excluded in S. 423, clause (1)(b), where we find the words "not so as to enhance the same." The power of enhancement of sentence is subject to the limitation contained in sub-section (4) of this section. Where a case comes to the notice of the High Court by way of an appeal preferred by the accused it is not desirable under this section, if the appeal is admitted to issue a notice to show cause why the sentence should not be enhanced. It is absolutely incongruous that the court should in the same breath admit an appeal and issue notice why the sentence should not be enhanced. The appeal should be heard first and then the question of enhancement should be considered. 49 B. 480 at 452 followed in 27 Cr. L. J. 339 = 92 Ind. Cas. 831. As a matter of practice the High Court will not entertain a revision application for the enhancement of sentence at the instance of a private complainant. The remedy of a private complainant is to draw the attention of Government to that fact and the District Magistrate, Sessions Judge or Public Prosecutor may draw the attention of the High Court to the inadequacy of a sentence with a view to its being enhanced. The High Court, may also, of its own motion send for the records and take such action as it thinks necessary. 48 B. 355 ; 27 Cr. L. J. 818 = 95 Ind. Cas. 594.

SUB-SECTION (2).—The language of this sub-section is mandatory and is clearly an exception to S. 440, *infra*, 47 M. 428 at 432. It is here expressly enacted that notice to the accused is necessary before an order is passed by the High Court in revision, to his prejudice. When an order of enhancement is made by a single Judge without affording the petitioner an opportunity of being heard, the order so passed is a nullity and the matter could be reheard after giving the accused a reasonable opportunity to show cause, 47 M. 428 at 432, 437, 438 followed in 26 Cr. L. J. 543 = 85 Ind. Cas. 383.

SUB-SECTION (3).—The maximum term of imprisonment which the High Court is empowered to pass in cases tried by Magistrates cannot exceed the sentencing power of a Presidency Magistrate or Magistrate of the first class, namely two years. Such a sentence could be passed even in cases where the accused was originally tried by a third-class Magistrate who could inflict only a maximum sentence of one month's imprisonment, 1 Lah. 453 ; 16 Cr. L. J. 712, and in enhancing the sentence the High Court cannot pass a higher sentence than is prescribed for the offence by the Penal Code. The Magistrates empowered under S. 30 can pass any sentence under S. 34, *supra* except a sentence of death or transportation for a term exceeding seven years or imprisonment for a term exceeding seven years. Sentence should not be enhanced when the convicted person has duly served out the sentence before the enhancement is made. 11 Cr. L. J. 99 = 4 Ind. Cas. 980. See also 21 Ind. Cas. 471.

SUB-SECTION (4).—S. 273, *supra*, relates to an entry in the High Court Sessions by the presiding judge that any charge is clearly unsustainable against the accused. It has not the effect of an acquittal, but such entry shall have the effect of staying proceedings upon the charge. Such an order cannot be revised by the High Court under this section. Notwithstanding the reference to S. 273 this section does not empower the High Court to revise the judgment of one or more of its own Judges, 46 M. 382 at 387. Where an accused was convicted under Ss. 420 and 507, I.P.C. and on appeal the conviction was altered into one under Ss. 385 and 503, I.P.C. holding that Ss. 420 and 507 were not applicable to the case it was

open to the High Court in revision to find the accused guilty of an attempt to cheat under Ss. 420 and 511, I.P.C. as the prohibition under this clause did not apply to such a case. The case was one in which it was difficult to say what offence was committed and it was doubtful whether the alteration of one section into another can be said to be an acquittal within this sub-section, 48 M. 773 at 780.

CONVERT A FINDING OF ACQUITTAL INTO ONE OF CONVICTION.—This clause deprives the High Court of the power which it would otherwise have had under clause (1) of this section read with S. 423 (1) (a), *supra*. It prohibits only converting a finding of acquittal into one of conviction. Where there is no acquittal of the accused of an offence say, grievous hurt under S. 325, I.P.C. the accused being tried under S. 302, I.P.C. and convicted of hurt under S. 323, I.P.C. the High Court is not precluded by reason of this sub-section from recording a conviction and sentence for grievous hurt under S. 325, I.P.C., 27 Cr. L.J. 563—93 Ind. Cas. 132, but there is nothing here to prevent the High Court from setting aside the acquittal and ordering a re-trial of the case. The only method of securing a conviction in a case of acquittal is that provided in S. 417, *supra*, viz., an appeal by Local Government against the order of acquittal, 44 A. 332; 40 A. 83; 20 L.W. 327; 2 Pat. 708 at 710; 22 A.L.J. 820 at 822. When a prisoner appeals and the High Court takes action under this section, it has power to convict an acquittal of murder into a conviction therefor, because in such a case the High Court is acting under S. 423 and this section. 1 Rang. 436 at 445 where 37 M. 119 is followed and 44 A. 332 is distinguished, on the ground that the prisoner had not appealed and the High Court was merely acting as a Court of revision. See also 48 B. 810. But this view has been dissented from by a Bench of the Madras High Court in *Criminal Revision Case No. 654 of 1925*, 28 L.W. (sh. n.) 6 where 44 A. 332 is followed and 37 M. 119 is dissented from. But see 27 Cr. L.J. 1121—97 Ind. Cas. 631 which follows 37 M. 119 and 1 Rang. 436, and dissents from 48 B. 810 and 44 A. 332. "Acquittal" means in this section a complete acquittal, 37 M. 119, followed in 27 Cr. L.J. 339—92 Ind. Cas. 851. It is a well-settled view of all the High Courts in India that as a general rule it is not expedient to interfere in an acquittal at the instance of a private party and such application should be discouraged, 48 M. 813; 32 M. 109; 39 M. 808; 38 M. 1028, 28 M.L.J. 692; 14 M. 363; 42 C. 612; 38 C. 786; 41 B. 560; 44 A. 332; 40 A. 83; 2 Pat. 708; 4 Rang. 140. In 14 M. 363 the Madras High Court refused to hear Counsel for private complainant in a case of revision against acquittal, but in 50 C. 189, Counsel for private complainant was heard in spite of objection raised on the facts of the case. There is a deeper and fundamental reason for non-interference which turns upon the position of a private prosecutor in prosecutions for cognizable offences. The private prosecutor has no position at all in the litigation. The crown is the prosecutor and custodian of the public peace and if it decides to let an offender go, no other aggrieved party can be heard to object because he has not taken his full dole of private vengeance. 2 Pat. 708 at 710.

SUB-SECTION (5).—This sub-section precludes the High Court from entertaining any proceeding by way of revision at the instance of the Local Government for an enhancement of the sentence when the Local Government could have appealed in a case. Where the accused is charged with dacoity and murder and acquitted of the latter offence but convicted of the former, it is not open to the Local Government to apply to have the conviction under S. 395 altered to one under S. 396. The High Court will not exercise its revisional powers to enhance the sentence unless it is manifestly inadequate and it is not enough to show that if the trial Court had imposed a more severe sentence the High Court in appeal would have maintained it, 28 Cr. L.J. 1363—89 Ind. Cas. 452, following 2 C. 273. The prohibition contained in this section is to the entertaining an application for revision at the instance of a party who could have appealed. Having regard to this sub-section when an appeal lies and no appeal is brought, no proceedings by way of revision can be entertained at the instance of the party who could have appealed, and if proceedings by way of revision are instituted by such party, the High Court cannot interfere even of its own motion under sub-section (1), 28 Cr. L.J. 1362—82 Ind. Cas. 754. But in a case where the effect of allowing the revision in the case of those who could have appealed, and did not appeal would be to sustain a sentence of eight and ten years imprisonment, when they could

only be convicted under S. 143, I.P.C. (maximum sentence being only six months' imprisonment) it is right to hear the case under the general powers of revision and the High Court interfered with the conviction in revision, 20 L.W. 914=26 Cr. L.J. 747=86 Ind. Cas. 283. It will be still open to the High Court, if it so desired to act, whenever the matter comes to its knowledge otherwise than by an application for revision, if the person who could have appealed but did not act to do so, *vis.*, on reference from the lower Court under S. 498 or when the matter otherwise comes to its knowledge under this section, see 9 C. 513, where the High Court interfered in revision in a matter falling within this sub-section. Where a District Magistrate did not move the Local Government to prefer an appeal against an acquittal but sent up a case direct to the High Court for revision it was held to be inexpedient to exercise the High Court's powers of revision, 24 A. 316, see also 25 A. 123 and 38 M. 1028. An application by a private complainant direct to the High Court when the Local Government had not chosen to appeal against the acquittal does not come within the prohibition contained in this sub-section, 38 C. 786. In 2 Bom. L.R. 334 certain convicted persons did not appeal but others who were tried with them and convicted appealed from the conviction and they were acquitted on appeal, and the High Court, when moved by the District Magistrate for setting aside the conviction of those who did not appeal refused to interfere on the ground that the accused did not choose to have recourse to the proper remedy open to them, namely, to appeal. The High Court can under this section deal in revision with the case of an accused person who has not appealed when hearing an appeal from others jointly tried and convicted when it found that the entire prosecution evidence was unworthy of credit, 6 C.W.N. 330.

SUB-SECTION (6).—This sub-section is new. The effect of the enactment of this sub-section is that the High Court when adjudicating upon an application for 'enhancement of sentence is converted into a Court of appeal against the conviction and the accused person is now entitled to show that his conviction is unsustainable, 27 Cr. L.J. 330=92 Ind. Cas. 892. When a notice under sub-section (2) of this section is issued to the accused to show cause why the sentence passed on him should not be altered, then sub-section (6) of this section becomes applicable and the accused is entitled to show cause against the conviction, 27 Cr. L. J. 593=94 Ind. Cas. 257. It was held in 32 B. 162, that it has been the invariable practice of the High Court of Bombay in cases that come before it for enhancement to accept the conviction as conclusive and to consider the question of enhancement of the sentence on that basis. It was open to the accused to apply for revision of the conviction, but having failed to avail himself of that, he cannot be permitted to assail the conviction in a proceeding where the sole question is whether the sentence passed was adequate. This ruling has now been overruled by the new sub-section and is no longer law. The accused is now entitled to question the propriety and legality of the conviction when he has been called upon to show cause why the sentence should not be enhanced. It is in accordance with justice that the accused should be entitled to show cause not only against the sentence being enhanced, but also against the conviction. But in the case of an appeal preferred by the accused it is absolutely incongruous that the court should admit the appeal and issue notice calling upon him to show cause why the sentence should not be enhanced especially in a case of murder when transportation for life is awarded, 49 B. 450 as 452. The language of this sub-section is very wide and it is open to an accused person when called upon to show cause why his sentence should not be enhanced to raise any question that might be urged against his conviction; thus it is competent under this sub-section to an accused person to object to the legality of his trial on the ground of misjoinder of charges. 27 Cr. L.J. 308=92 Ind. Cas. 689; 49 B. 872.

DISMISSAL FOR DEFAULT.—When the High Court dismissed a criminal revision petition for default of appearance, it has no power to restore it to file subsequently, 23 M.L.J. 499. This ruling was followed in 44 M.L.J. 27=47 L.W. 23 where it was held that it was an universal principle of law in the absence of direct statutory provision, that when a matter has been finally disposed of by Court, the Court is *functus officio* and cannot entertain a fresh prayer for the same relief, unless or until the previous order of final disposal has been set aside, and therefore a second revision petition cannot lie to rehear a previously disposed of petition even

though the latter petition was dismissed for default of appearance, But a different view has been expressed in 46 M. 382. In the case of a criminal appeal or revision petition there is no provision in the Code for dismissing an appeal or revision petition for default of appearance. In a criminal matter the question is not one between party and party. It is the duty of the Court to go into the matter and dispose of it on the merits, and if a case has been dismissed for default, it is not a legal disposal and must be considered to be still pending, and the party can in such a case move to have the petition heard and disposed of on the merits, 46 M. 382 at 401, where 23 M.L.J. 371 is disapproved. See also 27 C.W.N. 947. The High Court has no power under this section to set aside the judgment of a court below merely on the ground that the accused counsel was prevented from being present in time on account of unavoidable circumstances, say a railway strike and therefore could not be heard, 24 Cr. L.J. 118-71 Ind. Cas. 248. The High Court has power under this section to set aside the order of a Sessions Judge rejecting an appeal filed by a practitioner on the ground that a subsequent appeal from jail by the convicted accused has been dismissed by him in ignorance of the fact of the previous appeal preferred to him. The High Court while setting aside the order of dismissal directed the Sessions Judge to re-hear the appeal after giving the practitioner an opportunity of being heard. 26 Cr. L.J. 1621-90 Ind. Cas. 917.

POWER TO EXPUNGE REMARKS IN A JUDGMENT.—A Magistrate is not empowered to make observations in his judgment concerning a person who was not a party to the proceedings before him and who had no opportunity of being heard on materials not admissible in evidence and which would not justify the observations in question and such a course amounts to an abuse of judicial privilege. It would be a denial of justice to allow the reflection upon the character of the person, to stand, and the High Court in revision directed that portion of the offending judgment to be expunged. 6 Lah. 188.

440. No party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision :

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Provided that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect section 439, sub-section (2).

This section does not affect the provisions of S. 436, proviso (a) and S. 439 (2), *supra*. In 14 M. 363, the High Court refused to hear Counsel in a petition filed to revise an acquittal by the lower Court acting under the provisions of this section but in matters of importance the Calcutta High Court always hears Counsel. 19 C. 380. In the Allahabad High Court the Judges make a practice of hearing pleaders in revision but at the same time professional gentlemen ought to be extremely careful that this privilege is not abused, 8 A.L.J. 237. In 1 B. 64 the Bombay High Court refused to hear Counsel in a reference under S. 438, *supra*. The Court may under this section determine the points raised without hearing Counsel or pleader on either side, but where it has not been done so but merely disposed of the case in default of appearance, the Court has power to restore the case and to hear and determine it, 10 C.L.J. 80, where 14 C. 42 and 10 B. 176 are distinguished, see also 46 M. 382; 50 C. 159. Where an accused person applied in revision to the High Court and pending the revision the High Court released him on bail and subsequently he disappeared, it was held, that the High Court would not hear his application for revision. 24 Cr. L.J. 240-71 Ind. Cas. 704.

441. When the record of any proceeding of any Presidency Magistrate is called for by the High Court under section 435, the Magistrate may submit with the record a statement setting forth the grounds of his decision or order and any facts which he thinks material to the issue; and the Court shall consider such statement before overruling or setting aside the said decision or order.

Statement by Presidency Magistrate of grounds of his decision to be considered by High Court.

This section evidently applies to cases in which a Presidency Magistrate passes a non-appealable sentence. Under S. 370, *supra* a Presidency Magistrate need not write a judgment in non-appealable cases but is only required to record certain particulars and even reasons for conviction need not be stated. The High Court may call for the records under S. 435 and the Magistrate may then give his reasons for his conclusion under this section. A statement submitted under this section by a Presidency Magistrate, supplies the defect if any, in the record and is conclusive as against affidavits filed in support of the revision. 12 B 377. Mere omission by the Magistrates to give reasons before referring a case for police investigation under S. 302, *supra*, and dismissing the complaint under S. 303, *supra*, is only an irregularity which can be rectified by a statement submitted under this section, 5 M.L.T. 79=2 Ind. Cas. 818. This section permits the Magistrate to supplement his reasons but does not abrogate the terms of S. 263 or S. 270 and a Bench of Presidency Magistrates imposing a sentence of imprisonment for the offence must record the reasons for the conviction; the omission to do so, especially where there is no record of evidence, is a grave irregularity entitling the High Court to interfere in revision; 16 M. 253; 18 B. 37; 8 C. 379.

442. When a case is revised under this Chapter by the High Court it shall, in manner hereinbefore provided by section 425, certify its decision or order to the Court by which the finding, sentence or order revised was recorded or passed, and the Court or Magistrate to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified; and, if necessary, the record shall be amended in accordance therewith.

High Court's order to be certified to lower Court or Magistrate.

This section provides for the High Court's order in revision to be certified to the Court below to enable that Court to make such orders as are conformable to the decision of the High Court. S. 425 relates to the order of the High Court on appeal being certified to the Court below and the manner of certifying is specified there. The provision in this and S. 425 *supra* that the High Court is to certify its decision or order to the lower Court negatives the idea that the High Court can revise its own findings. In such a case it has to certify to itself which could not be done, 9 Cr. L.J. 378=1 Ind. Cas. 747.

PART VIII. SPECIAL PROCEEDINGS.

CHAPTER XXXIII.

SPECIAL PROVISIONS RELATING TO CASES IN WHICH EUROPEAN AND INDIAN BRITISH SUBJECTS ARE CONCERNED.

SCOPE AND OBJECT OF THE CHAPTER.—This Chapter has been newly introduced at the suggestion of the Racial Distinctions Committee by the Criminal Law Amendment Act XII of 1923 in substitution of the old Chapter which applied only to European British subjects and other Europeans and Americans. It lays down the procedure in respect of the trial

of summons and warrant cases, concerning European British subjects and the same right is now extended to Indian British subjects. In this chapter, some attempt is made at equality before the law irrespective of race and colour. According to the procedure laid down in this chapter cases are divided into summons and warrant cases punishable with imprisonment and it applies only to cases arising outside the Presidency towns. The word 'complainant' is specially defined and the procedure in summons and warrant cases is specially laid down. In cases not falling under this Chapter the procedure is that laid down in Chapters XX to XXII, *supra*. (See S. 528A.) This Chapter deals with special provisions relating to cases in which European and Indian British subjects are concerned. By S. 443 to which Ss. 444, 445 and 446 refer, the provisions are applicable to a trial outside a Presidency Town; S. 447 enjoins on a Magistrate to forthwith inform the accused of his rights under this Chapter when he appears to be one which is, or might be held to be one which ought to be tried under this Chapter. S. 448, relates to references made in trial in Rangoon and S. 449, makes certain special provisions as to appeals. The special procedure laid down in the chapter is available if the trial is outside the Presidency Town, of offences punishable with imprisonment and if the condition mentioned in Cl. (a) or (b) of S. 443, (1) is satisfied and a claim is made under this chapter, either at the accused's own instance or on his being appraised of his rights by the Magistrate. If the claim is rejected the person may appeal to the Sessions Judge whose decision shall be final and not open to further appeal or revision. The stage at which this claim is to be preferred is specifically mentioned in sub-section (1) of S. 443, where it is put forward by the accused on his own initiative. But such a restriction does not exist where the Magistrate informs him about it, which the law enjoins the Magistrate shall forthwith do, at any stage of the inquiry or trial at which the case appears to him to be of such a nature. A claim to be tried under the provisions of this chapter is wholly different from a claim to be tried as an European British subject, or an Indian British subject or European, not being an European British subject or an American, that it is the latter claim only which is dealt with in Chapter XLIV-A of the Code in which Ss. 528-A and 528-B occur. So far as the former claim is concerned the question of status of the claimant does not always arise as is evident from the provisions of S. 443 (1) (b); whereas in a claim to be dealt with as an European British subject, or an Indian British subject or an European, not being an European British subject, or an American, the claimant has to prove his own status, in a claim to be tried under this chapter, the claimant may or may not have to do so. If the latter claim is based upon clause (a) of S. 443 (1), the claimant will have to prove that the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects. If it is based upon clause (b) of S. 443 (1), the claimant will have to prove that in view of the connection with the case of both an European British subject, and an Indian British subject, it is expedient for the ends of justice that the case should be tried under this chapter which may or may not involve a question of the claimant's own status. It will also be seen that S. 528A is expressly limited in its operation to a case to which the provisions of this chapter do not apply and S. 528B applies only to such cases as are contemplated by S. 528A and S. 449 under which the right of appeal is claimed under this chapter; consequently Ss. 528A and 528B can have no application to S. 449, *infra*, S. C. 347. The mere fact of a person being a European British subject, does not entitle him to the benefit of this chapter which is devised for the benefit of both European and Indian British subjects. An Indian British subject has certain privileges just like a European British subject under this chapter. The distinctive rights of a European British subject are detailed in Chapter XLIV-A which also deals with the distinctive rights of an Indian British subject. The determination of this question of the class of British subjects, is necessary for the application of the provisions of S. 275, *supra*, in the case of jury and of S. 264A in the case of assessors. When a person has been found by a Magistrate under the provisions of Chapter XLIV-A to be an European British subject, he is entitled to have the majority of the Jury to be European British subjects, and all the assessors in assessor trials to be European British subjects. That is the necessity for the determination of the question whether an accused person is an European British subject or not, 25 Cr. L.J. 1217—88 Ind. Cas. 833. The fact that an accused person made no claim to the status of a European British subject under Chapter XLIV-A of the Code will not debat

him from urging that the conditions mentioned in clause (a) or (b) of this section exist. The clauses do not refer only to the status of the accused person, but to the status of two persons. Where an accused person claims to be tried under this chapter the duty of the Magistrate is to satisfy himself that (1) the complainant and the accused are respectively European and Indian British subjects and *vice versa* (2) that in view of such status of complainant and accused respectively it is expedient in the interest of justice that the case should be tried under the provisions of this Chapter. If the Magistrate is so satisfied he must record a finding that the case should be tried under this chapter and the trial is to take place under S. 446, *infra*, which provides for a trial in accordance with S. 275, *supra*, and other provisions of Chapter XXIII so far as they are applicable *i.e.*, the accused must be tried by jury the majority of whom if he so requires must be of the category within which the accused comes. But the trial in the Sessions Court would be in the ordinary course, *i.e.*, in the absence of a claim by accused to be tried under this chapter or in the absence of a government notification under S. 269, *supra*, with the aid of assessors and the accused has the right under S. 466 to be tried by assessors all of whom shall be Europeans, Americans or Indians according to the category within which the accused comes, 26 Cr. L.J. 340-85 Ind. Cas. 380.

443. (1) *Where, in the course of the trial outside a presidency-town of any offence punishable with imprisonment, the accused person, at any time before he is committed for trial under section 213 or is asked to show cause under section 242 or enters on his defence under section 256, as the case may be, claims that the case ought to be tried under the provisions of this Chapter, the Magistrate inquiring into or trying the case, after making such inquiry as he thinks necessary, and after allowing the accused person reasonable time within which to adduce evidence in support of his claim, shall, if he is satisfied—*

(a) that the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects, or

(b) that, in view of the connection with the case of both an European British subject and an Indian British subject, it is expedient for the ends of justice that the case should be tried under the provisions of this Chapter,

record a finding that the case is a case which ought to be tried under the provisions of this Chapter, or, if he is not so satisfied, record a finding that it is not such a case.

(2) *Where the Magistrate rejects the claim, the person by whom it was made may appeal to the Sessions Judge, and the decision of the Sessions Judge thereon shall be final and shall not be questioned in any Court in appeal or revision.*

(3) *Where the Magistrate rejects the claim, he shall stay the proceedings until the expiration of the period allowed for the presentation of the appeal or, if an appeal is presented, until it has been decided.*

SCOPE OF THE SECTION.—The procedure herein prescribed applies to European and Indian British subjects alike. A claim under this section by the accused and a finding

by the Magistrate are necessary ingredients for the application of the provisions of this Chapter. If no claim is made prior to commitment and no finding is recorded by the Magistrate, the question cannot be raised in the Sessions Court. If a claim is made and found in accused's favour the Sessions Judge is bound to accept it and act under the provisions of this Chapter and cannot go behind it, holding that the provisions of the Chapter cannot apply. A finding by the Magistrate in favour of the accused is final, and any adverse finding is also final unless appealed against to the Sessions Judge. The matter could not be reargued again in the High Court after a prolonged trial in the Sessions Court, 26 Cr. L.J. 1217—88 Ind. Cas. 833. There is no provision in the Code enabling a person to put forward a claim to be dealt with under the provisions of this chapter either before a Magistrate holding an inquiry or trial in a Presidency town or before the High Court Sessions during the trial of the case. It is unreasonable to suppose that the Legislature ever intended that where there was no knowing whether there would be a conviction or an acquittal and both open to appeal under S. 443, (*infra*) any inquiry might be asked for and the court required to decide on the question as to whether, if the accused be tried outside the Presidency town the case would have been triable under this chapter. The only object of such inquiry being that result of it may be availed of, for an appeal by the accused when convicted and by the Crown when acquitted. The proper time to raise the question is when leave to appeal is applied for and that is when appellatant has raised it. 52 C. 347. For definition of European British subjects see S. 4 (1) (i) *supra*, newly given. There is no definition of the term "Indian British subject" in the Code.

TRIAL OUTSIDE A PRESIDENCY TOWN.—The special provisions of this Chapter do not apply to trial by Magistrates in a Presidency-town. The trial must relate to an offence punishable with imprisonment and not to other offences. The complainant and the accused persons or any of them are to be European and Indian British subjects or Indian and European British subjects. The applicability of the provision of this Chapter must be determined preliminary to the trial and from such determination as to the non-applicability of the provisions of this Chapter an appeal is provided for to the Sessions Court and the decision of the Sessions Judge shall be final and the Magistrate is bound to stay proceedings until the expiration of the period allowed for appeal and pending the disposal of the appeal presented. The Magistrate is bound to allow the accused person reasonable time to adduce evidence in support of his claim to be tried under this Chapter and on the evidence he is to be satisfied that the claim is well founded and the ends of justice require that the accused should be tried under the provisions of this Chapter. It is the duty of the accused to claim to be tried under this Chapter.

See Art. 150A of Sch. II, Limitation Act, which prescribes seven days' time for preferring an appeal under sub-section (2), from the date of the finding of the Sessions Judge rejecting a claim under this section. See S. 42, Act XII of 1923.

444. For the purposes of section 443, "complainant" means any person making a complaint or, in relation to any case of which cognizance is taken under clause (b) of section 190, sub-section (1), any person who has given information relating to the commission of the offence within the meaning of section 154 :

Provided that a Public Prosecutor, a public servant, a member, officer or servant of any local authority, a railway servant as defined in section 3 of the Indian Railways Act, 1890, or an officer or servant of any company, association or other body to which the Local Government may, by general or special order published in the local official Gazette, declare the provisions of this section to apply, shall not, by

reason only of the fact that he has made a complaint of, or given information of, an offence in his capacity as such Public Prosecutor public servant, railway servant, member, officer or servant, be deemed to be a complainant within the meaning of this section, nor shall a police-officer be so deemed by reason only of the fact that a report under section 173 relating to a case has been made by or through him.

The word "complainant" has been specially defined here for the purposes of the previous section and the proviso excludes a Public Prosecutor, a public servant, member, officer or a servant of any local authority, a railway servant or an officer or servant of any company from the definition, merely by reason of the fact that he has made a complaint in his capacity as such Public Prosecutor, public servant, etc. A police-officer making a report under S. 173, *supra*, is also excluded under this section.

PROVISO.—This proviso enacts that where a public servant makes a complaint under the orders of Government as such public servant the provisions of this Chapter do not apply, 27 Cr. L.J. 1044—97 Ind. Cas. 17. Every case in which a public servant, etc., filed a complaint or lodged information before the police would not become triable under the provisions of this Chapter. If the accused was a European British subject and the complainant or informant an Indian or *vice versa*. It was not contemplated by the Legislature in framing this proviso that in every case it would be open to the accused to allege that the formal complainant, a public servant, etc., had a personal knowledge of the facts of the case or a personal knowledge therein and in every such case the Magistrate would be obliged to institute an inquiry into the truth or otherwise of the allegation, 27 Cr. L.J. 770—95 Ind. Cas. 308.

445. (1) *Where a Magistrate or a Sessions Judge decides under section 443 that a case ought to be tried under the provisions of this Chapter and the case is a summons case, the Magistrate trying the same shall direct that the case be referred to a Bench of two Magistrates and shall send a copy of such order to the District Magistrate who shall forthwith provide for the constitution of a Bench of two Magistrates of the first class, of whom one shall be an European and the other an Indian for the trial of the case.*

(2) *Where the Magistrates constituting the Bench by which a case is tried under this section differ in opinion, the case, together with their opinions thereon, shall be laid before the Sessions Judge, who may examine any party or recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall thereafter pass such judgment, sentence or order in the case as he thinks fit and as is according to law.*

(3) *Any person convicted by a Bench under this section shall have the same right of appeal as if he had been convicted by a Magistrate of the first class, and any person convicted by a Sessions Judge under subsection (2) shall have the same right of appeal to the High Court as if he had been convicted by the Sessions Judge at a trial held by the Sessions Judge under this Code.*

(4) *In any case in which it is impracticable to constitute a Bench in accordance with the provisions of sub-section (1) in any district, the District Magistrate shall transfer the case for trial by a like Bench to such other district as the High Court may, by general or special order, direct.*

(5) *Notwithstanding anything contained in this section, the Local Government may, by notification in the local official Gazette, direct that all summons-cases tried under the provisions of this Chapter in any district specified in the notification shall be tried as if they were warrant-cases in accordance with the provisions hereinafter in this Chapter laid down for the trial of warrant-cases.*

This section prescribes the procedure in summons-cases before Magistrates and Benches in which European and Indian British subjects are concerned. When members of the Bench differ in opinion the case is to be laid before a Sessions Judge, who is to pass such judgment, sentence or order as he thinks fit according to law. From a conviction by a Bench and by the Sessions Judge an appeal will lie to the Sessions Court and the High Court respectively.

446. (1) *Where a Magistrate or a Sessions Judge decides under section 443 that a case ought to be tried under the provisions of this Chapter and the case is a warrant-case, the Magistrate inquiring into or trying the case shall, if he does not discharge the accused under section 209 or section 253, as the case may be, commit the case for trial to the Court of Session, whether the case is or is not exclusively triable by that Court.*

(2) *Where an accused is committed to the Court of Session under sub-section (1), the Court shall proceed to try the case as if the accused had required to be tried in accordance with the provisions of section 275, and the provisions of that section and the other provisions of Chapter XXIII, so far as they are applicable, shall apply accordingly :*

Provided that where the trial before the Court of Session would in the ordinary course be with the aid of assessors and the accused, or all of them jointly, require to be tried in accordance with the provisions of section 284-A, the trial shall be held with the aid of assessors all of whom shall, in the case of European British subjects, be persons who are Europeans or, Americans or in the case of Indian British subjects, be Indians.

This section prescribes the procedure in warrant-cases. A Magistrate is entitled to commit the case for trial to the Court of Session whether the case is or is not triable exclusively by that Court. The trial in the Sessions Court is to be conducted in accordance with S. 275 and the provisions of this Chapter. When an accused committed to the Sessions Court under this section had not required to be tried by European assessors but claimed to be tried by a jury of his own nationality and the Sessions Judge refused the prayer in the absence of a notification by the Local Government under S. 269, *supra*, it was held, that the object of the Legislature was to place Indian and European British subjects on the same footing by enacting this Chapter. The trial ought to be by Jury unless he required to be

tried by European assessors under this section. By the words "in the ordinary course" is meant the course which would be followed in the absence of a notification by the Local Government under S. 269, *supra*, 5 Lah. 518. (F.B.). When an European British subject is committed to the Court of Session before the amended Code came into force, he having a substantive right under the law as it stood to be tried by a jury, such substantive right cannot be taken away by the amendment of the law taking away his right of trial by jury and substituting in its place a trial by the Court of Session with the aid of assessors. The right which a person had to be tried by jury when committed for trial, could not be taken away by subsequent amendment of the law, the right being a substantive right and not one of procedure only, 6 Lah. 262.

447. *If at any stage of an inquiry or trial under this Code it appears to the Magistrate that the case is or might be held to be a case which ought to be tried under the provisions of this Chapter, he shall forthwith inform the accused person of his rights under this Chapter.*

Court to inform accused persons of their rights in certain cases.

See the new S. 534 *infra*, which enacts that the omission to inform a person of his rights will not affect the validity of the proceedings. Omission on the part of the Magistrate to inform the accused under this section of his rights under Chapter XXXIII is cured by the new section, S. 534 which enacts, that such omission shall not affect the validity of any proceeding. When a case triable under this Chapter has been actually tried in the High Court Session under Chapter XXIII, without a claim on the accused's part under S. 275, *supra*, for a trial under this chapter no appeal will lie in such a case. 3 Rang. 220.

448. *For the purpose of the trial in Rangoon of any person under the provisions of this Chapter references to the Sessions Judge shall be construed as references to the High Court of Judicature at Rangoon.*

References to Sessions Judge to be construed as references to High Court in Rangoon.

Special provisions relating to appeal.

449. (1) *Where—*

(a) *a case is tried by jury in a High Court or Court of Session under the provisions of this Chapter, or*

(b) *a case which would otherwise have been tried under the provisions of this Chapter is under this Code committed to or transferred to the High Court and is tried by jury in the High Court, or*

(c) *a case is tried by jury in the High Court in a presidency-town and the High Court grants leave to appeal on the ground that the case would, if it had been tried outside a presidency-town, have been triable under the provisions of this Chapter, then, notwithstanding anything contained in section 418 or section 423, sub-section (2), or in the Letters Patent of any High Court, an appeal may lie to the High Court, on a matter of fact as well as on a matter of law.*

(2) *Notwithstanding anything contained in the Letters Patent of any High Court, the Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original order*

of acquittal passed by the High Court in any such trial as is referred to in sub-section (1).

(3) *An appeal under sub-section (1) or sub-section (2) shall, where the High Court consists of more than one Judge, be heard by two Judges of the High Court.*

SCOPE OF THE SECTION.—In ordinary cases tried by jury there is no appeal except on a matter of law under S. 418, *supra*, but when a case is tried by jury under the special provisions of this chapter an appeal is provided for by this section to the High Court on matters of fact as well as on matters of law and the finding of the jury on a question of fact is no longer final. 26 Cr. L.J. 1241—88 Ind. Cas. 887. This section gives a right of appeal against the decision of the High Court in three classes of cases: (1) cases tried by the High Court by jury under this Chapter; (2) cases which would otherwise be tried under this Chapter but are committed or transferred to the High Court and tried by Jury. In these two classes of cases an absolute right of appeal is given; (3) cases tried by the High Court by jury in Presidency Towns. The necessity of granting leave to appeal under clause (c) is due to the fact that in cases falling under clause (b) the question, whether Chapter XXXIII is applicable or not has been decided before the case is committed to or transferred to the High Court. In cases falling under cl. (c) this question, has not arisen, and it was necessary for the Legislature to provide for a decision of this question. The clause is not well drafted, but its meaning is that the question of *status* is to be decided by the High Court before leave to appeal is granted, and that, if that is decided in the accused's favour he is entitled as of right to appeal. The wording of cl. (c) also supports this view, since it states the ground on which leave to appeal may be granted. This ground would not be stated in this manner if other grounds had to be considered by the Court when granting leave to appeal. Power to grant leave to appeal also includes power to refuse leave to appeal, but if the power to grant leave to appeal is limited to a single ground, all that follows is, that the Court which has power to grant leave to appeal on that ground can refuse leave to appeal when that ground is not established. Therefore the Court to which an application for leave to appeal is made has only to decide whether the case would, if it had been tried outside the Presidency town, have been triable under the provisions of this Chapter. The conditions that would make a case, if it had been tried outside a Presidency town triable under this Chapter are set out in sub-section (1) (a) and (b) of S. 443, *supra*, 52 C. 636. As a matter of convenience and expediency the application for leave to appeal should be made to the Judge who tried the case. 52 C. 347 and 52 C. 636. It is desirable that applications for leave should be made to the trial Judge who is better qualified than any one else to decide whether circumstances which had nothing to do with the guilt of the accused, exist or not. Notice should be given of such applications to the Crown. The right of appeal confined herein is at best a qualified right and very different from that conferred by S. 410, *supra*, 52 C. 347. In this country it is unusual for the Legislature to make a provision for leave to appeal to be granted by the Court against which an appeal is sought to be preferred, although in England it is frequent. On general grounds it is better in the interests of justice that the application is heard by a Bench of two Judges. 52 C. 636. In the cases reported in 52 C. 347 and 52 C. 636, special leave to appeal was granted from a conviction had at the High Court Sessions and the High Court interfered on the merits also.

SUB-SECTION (1).—When a claim to be tried as a European British subject was asserted before the Magistrate and such claim was allowed and it was not clear whether the claim was to be tried according to the provisions of this Chapter and the Crown did not take any steps to get the order of the Magistrate set aside or corrected it was held that on an appeal from a conviction by the Sessions Court the appellant was entitled to appeal under this section both on matters of fact and matters of law, 41 C.L.J. 67—29 C.W.N. 260—26 Cr. L. J. 682—88 Ind. Cas. 38. An appeal under this sub-section preferred from a conviction and sentence is governed by Art. 165 of the 2nd Schedule to the Limitation Act, *i.e.*, sixty

days from date of conviction and sentence. The question of limitation arises on an application for leave to appeal under Cl. (c) of this sub-section because if the appeal is barred, the application for leave is necessarily out of time. 53 C. 746.

SUB-SECTION (2).—An appeal against an original order of acquittal under this Chapter passed by the High Court in the exercise of its original criminal jurisdiction is given a power similar to that contained in S. 417 of the Code.

450—463. *Repealed by Act XII of 1928.*

CHAPTER XXXIV.

LUNATICS.

464. (1) When a Magistrate holding an inquiry or a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness, and shall cause such person to be examined by the Civil Surgeon of the district or such other medical officer as the Local Government directs and thereupon shall examine such Surgeon or other officer as a witness, and shall reduce the examination to writing.

Procedure in case of accused being lunatic.

(1A) *Pending such examination and inquiry, the Magistrate may deal with the accused in accordance with the provisions of section 466.*

(2) If such Magistrate is of opinion that the accused is of unsound mind and consequently incapable of making his defence, he shall record a finding to that effect and shall postpone further proceedings in the case.

AMENDMENT.—Sub-section (1A) is new and empowers the Magistrate to release the accused alleged to be a lunatic on bail pending his examination and inquiry into the fact of lunacy. The addition of the words "shall record a finding to that effect and" in sub-section (2) make it obligatory on the Magistrate to record a finding as to unsoundness of mind and consequent incapability of making defence.

SCOPE OF THE SECTION.—This section contemplates a case in which an accused person appears to be unsound when a Magistrate is holding a preliminary inquiry or trial while the next section deals with a case in which a person committed for trial to the Court of Session, appears at the Sessions trial to be of unsound mind. The section has nothing whatever to do with the question whether the accused was or was not of unsound mind at the time when he is alleged to have committed the offence of which he is accused. 1900 A.W.N. 47. See 42 A. 137.

When an accused person appears to be of unsound mind the Court should inquire into the fact of such unsoundness before calling upon him to answer the charge. 1905 A.W.N. 2—2 Cr. L.J. 91. The procedure laid down in this chapter will not strictly apply to maintenance proceedings under Ch. XXXVI because the person proceeded against under the amended S. 488, *infra*, is not an accused person. The word "accused" used in the old section is avoided in the new section evidently with deliberation. However the provisions of this section as well as those which a Court of equity and good conscience would naturally follow, *i.e.*, if it finds that the person proceeded against is insane and incapable of understanding the questions put to him and giving rational answers, further proceedings must be postponed and this is all the

more necessary in a maintenance case in which he will be an important witness and has the right of offering terms, 48 M. 333 at 390-91. Where a Magistrate is of opinion that the accused is of unsound mind and therefore incapable of making his defence, he cannot legally acquit him but he is bound to postpone further proceedings in the case, Weir II, 561; 11 M. L.T. 24—13 Cr. L.J. 24—13 Ind. Cas. 215. A Magistrate cannot act on his own opinion and consign a person to an asylum. He must have before him the statement of a medical officer reduced to writing; a mere written certificate of a medical officer is not sufficient evidence of a prisoner being of unsound mind. Weir II, 580 and 582; 9 W.R. (Gr.) 23. When the evidence of a medical witness reduced to writing cannot be considered to be decisive on the question of the prisoner's state of mind; then the Magistrate should take further evidence regarding the prisoner's ordinary habits both before and after the commission of the alleged offence, 5 C. 826. The postponement contemplated by this section must be *sine die* after recording a finding that the accused is of unsound mind incapable of making his defence and the Magistrate may be required to resume the inquiry under S. 467.

465. (1) If any person committed for trial before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the jury, or the Court with the aid of assessors, shall, in the first instance, try the fact of such unsoundness and incapacity, *and if the jury or Court, as the case may be, is satisfied of the fact, the Judge shall record a finding to that effect, and shall postpone further proceedings in the case and the jury, if any, shall be discharged.*

Procedure in case of person committed before Court of Session or High Court being lunatic.

(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.

AMENDMENT.—In sub-section (1) it is enacted that if the jury or Court is satisfied of the fact of unsoundness, the Judge shall record a finding to that effect and shall then postpone further proceedings and discharge the jury.

SCOPE OF THE SECTION.—The provisions of this section are mandatory. It is incumbent on the Sessions Judge himself to hold an inquiry on the question whether the accused was capable of making his defence where the case comes before him after commitment. He is also to take the opinion of the assessors on that question and come to a decision before proceeding further with the trial. The question whether when the accused was brought up for trial, was of sound mind, is entirely different from the one whether he was of unsound mind at the time of alleged offence and non-compliance with the provisions of this section vitiates the trial, 7 Lab. 315; 27 Cr. L.J. 898—98 Ind. Cas. 160. Where in the course of the trial an accused person showed signs of insanity, the Judge instead of raising a preliminary issue as to the soundness of mind of the accused and his capacity to understand the proceedings to be tried by the jury first asked the jury to observe the accused closely and to form their own opinion and proceeded with the trial and the jury found the accused not insane it was held the procedure adopted was improper and re-trial was ordered to try the issue of insanity first, 44 C.L.J. 285. Under this section the issue of unsoundness should be tried first and the trial of that question shall be deemed to be part of the trial before the Court. 27 Cr. L.J. 898—98 Ind. Cas. 160. The Sessions Judge should not merely question the accused but should try the fact of his unsoundness of mind by examining the Civil Surgeon or some other medical officer and by taking evidence of persons resident in the accused's village to ascertain whether the accused had at any time prior to the commission of the

offence exhibited symptom of insanity, 1 B.H.C.R. (Cr. Ca.) 33 : the Judge alone cannot try the preliminary question, but the trial is to be by Judge and jury or by the Judge with the aid of assessors as the case may be, 10 B.L.R. Appr. 10=19 W.R. (Cr.) 15 ; 19 W.R. (Cr.) 26. Under this section the onus is on the prosecution to show that the accused was at the time, of sound mind capable of making a defence. 51 C. 584. The most satisfactory method to adopt is that if the inquiry is to be commenced under this section it should be regarded not so much as an issue joint between the parties but as a preliminary issue which is conducted for the satisfaction of the Court and in that view the prosecution ought to commence and to give their evidence, 51 C. 827. The preliminary inquiry cannot be held to be tried in the sense of ascertaining the guilt or not of the offence charged, 3 Pat. L.J. 291 (F.B.)=19 Cr. L.J. 139=43 Ind. Cas. 423.

SUB-SECTION (2).—This sub-section is merely an enabling enactment giving the Court which should subsequently try the accused, power to take into consideration the earlier proceedings as if they were part of the record in the trial without the necessity of formal proof and does not make it necessary to hold a preliminary inquiry first and then a subsequent trial with the consequence that the *personnel* of the Court must remain throughout as originally constituted, 3 Pat. L.J. 291 (F.B.). If as a result of such trial the Court is satisfied that the accused is capable of making his defence the trial shall proceed upon the charge on which the accused stands committed, 15 A.L.J. 239=18 Cr. L.J. 470. Failure to record a finding on this point vitiates the entire proceeding in the Sessions Court as the provisions of this section are obligatory, 21 Cr. L.J. 83=45 Ind. Cas. 483.

466. (1) Whenever an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or Court, as the case may be, *whether* the case is one in which bail may be taken or not, may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf.

(2) *If the case is one in which, in the opinion of the Magistrate or Court, bail should not be taken, or if sufficient security is not given, the Magistrate or Court, as the case may be, shall order the accused to be detained in safe custody in such place and manner as he or it may think fit, and shall report the action taken to the Local Government :*

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Local Government may have made under the Indian Lunacy Act, 1912.

The object of the preliminary inquiry provided by this section is to ascertain whether the accused is then in a fit state to be tried. The preliminary inquiry is not a trial to ascertain the guilt of the accused. If the inquiry results in the accused being found capable of making his defence then the trial will proceed and if not, the trial shall be postponed. The word "adjournment" in S. 295 and other sections implies the trial has begun, while the word "postponement" used here indicates something different from adjournment, 1918 Pat. 37.

467. (1) Whenever an inquiry or a trial is postponed under section 464 or section 465, the Magistrate or Court, as the case may be, may at any time resume the inquiry or trial, and require the accused to appear or be brought before such Magistrate or Court.

Resumption of inquiry or trial.

(2) When the accused has been released under section 466, and the sureties for his appearance produce him to the officer whom the Magistrate or Court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence.

When a trial is postponed under S. 465, *supra*, on the ground of unsoundness of mind of the accused and he being consequently incapable of making his defence the trial should not be resumed from the point at which it was previously stopped but should be commenced *de novo* when the Court finds him capable of making his defence. *Welr II, 582.* The jurisdiction of the Magistrate ceases the moment the lunatic is handed over for safe custody and it does not revive until the accused is sent back to the Magistrate under S. 473, *infra*, 2 G. 356.

468. (1) If, when the accused appears or is again brought before the Magistrate or the Court, as the case may be, the Magistrate or Court considers him capable of making his defence, the inquiry or trial shall proceed.

Procedure on accused appearing before Magistrate or Court.

(2) If the Magistrate or Court considers the accused to be still incapable of making his defence, the Magistrate or Court shall again act according to the provisions of section 464 or section 465, as the case may be, and if the accused is found to be of unsound mind and incapable of making his defence, shall deal with such accused in accordance with the provisions of section 466.

The Amendment in sub-section (2) is in consequence of the change in sub-section (2) of S. 466, *supra*.

469. When the accused appears to be of sound mind at the time of inquiry or trial, and the Magistrate is satisfied from the evidence given before him that there is reason to believe that the accused committed an act, which, if he had been of sound mind, would have been an offence, and that he was, at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law, the Magistrate shall proceed with the case, and, if the accused ought to be committed to the Court of Session or High Court, send him for trial before the Court of Session or High Court, as the case may be.

When accused appears to have been insane.

A Magistrate acts properly within his powers under this section when he commits an accused person for trial at the Sessions for murder and when he finds that the accused is insane at the preliminary inquiry, although he appeared to be insane when he committed the

act, 9 W.R. (Cr.) 23. A Magistrate cannot discharge the accused when the accused committed the offence when he was suffering from temporary insanity, *Wair II, 332*.

470. Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.

Judgment of acquittal on ground of lunacy.

See 7 W.R. (Cr.) 32 where the High Court acquitted an accused who was convicted by the Sessions Court on the ground of insanity and directed him to be kept in safe custody pending orders of the Local Government, See 23 Cr. L. J. 71-65 Ind. Cas. 423.

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 act would, but for the incapacity found, have constituted an offence, 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 Local Government:

Person acquitted on such ground to be detained in safe custody.

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Local Government may have made under the Indian Lunacy Act, 1912.

(2) The Local Government may empower the officer in charge of the jail in which a person is confined under the provisions of section 466 or this section, to discharge all or any of the functions of the Inspector General of Prisons under section 473 or section 474.

Power of Local Government to relieve Inspector General of certain functions.

The intention of the Legislature in amending this section was that in a case where it has been found that an offence has been committed by a lunatic that Court should confine itself to making an order that he should be kept in safe custody in such place and manner as the Court thinks fit. After that, it is for the Local Government under its powers to decide what should be done with the lunatic prisoner, 25 Bom. L. R. 286-26 Cr. L. J. 338-84 Ind. Cas. 652. This section does not compel the Court to send the accused to a lunatic asylum. All that is necessary to see is that such safeguards are taken as would keep him from mischief. When the lower Court failed to pass an order when acquitting the accused the High Court in revision can pass the necessary orders, 42 M. L. J. 72. He may therefore be ordered to be kept under the control of his parents, 23 Cr. L. J. 71-65 Ind. Cas. 423. When a criminal lunatic is acquitted, the Court can order under this section that he be detained in custody in the jail where he then is until further orders of the Government to whom the case is to be reported, 43 B. 134.

472. Repealed by Act IV of 1912.

473. If such person is *detained* under the provisions of section 466, and in the case of a person *detained in a jail, the Inspector General of Prisons, or, in the case of a person detained in a lunatic asylum, the visitors of such asylum or any two of them* shall certify that, in his or their opinion, such person is capable of making his defence, he shall be taken before the Magistrate or Court, as the case may be, at such time as the Magistrate or Court appoints, and the Magistrate or Court shall deal with such person under the provisions of section 468 ; and the certificate of such Inspector General or visitors as aforesaid shall be receivable as evidence.

Procedure where lunatic prisoner is reported capable of making his defence.

474. (1) If such person is *detained* under the provisions of section 466 or section 471, and such Inspector General or visitors shall certify that, in his or their judgment, he may be *released* without danger of his doing injury to himself or to any other person, the Local Government may thereupon order him to be *released*, or to be detained in custody, or to be transferred to a public lunatic asylum if he has not been already sent to such an asylum ; and, in case it orders him to be transferred to an asylum, may appoint a Commission, consisting of a judicial and two medical officers.

Procedure where lunatic detained under section 466 or 471 is declared fit to be released.

(2) Such Commission shall make formal inquiry into the state of mind of such person, taking such evidence as is necessary, and shall report to the Local Government, which may order his *release* or detention as it thinks fit.

475. (1) Whenever any relative or friend of any person *detained* under the provisions of section 466 or section 471 desires that he shall be delivered to his care and custody, the Local Government may, upon the application of such relative or friend and on his giving security to the satisfaction of such *Local Government* that the person delivered shall—

Delivery of lunatic to care of relative or friend.

(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 Local Government may direct, and

(c) *In the case of a person detained under section 466, be produced when required before such Magistrate or Court,*

order such person to be delivered to such relative or friend.

(2) *If the person so delivered is accused of any offence the trial of which has been postponed by reason of his being of unsound mind and incapable of making his defence, and the inspecting officer referred to in sub-section (1), clause (b), certifies at any time to the Magistrate or Court that such person is capable of making his defence, such Magistrate or Court shall call upon the relative or friend to whom such accused was delivered to produce him before the Magistrate or Court; and, upon such production, the Magistrate or Court shall proceed in accordance with the provisions of section 468, and the certificate of the inspecting officer shall be receivable as evidence.*

This section has been redrafted and sub-section (1) (c) and sub-section (2) are new.

CHAPTER XXXV.

PROCEEDINGS IN CASE OF CERTAIN OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE.

476. (1) When any Civil, Revenue or Criminal Court is, *whether on application made to it in this behalf or otherwise,* of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in section 195, sub-section (1), clause (b) or clause (c), which appears to have been committed in or in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the first class having jurisdiction, and may take sufficient security for the appearance of the accused before such Magistrate or if the alleged offence is non-bailable may, if it thinks necessary so to do, send the accused in custody to such Magistrate, and may bind over any person to appear and give evidence before such Magistrate.

*Provided that, where the Court making the complaint is a High Court, the complaint may be signed by such officer of the Court as the Court may appoint. **

For the purposes of this sub-section, a [Chief] † Presidency Magistrate shall be deemed to be a Magistrate of the first class.

(2) Such Magistrate shall thereupon proceed according to law and as if upon complaint made under section 200.

(3) *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*

* This proviso was added by Act II of 1926, S. 6.

† Omitted by Act II 1926, S. 6.

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.

AMENDMENT.—This section is practically new. The Court may act on its own motion when it is of opinion that it is expedient in the interests of justice to do so. The alleged offence must fall within the offences mentioned in S. 195 (1) (b) or (c) and a finding is to be recorded to that effect and then a complaint in writing signed by the presiding officer of the Court is to be forwarded not to the nearest Magistrate of the first class as before but to the first class Magistrate having jurisdiction in the matter. By Act II of 1926, S. 6, it is now enacted that a Presidency Magistrate is to be deemed a first-class Magistrate and not a Chief Presidency Magistrate as it stood before for purposes of this section. By this new amendment a Chief Presidency Magistrate who was not competent to take action under this section as the law stood before the amendment is empowered to take action and thus a real omission has been supplied. Even before the amendment it was held in 30 C.W.N. 276 that when the Chief Presidency Magistrate made a complaint to himself and transferred it to another Presidency Magistrate for disposal and the latter committed the case to the High Court Sessions the procedure was substantially correct and the technical error did not go to the root of the case. Power is also given by enacting sub-section (3) to adjourn the trial of the case pending the disposal of an appeal from the original decision out of which proceedings under this section were initiated. Ss. 476-A and 476-B have been newly added providing for appeals and giving power to superior Court to make a complaint. The new proviso added to sub-section (1) by Act II of 1926 removes the inconvenience felt by the High Court in having the complaint of Court signed by the presiding Judge; now such complaints can be signed by such officer as the Court may appoint.

SCOPE OF THE SECTION.—Under this section as amended it is not essential that the proceedings in respect of which action is taken should be of a judicial character, 28 Cr. L.J. 170 at 173—83 Ind. Cas. 730. This section has no application to offences not mentioned in S. 195 *supra*, 39 C.L.J. 82. The recent amendment to this section and S. 195 *supra* have resulted in connecting the two sections more closely together and they must be read together, 2 Rang. 374 following 15 M. 224; 18 M.L.T. 488; 14 Bom. L.R. 268; 18 B. 581 and 22 C. 1004. The expression "Court" occurring in S. 195 *supra*, is of wider scope than the expression "Civil, Criminal or Revenue Court" occurring in this section, 28 Cr. L.J. 1485—89 Ind. Cas. 1052. This section lays down the procedure to be adopted in cases falling under S. 195 (1) (b) and (c), *vis.*, offences relating to public justice and offences relating to documents produced or given in evidence in proceedings before Civil, Revenue or Criminal Courts and not to S. 195 (1) (a) dealing with contempts of lawful authority of public servants. The Court may act *suo motu* or may do so on the application made to it in this behalf. The offence must appear to have been committed in or in relation to any proceeding (not merely judicial proceeding as before) in any Court and the Court must be satisfied that it is expedient in the interests of justice that an inquiry should be made into the case. The Court after recording a finding may make a complaint in writing signed by the presiding officer and forward the same to a first-class Magistrate having jurisdiction. In the presidency-town the Chief Presidency Magistrate was deemed to be a first-class Magistrate, but curiously enough no provision was made when an offence is alleged to be committed before the Chief Presidency Magistrate. Now by the new amendment S. 6 of Act II of 1926 this omission has been rectified by omitting the word 'chief.' The Court may take sufficient security for the appearance of the accused before such Magistrate and in non-bailable offences send the accused in custody and may bind over persons to give evidence before the Magistrate. To avoid inconvenience, the presiding officer need not appear before a Magistrate to give a sworn statement and on receipt of a complaint the Magistrate shall proceed according to law as if on complaint made under S. 200. When a Court has taken cognizance of the offence of perjury on a sanction granted before the amended Code came into force but has not completed the trial before the amended code which abolished sanctions the trial can go on without a fresh complaint of Court under this section, 49 M.L.J. 276. Once a Court is properly seized of a case any subsequent amendment of law except an amendment which

takes away its jurisdiction to try the offence cannot affect the Court's authority to proceed with the trial. The consequence of an amendment of procedure is not that all matters properly begun under the old procedure collapse and have to be begun again under the new procedure but that they should be continued under the new procedure from time to time when the new procedure came into force. If this was the intention of the Legislature it would have said so, *ibid* p. 278. The law does not compel a detailed inquiry. The grant of a right of appeal under S. 476-B has not conferred any new right upon the accused and the extent of the preliminary inquiry is still left to the discretion of the Court, 27 Cr. L.J. 371-92 Ind. Cas. 889.

CIVIL, REVENUE OR CRIMINAL COURT.—The term "Court" used in this and S. 195 has a wider meaning than Court of Justice as defined in the I.P.C. and it includes a tribunal entitled to deal with a particular matter and authorised to receive evidence thereof, 45 C. 585. The Court entitled to take action under this section, *vis.*, to make a complaint of Court, is the Court which disposed the case and not the Court where the complaint was originally filed, 53 C. 489, where 6 C.W.N. 35 and 3 C.W.N. 33 is followed. Generally there is not much difficulty as to what is a Civil or Criminal Court. But the difficulty arises in finding out whether a revenue officer acting under this section is a Court. In 24 M. 121 it was held that a *Tahsildar* when holding an inquiry as to whether transfer of the names in a land register should be made or not is a Revenue Court, because he was authorised under Madras Act III of 1869 to receive evidence and decide the question of transfer and was therefore a tribunal empowered to deal with a particular matter and authorised to receive evidence on that matter thereby in order to enable him to arrive at a determination. 28 M.L.J. 123 = (1915) M.W.N. 177 = 2 L.W. 180 = 16 Cr. L.J. 221 = 23 Ind. Cas. 97. See 17 C. 872; 45 C. 336 and 585. A Magistrate holding an inquiry under S. 23 of the Legal Practitioner's Act is a Court, 9 A.L.J. 156 = 13 Cr. L.J. 190 = 13 Ind. Cas. 1006. Where the Collector was acting as a Revenue Court and was exercising judicial powers in setting aside the order of a Deputy Collector, he was subject to the superintendence of the High Court and his order was reversible under S. 115 C.P.C. and also under S. 107 of the Government of India Act and to set aside the order directing the institution of criminal proceedings, 26 Cr. L.J. 1565 = 90 Ind. Cas. 445. A High Court while exercising its powers of revision under the Code can take action under this section and lay a complaint of Court, 2 Rang. 330 (F.B.) See sub-section (2) of S. 195 as to what are included in the term "Court." "Court" in this section includes the successor of the Judge before whom the alleged offence was alleged to have been committed, 4 Lah. 58; 37 C. 642; 34 A. 393; 2 Rang. 58; 15 C.W.N. 691; 32 B. 184; 29 M. 331; 22 A.L.J. 772; 12 A.L.J. 103 = 16 Cr. L.J. 97 = 27 Ind. Cas. 145; 15 C.W.N. 691 = 14 C.L.J. 123 = 12 Cr. L.J. 209 = 10 Ind. Cas. 66; 27 Cr. L.J. 827 = 93 Ind. Cas. 991. When a suit is tried by a Judge of the High Court, the term "Court" occurring in the section must be taken to mean the High Court. Any Judge of the High Court has therefore power to hear and dispose of an application under this section whether the matter out of which the application arises was heard by him or some other Judge. No doubt as a matter of convenience that would seldom be done, but where the Judge has ceased to hold office there is nothing in the language of the section to prevent any Judge from disposing of the matter. The result of the amendment of the Code has robbed decisions upon the terms of the former Code of much of their significance, 49 B. 710 where 33 C. 123; 34 C. 551; 37 C. 642 are referred to, 25 Cr. L.J. 1485 = 89 Ind. Cas. 1053. The word "Court" includes a Court in which a deposit is made under S. 83 of the Transfer of Property Act and such a Court is entitled under this section to make a complaint in writing with respect of a document filed with such an application, 4 Pat. 24. A District Registrar is not a Civil, Criminal or Revenue Court under this section, 26 Cr. L.J. 1482 = 89 Ind. Cas. 1050. It cannot be suggested that Election Commissioners were either Civil or Criminal Court. Their function was obviously not that of either of such Courts. Election Commissioners were of opinion that they were a Civil Court and relied on the definition of 'Court' in S. 3 of the Indian Evidence Act, but S. 6 of Act XXXIX of 1920 (Election Offences Inquiries Act) makes the provisions of the Indian Evidence Act applicable subject to the provisions of the former Act. Even if the Election Commissioners are legally entitled to take evidence that would make them a Court and not a Civil Court. The Election Commissioners have not the powers of a civil Court and their power is restricted to matters in S. 5 of Act XXXIX.

of 1930 which makes no mention of this section but refers to Ss. 480 and 482 of the Code. Election Commissioners are not a civil Court and therefore had no power to take action under this section, but the High Court entertained an appeal from the order and while setting aside the order made under this section maintained it as a 'complaint' under S. 190, *supra*, 47 A 934 where 47 A. 813; 45 C. 588; 32 C. 4; 35 M. 72; 45 C. 926; 24 C. L. J. 235 are referred to.

WHETHER ON APPLICATION MADE TO IT IN THIS BEHALF OR OTHERWISE:—

These words have been newly added enabling a party to move the Court to take action under this section by making a complaint in writing against a person. The complaint required by this section must be a formal complaint as defined in S. 4 (1) (h), *supra*, and when it does not comply with the provisions of that section, the proceedings are liable to be quashed. 26 Cr. L.J. 1469—89 Ind. Cas. 1027.

EXPEDIENT IN THE INTERESTS OF JUSTICE.—These words are new and the sole consideration is whether the ends of justice require the initiation of proceedings against a certain person. Prosecution for offences against public justice should be allowed primarily in the interests of public justice, 37 C. 13 at 20; [1919] Patna 286; 20 Cr. L.J. 337—50 Ind. Cas. 817. The Court is bound to satisfy itself that the interests of justice require a prosecution, 10 M. L.T. 117; 1 C.W.N. 400; see also 28 M. 116; 4 L.W. 618; 39 M. 677. There is no use of passing an order under this section unless there is a reasonable probability of a conviction, 24 Cr. L.J. 823—74 Ind. Cas. 855. It is absolutely essential to the validity of an order under this section that the Court which passes the order should apply its mind to the matter upon its merits and when this essential condition is wanting, the order cannot be sustained. Where in a case, a Sessions Judge passed the following order "the accused want to be let off but as Mr. Justice Walsh has ordered me to prosecute them, I cannot help them. I therefore order their prosecution", it was set aside by the High Court as unsustainable, 26 Cr. L.J. 18—83 Ind. Cas. 498.

INQUIRY INTO AN OFFENCE REFERRED TO IN S. 195 (1) (b) or (c).—Before the amendment the words were "into an offence referred to in S. 195" and there was a good deal of conflict between the various High Courts as to the interpretation of these words, *viz.*, whether they were words of description or limitation. The amendment is in accordance with the Full Bench decision in 42 M. 640, which following the decisions in 40 M. 100 and 15 M. 224, held that the qualifying circumstances mentioned in S. 195, *supra*, are included in the reference to S. 195. See 2 Rang. 374. In this connection the decisions in 40 A. 116 and 24; 1 Pat. L.J. 298; [1918] Pat. 352; 20 Cr. L.J. 202 and 830; 18 B. 581; 14 Bom. L.R. 868; 32 M. 49 at 57 are no longer law. The Court has jurisdiction to act only with regard to offences mentioned in S. 195. It has no jurisdiction to take action for an offence under S. 409, I.P.C., 27 Cr. L.J. 974—95 Ind. Cas. 528. S. 195 *supra* is a restrictive section and there is nothing in that or this section to prevent a Court from making a complaint under the ordinary law in respect of an offence under S. 471, I.P.C. which it finds to have been committed before it, 26 Cr. L.J. 1806—80 Ind. Cas. 290.

COMMITTED IN OR IN RELATION TO A PROCEEDING IN THAT COURT.—Before the amendment the words were "committed before it or brought under its notice in the course of a judicial proceeding." The various restrictions which existed before have now been removed. The alleged offence need not be committed before it and it need not be in the course of a judicial proceeding. There was a conflict of opinion as to the appropriate time for taking action under this section. When action was taken after the termination of the judicial proceedings before the court it was held that the Magistrate or Court acted without jurisdiction as action under this section should be taken at or immediately after the termination of the proceedings before the matter has left the *ken* of the Court, 31 M. 140; 32 M. 49; 42 M. 422; 34 C. 551; 40 C. 444; Welr 11, 397; 6 M. L.T. 92, but the Bombay High Court took a different view in 32 B. 184, and even in Madras the Judges were not unanimous, Miller, J., dissented from the majority view in 31 M. 140, and later on a Bench of the Madras High Court questioned the correctness of the view expressed and referred the matter to another Full Bench. See 42 M. 422 and 22 L.W. 863—27 Cr. L.J. 280—92 Ind. Cas. 456. All this difficulty has been got over by the amendment. See fuller discussion at p. 627. The

words "committed in or in relation to any proceeding before that Court" occur in S. 195 (i) (b), Proceedings after an *ex-parte* decree is set aside must be regarded as continuation of the trial which ended in the *ex-parte* decree and it is therefore competent to the Court at the time of the final disposal of the suit to proceed against a witness under this section who gave evidence before the passing of the *ex parte* decree for offences under Ss. 193 and 196, I.P.C., 18 L.W. 133=25 Cr. L.J. 731=81 Ind. Cas. 219. An order under this section can be passed on the basis of the evidence recorded under S. 202 (2) *supra*, 24 Cr. L.J. 862=74 Ind. Cas. 1054. Under the amended section it is not necessary that proceedings in Court be judicial and the fact that no action could be taken before the amendment of the section and proceedings taken before was so dropped without any inquiry will not preclude action being taken afterwards, 25 Cr. L.J. 170=83 Ind. Cas. 730.

AFTER SUCH PRELIMINARY INQUIRY, IF ANY, AS IT THINKS NECESSARY.—Preliminary inquiry is only optional with the Court, 18 Bom. L.R. 285. Neither a notice to show cause nor a preliminary inquiry is indispensable and the person proceeded against cannot complain of the want of such inquiry, 15 C.W.N. 691; 20 C. 474; 8 C.W.N. 295; 26 M.L.J. 486; 34 A. 267. Although notice to the persons proceeded against is not essential under this section, it is highly desirable that it should be so given and the High Court looks with disfavour upon an order passed without notice, 25 Cr. L.J. 488=77 Ind. Cas. 388; 8 A. 98; 20 Cr. L.J. 777. In initiating proceedings under this section, the Court is not restricted to the evidence recorded at the original trial. It has inherent power to take such steps as may be necessary to discharge its duty imposed on it by law. The wording of the section such preliminary inquiry, as it thinks fit make the position clear, 25 Cr. L.J. 15=75 Ind. Cas. 703. The holding of a preliminary inquiry is no doubt discretionary and the Magistrate might well have sent the case to the nearest first class Magistrate without holding a preliminary inquiry. But if he does hold a preliminary inquiry he must give an opportunity to the accused to show cause why he should not be prosecuted and the inquiry should be a real one, 21 Cr. L.J. 29, 718 and 275; 22 Cr. L.J. 143; 25 Cr. L.J. 448=77 Ind. Cas. 388. When the incident in respect of which a complaint is made took place outside the Court the Judge ought to have held a preliminary inquiry to enable him to determine whether there was any case fit to be sent to the Magistrate, 21 C.W.N. 125. Where the identity of the offender is uncertain a preliminary inquiry ought to be held, 23 C. 532; 20 C. 474 and 349. There is no provision in the section as to the manner in which evidence is to be recorded in such preliminary inquiry. A summary of the statement should be made. 42 C. 240. The nature of the preliminary inquiry is a matter for the discretion of the Court. The law does not compel a detailed inquiry, 4 Pat. 485. The law does not compel to make a detailed inquiry. The grant of a right of appeal under S. 476-B, *infra* has not conferred any new right and the extent of the preliminary inquiry is still left to the discretion of the Court, 37 Cr. L.J. 371=82 Ind. Cas. 883. What a Court has to decide is (1) whether an offence specified in S. 195, *supra* appears to have been committed; (2) whether it is expedient in the interests of justice that it should be further inquired into. To arrive at a decision, the Court may, hold such preliminary inquiry as it thinks necessary. The nature, method and extent of the inquiry are entirely at its discretion. The inquiry is to satisfy the Court merely that an offence appears to have been committed. It cannot be held, that the law intended that a Court which has complete discretion, to refuse to hold an inquiry at all, must, if it holds one, issue notice to the party, and give him the equivalent of a full-dress trial. The inquiry that many of the rulings prescribe, seems to go far beyond the essential requirements of the section. The preliminary inquiry under this section should be of a nature merely to satisfy the Court that an offence appears to have been committed. Nothing more is necessary and a long discussion of a decision on the merits is as undesirable as it is unnecessary, 51 M.L.J. 331=23 L.W. 295=27 Cr. L.J. 1149=97 Ind. Cas. 869 where 34 A. 257 is followed and 6 Pat. L.J. 146 and 44 M.L.J. 74 are not followed; see also 15 A. 392; 28 A. 249; 4 Pat. 484; 10 M. 232; 8 A.L.J. 237; 10 A.L.J. 247; 21 Cr. L.J. 153; 25 Cr. L.J. 488=77 Ind. Cas. 388; 25 Cr. L.J. 15=75 Ind. Cas. 703 as to necessity for a preliminary inquiry.

RECORD A FINDING TO THAT EFFECT.—Namely that in his opinion a prosecution is necessary in the interests of justice.

MAKE A COMPLAINT THEREOF IN WRITING SIGNED BY THE PRESIDING OFFICER.—For a definition of complaint see S. 4 (1) (h). Before the amendment of 1923, it was held by the various High Courts, that action under this section should be taken at or immediately after the conclusion of the proceedings, before the matter had left the ken of the Court. Otherwise the proceedings taken were held to be without jurisdiction, 32 M. 49 (F.B.); 31 M. 140 (F.B.); 24 C. 551 (F.B.); 40 C. 444; 37 C. 642 (F.B.). The changes made by the amendment in this section and by the enactment of two new Ss. 476A and 476B are significant. Under the present section it is not only the Court in which the offence was committed, but also the Court which hears an appeal from that Court which is entitled to proceed under this section and a party also is entitled to move the Court to take action under this section. The new S. 476B, provides an appeal both against a complaint made under this section as well as against an order refusing to lay a complaint. No hard and fast rules can be laid down as to within what time a complaint should be made under this section. If a Court disposes of a case, on the last working day of a term, and initiate proceedings under this section on the first day of the re-opening after the long vacation it cannot be said that the Court acts with undue delay. 22 L.W. 883=27 Cr. L.J. 280=92 Ind. Cas. 486. The power under this section may also be exercised now by any judge of the Court concerned and not only by the judge who tried the case. 28 Cr. L.J. 800=85 Ind. Cas. 244; 26 Cr. L.J. 523=85 Ind. Cas. 382. By the amendment made by S. 6 of Act II of 1926, it is enacted that where the Court making the complaint is a High Court, the complaint may be signed by such officer as the Court may appoint. A letter to the District Magistrate in which all the facts were stated and concluded by soliciting orders in the case was held not to amount to a complaint within this section, 40 A. 641; 12 A.L.J. 831. The fact that the presiding officer of the Court instead of making a formal complaint of Court merely directed a copy of his proceedings be sent to the District Magistrate for necessary action will not vitiate the proceedings as the defect is merely formal, 3 Rang. 43. The Court is to hold such inquiry that its order when sent up to the Magistrate will amount to a complaint under S. 200, *supra*. For that purpose the complaining Court must decide upon and name the witnesses to be examined by the Magistrate or the complaint is liable to be dismissed on the ground that there are no witnesses. The lower Court should not leave to the Magistrate to inquire for himself and find out who the witnesses may be. In cases falling under S. 198 I.P.C. giving false evidence, it should be stated what is the false evidence given by the person sought to be proceeded against and it is not for the Magistrate to fish about in order to find out what statements the lower Court may have considered to be false. The complaint itself must make that clear, 48 M. 395 at 400.

FORWARD IT TO A MAGISTRATE OF THE FIRST CLASS HAVING JURISDICTION.—The words before the amendment were "send the case for inquiry or trial to the nearest Magistrate of the first class" and difficulty was felt in construing the word "nearest." It was held that the case must be sent to the nearest first class Magistrate irrespective of local jurisdiction, 43 B. 300; *Welfe II*, 390. To meet this difficulty the amendment has been made now. The complaint is to be forwarded to the Magistrate of the first class having jurisdiction, i.e., *territorial jurisdiction* over the place where the offence was committed. S. 177 *supra* enacts that every offence shall ordinarily be inquired into or tried by a Court within the local limits of whose jurisdiction it was committed. Provision is also made for securing the attendance of the accused and the witnesses and the accused is to be sent up to the Magistrate only in non-bailable offences. To meet the objection that a Presidency Magistrate was not included in the term "First class Magistrate" it was specially enacted that a Chief Presidency Magistrate shall be deemed to be a first-class Magistrate, but no provision was made for the Chief Presidency Magistrate to take action under this section and S. 6 of Act II of 1926 supplied this omission by omitting the word 'Chief'. The rulings in 9 Bom. L. R. 1160; 3 C.L.J. 357 are no longer law. The amendment obviates the difficulty felt by the Madras High Court when acting under the section in having to send the case to Saidapet and not to a Presidency Magistrate in the city. The complaint can now be made to any Presidency Magistrate.

PROVISO TO SUB-SECTION (1).—This has been newly added by Act II of 1926, S. 6, on account of the serious inconvenience felt by Judges of the High Court. The remarks that *Shadi Lal, C.J.* in 6 Lah. 34 at 40 are to this effect, 'Under the new law the Court has no alternative but to prefer a complaint in writingand this procedure in its application to the High Court is open to serious objections. It is hardly consistent with the dignity of a Judge of a High Court that he should have to make and sign a complaint that is to be inquired into by one of his subordinates and that he should be treated and recorded as a complainant throughout the proceedings nor is it fair to the accused that he should be arraigned in a case instituted on a complaint made by a Judge of the highest tribunal and be tried by a judicial officer subordinate to the complainant.....thus giving rise to a reasonable apprehension that his conviction is a foregone conclusion.'

SUB-SECTION (2).—This sub-section lays down the procedure to be followed on receipt of the complaint made in writing by the presiding officer under his signature. The proviso (aa) to S. 200, *supra*, in unmistakable term says that when such a complaint is made nothing in that section shall be deemed to require the examination of the complainant. The proviso is expressly made to obviate the difficulty and inconvenience of presiding officers of Courts and public servants acting as such in the discharge of official duties from appearing before Magistrates to give sworn statements like ordinary complainants. See 6 Lah. 34 at 40. It is not necessary that the Court making a complaint under this section should state under what section of the statute the offence falls and a failure to specify the section does not render the complaint illegal, 26 Cr. L.J. 1115=88 Ind. Cas. 283.

SHALL THEREUPON PROCEED ACCORDING TO LAW.—The Magistrate is bound to proceed with the investigation of the complaint made to him by a Civil Court under this section; the words "shall thereupon proceed according to law" are *imperative* and confer jurisdiction on the Magistrate, 26 B. 785. The Magistrate is bound to proceed under Chapters XVIII, XX and XXI with the investigation but he is not bound to proceed to record evidence and convict the accused in every case. Where the matter imputed to the accused does not in the opinion of the Magistrate constitute an offence it will be right and proper to discharge the accused. He cannot return the case to the Court which sent it to him nor can the Court once it has made a complaint of Court commit the accused to the Court of Session. 12 W.R. (Cr.) 41. He cannot order an investigation under S. 202, *supra*, 21 Cr. L.J. 310=55 Ind. Cas. 470, but is competent to discharge the accused, 5 B.H.C.R. (Cr. Ca.) 41. He cannot order compensation when dismissing the complaint, 14 Bom. L.R. 1166; he has no jurisdiction to question the validity of the initiation of proceedings, 26 B. 785; 13 B. 109; 26 A. 314.

SUB-SECTION (3).—Power is expressly given now at any stage to adjourn the hearing of the case until the appeal preferred against the decision arrived at in the judicial proceeding out of which the matter of the complaint has arisen is decided. Before the amendment the power to adjourn the case and to stay proceedings before the Magistrate rested on judicial decisions like, 20 C.W.N. 1116; 16 B. 729; 34 C. 348; 30 M. 226; 13 C.W.N. 398; 14 Bom. L.R. 988; 23 C. 532; 5 C.L.J. 233; 16 A. 80; 22 Cr. L.J. 236; 1903 A.W.N. 254.

MAY IF HE THINKS FIT.—This gives a discretion to the Magistrate to stay proceedings until the disposal of the appeal if he thinks that it is expedient in the interests of justice. It would be a dangerous doctrine to lay down any hard and fast rule to the effect that a criminal trial or inquiry should of necessity be stayed simply because a civil suit (or appeal) is pending, 13 C.W.N. 398; 34 C. 348; 22 Cr. L.J. 236. In each case the Court is to exercise a judicial discretion in granting a stay of proceedings.

FURTHER INQUIRY.—Where action is taken under this section by lodging a complaint of Court in writing before a Magistrate, and the Magistrate discharges the accused, it is open to a private party to move the Sessions Judge to revise the order of discharge and direct a further inquiry into the case. In every case somebody must bring to the notice of the superior Court, the order of discharge, as it cannot be supposed that it is aware of all the orders of discharge passed by Magistrates within its jurisdiction and there is nothing in the Code to limit the persons who can bring the matter to the notice of the superior Courts. The words used in S. 436, *supra*, are "on examining any record under S. 435, or otherwise," 27 Cr. L.J. 1130=97 Ind. Cas. 680.

476A. *The power conferred on Civil, Revenue and Criminal Courts by section 476, sub-section (1), may be exercised, in respect of any offence referred to therein and alleged to have been committed in or in relation to any proceeding in any such Court, by the Court to which such former Court is subordinate within the meaning of section 195, sub-section (3), in any case in which such former Court has neither made a complaint under section 476 in respect of such offence nor rejected an application for the making of such complaint; and where the superior Court makes such complaint, the provisions of section 476 shall apply accordingly.*

Superior Court may complain where subordinate Court has omitted to do so.

The present S. 476, this section and 476B have taken the place of the old Ss. 195 and 476, and when a Subordinate Judge allowed the proceedings under S. 195 to be dropped without passing any order of rejection it is quite open to the District Magistrate to instruct the Public Prosecutor to move to the District Court to take action under S. 476-A, Pat 24 at 31. This section is new and makes provision where a Civil, Revenue or Criminal Court has omitted to complain. In such a case a superior Court is empowered to act under S. 476, *supra*, and make a complaint of Court. S. 476, *supra*, deals with the procedure to be adopted in cases referred to in S. 195 (1) (b) or (c) *supra* by a Court with regard to offences which appear to have been committed in or in relation to a proceeding in that Court and this section confers certain powers upon a superior Court where the subordinate Court has omitted to take action. The scheme of the section is that if the subordinate Court has neither made a complaint nor rejected an application for the making of a complaint then the superior Court may take action and make a complaint in respect of such offence. This section does not apply to a case where the subordinate Court rejected an application made to it for making a complaint and in such a case the next section alone will apply, 32 G. 1009. Under this section the superior Court has jurisdiction to interfere and file a complaint only in two contingencies (a) the lower Court has not made a complaint under S. 476, *supra*, (b) that it had rejected an application to make such a complaint. The section is never intended to apply to the case of a Court not invoking a power which it never had power to invoke where, before the amendment the subordinate Court had granted sanction under S. 195 for the prosecution, but such sanction had lapsed by the passing of the amended code; the remedy of the party is to move the subordinate court to prefer a complaint of Court under S. 476 as amended and not to move the superior Court under this section to make a complaint, 26 Cr. L.J. 1128-88 Ind. Cas. 358.

476B. *Any person on whose application any Civil, Revenue or Criminal Court has refused to make a complaint under section 476 or section 476A, or against whom such a complaint has been made, may appeal to the Court to which such former Court is subordinate within the meaning of section 195, sub-section (3), and the superior Court may thereupon after notice to the parties concerned direct the withdrawal of the complaint or, as the case may be, itself make the complaint which the subordinate Court might have made under section 476, and if it makes such complaint the provisions of that section shall apply accordingly.*

Appeals.

SCOPE OF THE SECTION.—This section is new and has been enacted in the place of the original sub-section (6) of S. 195, *supra* which gave the appellate Court the power of reversing an order granting sanction or an order by a Court instituting a complaint. S. 195, (6)

itself provides for a remedy in cases where a complaint in writing is filed by a public servant under S. 195 (1) (a), viz., the superior public servant is authorised to direct a withdrawal of such complaint. It provides an appeal where a Civil, Revenue or Criminal Court refuses to make a complaint of Court on the application of any person or makes a complaint against a person under S. 476, *supra*. The section gives a right of appeal not only to the person against whom the complaint of Court has been made but also to the person whose application to the Court for making a complaint of court has been rejected. If the subordinate Court has neither made a complaint nor rejected an application then this section cannot apply and under S. 476A, *supra* the superior Court is empowered to take action and make a complaint of Court. Where the Subordinate Court has rejected the application for making such complaint of Court then the procedure contemplated by the Code is by way of an appeal to the superior Court under this section. 42 C.L.J. 120-26 Cr. L.J. 1569-90 Ind. Cas. 529. S. 195 (3) specified the Court to which such appeals are to be preferred. The superior Court may thereupon give notice to the parties concerned and either direct the withdrawal of the complaint made by the inferior Court or make the complaint which the inferior Court might have made but had refused to make. By this section the Legislature intended that the appellate Court in cases of appeals under this section should reconsider the entire matter on the merits and while allowing reasonable weight to the opinion of the Court below, should nevertheless reconsider the question of the propriety of the order appealed against upon a complete review of the entire facts. If the appellate Court is not satisfied that a *prima facie* case has been made out, the order appealed against must be set aside. The words occurring in S. 476, *supra* "offence which appears to have been committed" seems to have been used to mean that the facts before the Court unless rebutted show that an offence has been committed. 23 A L.J. 315-26 Cr. L.J. 1126-38 Ind. Cas. 358. This section gives a right of appeal to a person against whom a complaint *has been made*. This contemplates that an appeal is to be filed after a complaint has been actually made and not before. Also on appeal, the appellate Court's order would be to direct the *withdrawal of the complaint*. The law does not contemplate that any great interval should elapse between the passing of a formal order directing a complaint to be made and the actual making of the same and therefore an appeal is allowed not from the finding of the Court that a complaint should be made but from the making of the complaint. The view is further supported by the wording of S. 476 which provides that the Courts after making such preliminary inquiry, if any, as it thinks necessary, may record a finding that it is expedient in the interests of justice that an inquiry should be made into an offence referred to in S. 195 (1) (b) and (c) and make a complaint thereof in writing. The person against whom such a finding is recorded is affected by it only when a complaint is actually made. So time for appeals begins to run from the date on which the complaint is made and not from the date of the order directing a complaint to be drawn up. 7 Lah 77.

An appeal under the Code is given by this section and this being an application of a criminal nature it would not be proper for the appellate court to extend the time given for the appeal even if the delay arises in consequence of any genuine mistake which could have been averted by a proper inquiry. Under the Code no application for revision lies in cases in which an appeal lies and therefore it is impossible for the appellant to invoke the High Courts revisional jurisdiction when the complaint of Court is filed by a Civil Court the power of the High Court under S. 115, C.P.C. cannot be invoked which applies only to orders passed under that Code. This particular jurisdiction of taking action under S. 476 *supra*, is given to the Civil Court by the Criminal Procedure Code only and it is in the exercise of that criminal jurisdiction for that the Civil Court is acting for a particular purpose. "Any error therefore committed by a Civil Court in exercising special jurisdiction so conferred must be corrected if at all by the machinery provided by the statute conferring jurisdiction, i.e., by the Criminal Procedure Code, 27 Cr. L.J. 780-83 Ind. Cas. 315. The words of the section indicate clearly that the Court to which appeals lie, if a Civil Court makes an order is the authority or tribunal to which such Court is subordinate. Where an order is made by a District Munsif hearing a Civil suit, the appeal lay to the District Judge. Although the appeal is one allowed by this Code it must be heard by the District Judge exercising Civil appellate jurisdiction and the procedure governing an appeal of this description is one which

has to be sought for in the four corners of the Civil Procedure Code the provisions of which are applicable. Therefore a District Judge is empowered to dismiss an appeal for default of appearance of the appellant and his pleader and no illegality in such dismissal, 53 C. 827. This section gives a right of appeal to a private person; the words are 'any person on whose application a Civil, Criminal or Revenue Court has refused to make a complaint may appeal etc.' The language does not indicate that any legal representative of a deceased applicant may appeal or support it on his death, 47 A. 359 see also 45 M. 88. Article 154, Limitation Act, governs such appeals and time taken for obtaining copy of the order can be deducted, 47 A. 462. Article 155 applies to appeals to the High Court, 24 A.L.J. 369.

MAY APPEAL TO THE COURT TO WHICH SUCH COURT IS SUBORDINATE.

WITHIN S. 195 (3).—Sub-section (3) of S. 195 indicates the Court to which the Court making the complaint should be deemed to be subordinate. A court should be deemed subordinate to the court to which *appeals ordinarily lie* from its appealable decrees or sentences. See notes under S. 195 at pp. 273-74. This section contemplates that if an appellate Court sets aside the original Court's order, the party prejudicially affected has a right of appeal to the Court to which appeals ordinary lie from that appellate Court. 26 Cr. L.J. 1583 at 1587-90 Ind. Cas. 425. This section gives a right of appeal only when a court has made or refused to make a complaint under S. 476 or 476A, *supra* and neither if these sections relate to a complaint made by Court on appeal from an order made by a subordinate court refusing to make a complaint. From such an order no appeal lies, 6 Lah. 86 but see 26 Cr. L.J. 1583 at 1587-90 Ind. Cas. 425, which take a different view and holds an appeal lies. Upon a proper construction of S. 476, S. 476A and this section, an appeal lies in the following cases: (1) where a District Munsif refuses to make a complaint of Court, and the District Judge on appeal made a complaint, (2) where under S. 476A a District Judge makes or refuses to make a complaint under S. 476, *supra*, the Munsif not having taken action *suo motu* or an application to him to take action. In no other case the appeal will lie to the High Court and the High Court is rather loathe to interfere save in exceptional circumstances as the filing of a complaint is one of discretion, 5 Pat. 262 following 52 C. 478 and 26 Bom. L.R. 289 and *dissenting* from 6 Lah. 86 see also 7 Lah. 108. Where the Chief Judge of the Presidency Court of Small Causes makes a complaint of court under S. 476, *supra*, it has been held that an appeal lies from such order to the appellate side of the High Court and not to the Full Bench of the Court of Small Causes or to the original side of the High Court, 48 M. 395 where 34 B. 316 is followed. It is submitted that due weight has not been attached to the words "*ordinary original civil jurisdiction*" occurring in S. 195 (3) when holding that the appeal lay to the appellate side and not to the original side of the High Court. Where a District Munsif invested with Small Cause powers makes a complaint of Court an appeal lies from such order to the District Court and not to a Subordinate Judge, 27 Cr. L.J. 83-91 Ind. Cas. 337. Where certain Election Commissioners purported to act under S. 476, *supra*, professing to be a Civil Court and assumed jurisdiction an appeal will lie even though the Commissioner acted within jurisdiction and the High Court entertained the appeal and set aside the order of the Election Commissioners. 47 A. 934 where 23 A. 575; 12 A.L.J. 1113; 45 A. 669; 16 Cr.L.J. 77, 24 C.L.J. 235 and 45 C. 925 are referred to. The article of the Limitation Act applicable to appeals under this section is Art. 154 of Sch II of the Act, *vis.*, thirty days from the date of the order appealed against, 42 C.L.J. 120, and the party can avail himself of S. 12 of the Limitation Act which permits of the time taken for obtaining a copy of the order appealed against, 47 A. 462. Where the superior Court entertained an appeal after the expiry of the thirty days holding that there was no rule of limitation applicable to a case of this kind, an offence against the administration of justice and instituted a complaint of Court after setting aside the order of the first Court the High Court in the exercise of its revisional jurisdiction set aside the appellate order. 52 C. 1009.

REVISION.—No further appeal lies to the High Court against the appellate orders under this section and as a general rule it is undesirable that the High Court should interfere in revision with an appellate order refusing to withdraw a complaint of Court which is

in the discretion of the lower Court, 7 Lah. 108. The High Court will not interfere except perhaps under very extraordinary circumstances as the question whether a complaint of Court should be made or not is almost invariably a matter of discretion and if the lower Court thinks that there should be no complaint of Court it would be undesirable that the High Court should interfere, 48 B. 401. See also 47 A. 462. where the High Court entertained a revision and set aside the order of the appellate Court directing the filing of a complaint when the Court of first instance refused to make a complaint. Where a superior Court sets aside the order of the first Court refusing to file a complaint, reasons must be given by the superior Court as to why it thinks that the discretion was not properly exercised and when no reasons were given the High Court will be justified in interfering in revision. 52 C. 478. Where an order purported to be under S. 476 *supra* but was not a complaint of Court as required by that section the High Court interfered in revision. 52 C. 686. In 52 C 1009, the High Court interfered in revision when the superior Court entertained an appeal which was filed more than thirty days from the date of the original order, holding that there was no rule of limitation to a case of this kind. When a Civil Court takes action under this S. 476, *supra* the High Court cannot revise the order under S. 499, *infra*, 26 Cr. L. J. 523—85 Ind. Cas. 382. S. 495, *infra* only empowers the High Court to call for records of inferior Criminal Courts and no other, 24 A.L.J. 217—27 Cr. L.J. 278—92 Ind. Cas. 454; 17 M.L.T. 268—16 Cr. L.J. 282—27 Ind. Cas. 903. Where a Collector was acting as a Revenue Court and was exercising judicial powers in setting aside the order of a Deputy Collector, it was held that he was subject to the revisional jurisdiction of the High Court and his order was revisable by the High Court under S. 115, C.P.C. and S.107 of the Government of India Act and the High Court set aside directing the institution of criminal proceedings, 26 Cr. L.J. 1665—90 Ind. Cas. 445.

477. *Repealed by Act XVIII of 1923, S. 129.*

478. (1) When any such offence is committed before any Civil or Revenue Court, or brought under the notice of any Civil or Revenue Court in the course of a judicial proceeding, and the case is triable exclusively by the High Court or Court of Session, or such Civil or Revenue Court thinks that it ought to be tried by the High Court or Court of Session, such Civil or Revenue Court may, instead of sending the case under section 476 to a Magistrate for inquiry, itself complete the inquiry, and commit or hold to bail the accused person to take his trial before the High Court or Court of Session, as the case may be.

(2) For the purpose of an inquiry under this section the Civil or Revenue Court may exercise all the powers of a Magistrate, and its proceedings in such inquiry shall be conducted as nearly as may be in accordance with the provisions of Chapter XVIII and of Chapter XXXIII in cases where that Chapter applies and shall be deemed to have been held by a Magistrate.

SCOPE OF THE SECTION.—This section deals with a special case where a Civil or Revenue Court is empowered to commit the accused to the Court of Session instead of sending the case for inquiry to a Magistrate under S. 476, *supra*, 28 A. 554 at 560 (F.B.). Such Court may complete the inquiry and frame a charge and commit, or hold to bail the accused person to take his trial before the Court of Sessions, but the Court is bound to send the charge with the order of commitment and the record of the case to a Magistrate authorised

to commit for trial and such Magistrate shall bring the case before the Court of Session together with the witnesses for prosecution and defence, S. 479, *infra*. The present Ss. 476, 476-B, and this section have taken the place of the old Ss. 195 and 476 and when a subordinate Judge allowed the proceedings taken by him under S. 195 to be dropped without passing any order of rejection it is quite open to the District Magistrate to instruct the public Prosecutor to move the District Court to take action under S. 416-A, *supra*, § Pat. 24 at 31. When the Civil or Revenue Court takes action under this section the responsibility of the prosecutions rests entirely upon the Court, 13 B. 384 at 388; 29 M. 331.

ANY SUCH OFFENCE.—This expression relates to offences referred to in S. 195. There was really a conflict whether the conditions laid down by S. 195 are also to be incorporated when construing the expression "any such offence." In 22 O. 1004 it was held that the word "offence" is not qualified by the circumstances under which it was committed as described in clause (c) of sub-section (1) of S. 195 by a party to any proceeding in any Court. See also 40 A. 116; 18 B. 381. The Madras High Court in 15 M. 224 took a different view holding that the offence must have been committed by a party to the proceeding. The view was followed in 40 M. 100 and confirmed by 42 M. 510 (F.B.).

BROUGHT UNDER ITS NOTICE IN THE COURSE OF JUDICIAL PROCEEDING.—This section refers not only to offences committed before any Court Civil or Revenue but also refers to offences brought under its notice in the course of a judicial proceeding. So far as Criminal Courts are concerned there is separate specific provision in S. 487, *infra*.

INSTEAD OF SENDING THE CASE UNDER S. 476.—The use of the word 'instead' is significant. The procedure herein contained is only alternative and the Court has no power on failure of one to adopt the other. The procedure in this section is alternative to that of S. 476. The Court cannot proceed under both the sections. When a Civil Court had once sent a case under S. 476 for inquiry and the Magistrate after an enquiry discharged the accused the Civil Court has no power to revive the case against the accused before itself and issue notice to him to show cause why he should not be proceeded against Ratanlal 989, nor can it convert proceedings under S. 476 to one under this section subsequently, 40 A. 32.

ITSELF COMPLETE THE INQUIRY.—A commitment cannot be made without holding the preliminary inquiry required by this section, 4 M. 227; Welr II, 535; 29 W.R. (Cr.) 52; 1 W.R. (Cr.) 5. The preliminary inquiry must be conducted in accordance with the provisions of Chapter XVIII, *supra*.

AND COMMIT.—It is discretionary to commit, 7 B.H.C.R. (Cr. Ca.) 29. If the offence has not been committed before it or is not one exclusively triable by a Court of Session then further inquiry is desirable and no commitment is to be made but the case sent to a competent Magistrate for inquiry, 4 B. 287. A Court not being bound to commit, the responsibility for the prosecution rests entirely on it, 13 B. 384.

SUB-SECTION (2).—"With one exception perhaps I know of no statutory provision which confers upon any Civil Court as a Civil Court criminal powers of any kind. Enactments which create or appear to create new jurisdiction have to be construed strictly. In the one and only case in which I know of criminal jurisdiction being conferred upon Civil or Revenue Courts, *viz.*, Ss. 478 and 479 of the Code of Criminal Procedure, the powers and procedure are laid down in very precise and well defined terms"—*per Knox, J.*, in 28 A. 354, at 380. The proceedings of a Civil or Revenue Court acting under this section shall be deemed to have been held by a Magistrate. A commitment made by a Civil or Revenue Court under this section can be quashed by the High Court under S. 215, *supra*, only on a point of law. But it was left open whether an appeal lay under S. 15 of the Letters Patent from an order of commitment made by a Judge sitting on the Original Side of the High Court exercising Ordinary Original Jurisdiction; where a Civil Court neither examined the witnesses in the presence of the person against whom action is taken nor explained the charge to him the commitment was quashed as bad in law, 40 A. 32; 43 M. 381. There is no decided case holding that the Civil or Revenue Court acting under this section is an inferior Criminal

Court within S. 435, *supra* empowering a Sessions Judge to call for records in such a case or stay proceedings. All that the section says, is, that for the purpose of inquiry, under this section, the Civil or Revenue Court may exercise all the powers of a Magistrate and the inquiry shall be conducted as nearly as may be in accordance with the provisions in Chapter XVIII or Chapter XXXIII if it applies and shall be deemed to have been held by a Magistrate. Perhaps the last portion of sub-section (2) "shall be deemed to have been held by a Magistrate" it is submitted, makes the Court inferior to the Sessions Court.

479. When any such commitment is made by a Civil or Revenue Court, the Court shall send the charge with the order of commitment and the record of the case to the Presidency Magistrate, District Magistrate or other Magistrate authorised to commit for trial, and such Magistrate shall bring the case before the High Court or Court of Session, as the case may be, together with the witnesses for the prosecution and defence.

Procedure of Civil or Revenue Court in such cases.

This section speaks of the procedure to be adopted by the Civil or the Revenue Court after making an order of commitment, *vis.*, to send the charge with an order of commitment and the record of the case to the Presidency Magistrate, District Magistrate or other Magistrate authorised to commit, and such Magistrate shall bring the case before the High Court or Court of Session with the witnesses for prosecution and defence. When a Judge of the High Court on the Original Side or a Judge of the Presidency Small Cause Court or City Civil Court makes a commitment, the procedure is to send the charge with the order of commitment and the record to the Chief Presidency Magistrate who shall bring the case before the High Court Sessions.

480. (1) When any such offence as is described in section 175, section 178, section 179, section 180 or section 228 of the Indian Penal Code is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender to be detained in custody and at any time before the rising of the Court on the same day, may, if it thinks fit, take cognizance of the offence, and sentence the offender to fine not exceeding two hundred rupees, and, in default of payment, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

(2) Nothing in section 29A, or in Chapter XXXIII, shall be deemed to apply to proceedings under this section.

CONTEMPT OF COURT.—The jurisdiction to punish for contempt of Court is inherent in the High Court as a Court of record and without it, its constitution as a Court of record would altogether be useless. But the Court always exercises its power of punishing for contempt with great forbearance and acts with scrupulous care. It is ordinarily very chary in punishing people for contempt and where the occasion arises it deals with such question in the interests of the public, bearing in mind that the greater the power it possesses the more caution it is necessary to use in exercising it. In other words the Court does not interfere where the offence is of a slight or trifling nature and it only interferes where there is a real attempt to obstruct the course of justice. From very early times it has been held to be a contempt of Court to assault, ill-treat or threaten a process server engaged in his duty. The object in punishing for such contempt is not to vindicate the dignity of the Court but to prevent undue interference with the administration of justice. The law has armed the Courts

with the power and imposed on it the duty of preventing *brivi manx* and by summary proceedings any attempt to interfere with the administration of justice. It is on that ground and not any exaggerated notion of the dignity of individuals that insults to witnesses, jury men and process-servers are not allowed. The principle those who have duties to discharge pursuant to orders of Court are protected by the law and shielded on their way to the discharge of such duties while discharging them and on their return therefrom in order that such persons may safely have resort to Courts of justice and carry out their orders. 26 Cr. L.J. 1205=88 Ind. Cas. 725; See also 28 Cr. L.J. 1409=89 Ind. Cas. 833. Any act done, or writing published, calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, or any act done or writing published to obstruct or interfere with the due course of justice, or the lawful process of Court, is a contempt of Court, 33 B. 240 at 245; 10 B.H.C.R. (Cr. Ca) 73. The object of punishing for contempts is the protection of the public from the evil which will result if their faith in the authority and justice of tribunals is inferred, 23 Cr. L.J. 645. S. 176, I.P.O., intentionally omitting to produce a document before a public servant, etc.; S. 178 I.P.O., refusing oath when duly required to take oath by public servant; S. 179, I.P.O. refusing to answer questions being legally bound to state the truth, 26 Cr. L.J. 354=84 Ind. Cas. 706. S. 180, I.P.O. refusing to sign statement made to a public servant when legally required to do so; S. 228, I.P.O., intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding. Where a witness being asked his grandfather's name, replies that he does not remember it cannot be held that he refuses to answer the question put to him and will not therefore render himself liable to be dealt with under this section. 27 Cr. L.J. 262=92 Ind. Cas. 428. Where an accused person walked with creaking shoes near the Court room, a Court is not justified in inferring that the accused intended to insult or interrupt its work, 5 M.L.T. 286=9 Cr. L.J. 309=1 Ind. Cas. 580. Where a pleader uses derogatory language and he assures the Court that they were not meant to apply to the Court, the Court ought to accept the assurance and action under this section is unwarranted, 11 A.L.J. 955=21 Ind. Cas. 1007. But in 9 M.L.T. 444 it was held, without deciding whether the act of a person walking in the view of a Magistrate with shoes on, while the Magistrate was sitting as a Magistrate amounted to an offence under S. 228 I.P.O., that no suit for damages will lie against the Magistrate as it was found that the Magistrate acted *bona fide* though he could have maintained the dignity of the Court without taking notice of the conduct in question. It is a contempt of Court to commit in a pending case if the effect of such comment is to prejudice the fair trial of an accused person, 14 Bom. L.R. 231=13 Cr. L.J. 351=15 Ind. Cas. 93. See 15 C.W.N. 771; 41 C. 173. There ought to be a spirit of give and take between the Bench and the Bar and every little persistence on the part of a practitioner should not be turned into an occasion for a criminal trial unless the practitioner's conduct is so clearly vexatious as to lead to the inference of intentional insult or interruption of the court 6 Bom. L.R. 351=1 Cr. L.J. 612. A contempt of court being a criminal offence, no person *s.g.* a practitioner of the court can be punished for contempt unless the specific offence charged against him is distinctly stated and an opportunity given to him of answering the same before passing a sentence. L.R. 2 P.C. 108.

IN THE VIEW OR PRESENCE OF.—This is what known in English law contempt 'in the face of the Court' In cases of such contempt the offender can be arrested and sentenced at the discretion of the Court immediately without further proof. This section cannot apply to the case of a witness who when summoned to produce a document stated that it was not in his possession, which was disbelieved by the Magistrate. He should proceed, if at all, under S. 476, *supra*, 13 M. 25.

AT ANY TIME BEFORE RISING OF COURT ON THE SAME DAY.—The procedure herein laid down should be strictly followed, and the provisions of the section were intended to be applied *then and there*, or at any rate before the rising of the Court in whose view or presence the contempt was committed; Courts, when resorting to a use of this section, will do well to follow the procedure therein laid down, 11 A. 361 at 353.

SENTENCE TO FINE NOT EXCEEDING RUPEES TWO HUNDRED.—The power to punish is limited by the provisions of this section to rupees two hundred or in default to

simple imprisonment for one month. The Magistrate has no power to award imprisonment, as a substantive punishment. If he considered a fine to be too light a sentence for the offence committed, he ought to proceed under S. 482, *infra* by referring the case to some other Magistrate who would have had power to inflict the severe punishment awardable under S. 228, I.P.C. Notwithstanding the provisions as to punishment in S. 228, I.P.C., a Court proceeding under this section cannot pass a sentence in excess of that prescribed herein, Weir II, 603; 6 M.H.C.R. (Appx.) 16.

APPEAL.—An appeal lies from every order of conviction made under this section, see S. 486, *infra*. A Sessions Judge cannot decline to interfere on appeal merely because in his opinion the matter is a mere trifle. He is bound to hear the appeal and decide whether the conviction is legal. Ratanlal 978.

SUB-SECTION (2).—The provisions of this section apply to European British subjects also.

481. (1) In every such case the Court shall record the facts constituting the offence, with the statement (if any) made by the offender, as well as the finding and sentence.

Record in such cases.

(2) If the offence is under section 228 of the Indian Penal Code, the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult.

SHALL RECORD THE FACTS.—The intention of the Legislature in requiring that certain particulars shall be recorded by the Court was to provide a safeguard against an abuse of power and to enable the appellate Court to see whether the conviction was justifiable, 28 Cr. L.J. 9. The section does not say that a charge is to be framed but only that the facts constituting the offence are to be recorded. The directions contained in this section as to the recording of facts constituting the offence, with the offender's statement, finding and sentence are clearly mandatory and omission will vitiate proceedings, 10 C.W.N. 1052—19 M.L.J. 324—11 Cr. L.J. 227; 13 C.W.N. 684; L.R. 2 P.C. 10; Courts when resorting to the use of this section would do well to follow the procedure laid down herein, 11 A. 331; when the Magistrate did not specifically record his reasons and the facts constituting the contempt the order was set aside, 4 M.H.C.R. 229. See also 4 M.H.C.R. 146 where it was held that it was no contempt to laugh and hesitate in speaking. But in 15 Cr. L.J. 621—25 Ind. Cas. 629, the Madras High Court while holding that the defect was curable under S. 537, *infra*, was of opinion it will not be condoned when the records did not disclose the stage of the judicial proceeding in which the offence was committed and it was doubtful whether the facts amounted to an offence.

STATEMENT IF ANY.—No person can be punished for contempt of Court which is a criminal offence unless the specific offences charged against him be distinctly stated and opportunity given him of answering the same. The expression "if any" in this section indicates that the Court cannot compel the accused to make a statement, but it does not mean that it should not give him an opportunity to make a statement. This is not an express provision of law enacting a special procedure contrary to the principle of criminal jurisprudence that a man must be heard before he is condemned, 24 Cr. L.J. 798—75 Ind. Cas. 542.

FINDING AND SENTENCE.—The finding and sentence to be recorded under this section will fall within a "judgment" as held in 10 C.W.N. 1062.

SUB-SECTION (2).—A coarse expression used by a party but not addressed to the Court can scarcely be treated as an insult to or interruption of the Court even if uttered within

the hearing of the presiding Judge. 13 Cr. L.J. 567—15 Ind. Cas. 988. Prevarication while giving evidence will not constitute contempt under this section or under S. 228, I.P.C., 4 B. H.C.R. (Cr. Ca.) 6; see also 15 Cr. L.J. 621—25 Ind. Cas. 629, nor refusal or neglect to give direct answers to question, 4 B.H.C.R. (Cr. Ca.) 7. Some latitude should be shown to a member of the Bar insisting upon his questions being taken down or his objections being noted by the Court when the Court thinks the question inadmissible or the objection untenable, 6 Bom. L.R. 541—1 Cr. L.J. 612.

482. (1) If the Court in any case considers that a person accused of any of the offences referred to in section 480 and committed in its view or presence should be imprisoned otherwise than in default of payment of fine, or that a fine exceeding two hundred rupees should be imposed upon him, or such Court is for any other reason of

Procedure where Court considers that case should not be dealt with under section 480.

opinion that the case should not be disposed of under section 480, such Court, after recording the facts constituting the offence and the statement of the accused as hereinbefore provided, may forward the case to a Magistrate having jurisdiction to try the same, and may require security to be given for the appearance of such accused person before such Magistrate, or, if sufficient security is not given, shall forward such person in custody to such Magistrate.

(2) The Magistrate, to whom any case is forwarded under this section, shall proceed to hear the complaint against the accused person in manner hereinbefore provided.

SCOPE OF THE SECTION.—This section contemplates that the trial is to be by a judicial officer other than the person before whom the contempt was committed and it applies to cases when a more severe punishment than that is allowed by S. 480 *supra*. There is nothing to warrant the inference that an officer before whom, while acting in a particular capacity a contempt has been committed punishable under S. 228, I.P.C., can in another capacity take up and try the offence, an offence committed against himself. If he could do so, it would be a violation of that fundamental rule in the administration of justice that no man can be a Judge in a case wherein he is interested, 12 W.R. (Cr.) 18 at 21. The necessity for commitment to another Magistrate arises only where the Court thinks, imprisonment without the option of fine or a fine of two hundred rupees, is demanded by the circumstances of the case. 6 M.H.C.R. (Appx.) 16.

SUB-SECTION (1).—Under this section the Court is to record a statement of facts constituting the contempt and the statement of the accused and then forward the case to a Magistrate, 11 W.R. (Cr.) 49; when a civil Court omitted to call upon the person who was charged with contempt to make his defence it was held that the irregularity was fatal to the order and the High Court would set it aside, 7 B.H.C.R. (Cr. Ca.) 108; 5 Bom. L.R. 343, but where the offender was a practitioner who left the Court abruptly before a statement could be recorded from him the omission was held immaterial and the dismissal of the case of contempt against the practitioner on the sole ground that the offender was not allowed an opportunity of explaining his conduct was set aside by the High Court. Welr. II, 604; the procedure under S. 480, *supra* is summary and the punishment can be one of fine only and action should be taken on the same day the contempt was committed. This section need not be read along with S. 480 *supra* and it is not imperative on a Magistrate to draw up the proceedings on the same day, 35 C. 161. A Magistrate instead of forwarding the case under this section may commit. See S. 487 (2) *infra*. In cases of contempt the Court is bound to accept, if sufficient bail is offered, 12 W.R. (Cr.) 19; 11 W.R. 19.

SUB-SECTION (2).—The Magistrate to whom the case is forwarded shall proceed to hear the complainant in the manner hereinbefore provided, *vis.*, in S. 200 and following sections. The wording of S. 476 (2) *supra* is narrower. Here the words used “hear the complaint and proceed as if upon complaint made under S. 200.” The same officer in another capacity cannot try the offender for no man can be a judge in a case in which he is interested, 12 W.R. (Cr.) 18.

When Registrar or Sub-Registrar to be deemed a Civil Court within Ss. 480 and 482.

483. When the Local Government so directs, any Registrar or any Sub-Registrar appointed under the Indian Registration Act, 1908, shall be deemed to be a Civil Court within the meaning of sections 480 and 482.

The section is in accordance with the decision in, 13 B.L.R. Appx. 40=22 W.R. (Cr.) 10. Where it was held that a Sub-Registrar under the Registration Act, being a public servant and the proceedings before him being judicial proceedings within S. 228, I.P.C. had jurisdiction to take contempt proceeding. A Sub-Registrar is held to be not a Court within S. 195, *infra* 12 B. 36; 11 M. 3; 12 M. 201; 4 M.L.J. 139. and sub-section (2) of S. 195 expressly enacts so. This section is an exception and makes a Sub-Registrar a Court for dealing with contumacious contempts and is an excrescence on the general system and an exceptional provision, 12 B. 36 at 42, 43.

484. When any Court has under section 480 or section 482 adjudged an offender to punishment or forwarded him to a Magistrate for trial for refusing or omitting to do anything which he was lawfully required to do, or for any intentional insult or interruption, 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.

Discharge of offender on submission or apology.

When a pleader was punished for contempt by a District Munsiff for certain words uttered in Court which the Munsiff thought was derogatory to his position and the Munsiff declined to accept the assurance of the pleader that the words had no reference to the Court and the District Judge on appeal declined to interfere the High Court in revision directed the Munsiff to consider whether it was not a case in which he should accept the assurance of the pleader and act under this section. Upon the Munsiff's declining to do so as the pleader had not withdrawn the words uttered, it was held that the assurance given that the words were not uttered with reference to the Court should be taken to be sufficient, 11 A.L.J. 985=14 Cr. L.J. 687=21 Ind. Cas. 1007. Litigants are bound to conduct themselves in an orderly manner in Court, but too much notice should not be taken of any sudden lapse, during a moment of excitement into language which is unfortunately too common among the lower class of rusties and is not meant to be taken seriously when a litigant is detained and adopts submissive attitude when brought before the Court later on after excitement is worn off. A due admonition or a petty fine at the most is sufficient for preservation of order. 13 Cr. L.J. 567=15 Ind. Cas. 988.

485. If any witness or person called to produce a document or thing before a Criminal Court refuses to answer such questions as are put to him, or to produce any document or thing in his possession or power which the Court requires him to produce, and does not offer any reasonable excuse, for such refusal, such Court may,

Imprisonment or committal of person refusing to answer or produce document.

for reasons to be recorded in writing, sentence him to simple imprisonment or by warrant under the hand of the presiding Magistrate or Judge commit him to the custody of an officer of the Court for any term not exceeding seven days, unless in the meantime such person consents to be examined and to answer, or to produce the document or thing. In the event of his persisting in his refusal, he may be dealt with according to the provisions of section 480 or section 482, and, in the case of a Court established by Royal Charter, shall be deemed guilty of a contempt.

"Any witness or other person" cannot include a complainant who cannot be punished under this or S. 179, I.P.C. There is no case which brings in a complainant under these penal provisions. 13 B. 600 at 604.

The special power under this section is different from the power possessed by Courts of Record to commit for contempt. The High Court in the Indian Presidencies are superior Courts of Record. The offence of contempt of Court and the powers of the High Court to punish it are the same as in the superior Courts in England and the jurisdiction was exercised by the High Court in such a case, 45 C. 169 at 183-184; 41 C. 173 at 216 and 242; 10 C. 108 (P.C.); 11 C.W.N. 273; 21 M.L.J. 832-10 M.L.T. 209; 33 B. 240. The object which a Court has in view for punishing for contempt is the protection of the public from the evil which will result if their faith in the authority and justice of the tribunals is impaired, 23 Cr. L.J. 644. A District Court is not a Court of Record and as such has no inherent powers to punish for contempt, 26 M. 494. The power to punish for contempt is not by virtue of the Penal Code for British India and this Code, but by virtue of the Common Law of England. 5 Moore P.C. (N.S.) 497. The jurisdiction to punish for contempt of inferior Courts also exists in the Superior Court of Record, 21 M.L.J. 832-10 M.L.T. 209. But a different view was taken by the Calcutta High Court in 41 C. 173 (Sp. B.)

486. (1) Any person sentenced by any Court under section 480 or section 485 may, notwithstanding anything hereinbefore contained, appeal to the Court to which decrees or orders made in such Court are ordinarily appealable.

Appeals from convictions in contempt cases.

(2) The provisions of Chapter XXXI shall, so far as they are applicable, apply to appeals under this section, and 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 in a presidency-town shall lie to the High Court, and

an appeal from such conviction by any other 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 officer as Registrar or Sub-Registrar appointed as aforesaid may, when such officer is also Judge of a Civil Court, be made to the Court to which it would, under the preceding portion of this section, be made if such conviction were a

decree by such officer in his capacity as such Judge, and in other cases may be made to the District Judge, or, in the presidency-towns, to the High Court.

This section provides for appeals in cases of conviction for contempt.

ORDINARILY APPEALABLE.—This expression means appealable in majority of cases, 11 B. 438 at 440. When a single Judge sitting on the Original Side of the High Court refused on application to commit for contempt of Court, it was held an appeal lay to the Appellate Side of the High Court under S. 15 of the Letters Patent, 1865, 25 C. 235.

SUB-SECTION (3).—In this sub-section, it is provided that an appeal from a conviction by a Court of Small Causes shall be to the Court of Session. But in sub-section (4) the appeal lies to the District Judge. It is more appropriate to state that the appeal, under this clause also lies to the District Judge rather than to the Court of Session as the conviction is by a Civil Court. An appeal from a Court of Small Causes to the Court of Session is also inconsistent with the expression "ordinarily" occurring in sub-section (1).

487. (1) Except as provided in sections 480 and 485, no Judge of a Criminal Court or Magistrate, 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 himself or in contempt of his authority, or is brought under his notice as such Judge or Magistrate in the course of a judicial proceeding.

Certain Judges and Magistrates not to try offences referred to in S. 195 when committed before themselves.

(2) Nothing in section 476, or section 482 shall prevent a Magistrate empowered to commit to the Court of Session or High Court from himself committing any case to such Court.

OBJECT OF THE SECTION.—This section is limited to offences referred to in S. 195, *supra*. The prohibition in the section is a personal prohibition, the mischief to be prevented being that the same person should not decide a matter which he may have already prejudged. It does not refer to the office of the Magistrate or Judge before whom an offence of the class described in the section is committed, but only refers to the person of the Magistrate, 1 M. 305.

NO JUDGE OF A CRIMINAL COURT.—The use of the word "criminal" is significant and shows that the prohibition does not extend to a Judge of a Civil Court. Therefore a District Judge who takes action under S. 195 or S. 476, *supra* is not debarred from trying the offence in his capacity as a Sessions Judge, 6 B. 479; 7 C.W.N. 708; 15 C. 786 (F.B.); 18 B. 390 (F.B.) The prohibition applies when a Sessions Judge directs prosecution in relation to a judicial proceeding before himself, 14 A. 354; 1 B. 311; Weir II, 609. Even though the trial is not illegal it is undesirable that the same person should try the offender, 6 B. 479; 1837 A.W.N. 139. The use of the word "Judge" is significant. The disqualification is personal and the successor in office is not disqualified to hold the trial.

MAGISTRATE.—The word "Magistrate" includes a Presidency Magistrate, 12 C.W.N. 246.

SHALL TRY ANY PERSON FOR AN OFFENCE.—This section does not prohibit the hearing of an appeal, Weir II, 607; 7 C.W.N. 708. The word "try" as used in this section includes the hearing of an appeal, 25 Cr. L.J. 713-81 Ind. Cas. 201.

REFERRED TO IN S. 195.—This section specifically refers only to contempts referred to in S. 195 (1) (a) dealing with Ss. 172-188, I.P.C., contempts of the lawful authority of

public servants referred to S. 195 (1) (b), offences against public justice, and S. 195 (1) (c), offences relating to documents given in evidence.

OTHER THAN A JUDGE OF THE HIGH COURT.—The High Court is a Court of Record and has the power of summarily punishing every contempt without sending the accused for trial to ordinary Criminal Courts, 24 M. 523 at 518 and 262 ; 8 W.R. (Cr.) 32 ; 1 B. 339.

SUB-SECTION (2).—This sub-section gives no power to commit, to a Magistrate not ordinarily competent to commit. It only says that a Magistrate ordinarily competent to commit is not obliged to adopt the procedure of Ss. 476 and 482 *supra*. The inquiry will be in the way prescribed by Chapter XVIII of the Code.

CHAPTER XXXVI.

OF THE MAINTENANCE OF WIVES AND CHILDREN.

This Chapter seems to be out of place in a Code of Criminal Procedure and it is here inserted only because corresponding provisions were placed in the Codes of 1861 and 1872. Sir James Fitzjames Stephen thinks that this chapter should be placed in Part IV relating to prevention of offences, as he says it is a mode of preventing *vagrancy* or at least preventing its consequences. Unfortunately, though *vagrancy* is an offence in England, it is not and never has been an offence in India. *Whitley Stokes's Anglo Indian Codes, Vol. II, p. 29*. The right to maintenance enforceable under the Code is a right which exists independently of the personal law of the parties. The provision is analogous to that made by the English Poor Law under which children who have no Common Law right to claim it from their father's hands may claim it before a Magistrate, 20 M. 470 at 473 (F.B.)

488. (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding *one hundred* rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.

(3) If any person so ordered *fails without sufficient cause* to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made :

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such

Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Provided, further, that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

(6) All evidence under this Chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons-cases :

Provided that, if the Magistrate is satisfied that he is wilfully avoiding service, or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case *ex parte*. Any order so made may be set aside for good cause shown on application made within three months from the date thereof.

(7) The Court in dealing with applications under this section shall have power to make such order as to costs as may be just.

(8) *Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child.*

EXTENT OF AMENDMENT.—The maximum amount of maintenance awardable under sub-section (1) has been increased from rupees fifty to rupees one hundred. In sub-section (3) the words "wilfully neglects" have been omitted and the words "fails without reasonable cause" have been substituted. A new proviso has also been added to the sub-section making it obligatory to apply for a warrant for recovery of the amount due within one year from the date on which the amount becomes payable. Sub-section (7) has been omitted inasmuch as provision is made in S. 340, *supra* for examination of the accused as a witness. Sub-sections (8) and (9) have been re-numbered as (7) and (8) and contain only mere verbal alterations.

OBJECT OF THE SECTION.—The object of this section is not to punish a parent for his past neglect but to prevent vagrancy, 25 Cr. L.J. 1249—82 Ind. Cas. 257; 9 B. 40. The intention of the Legislature is to enforce the liability of the husband of the woman and the male parent of an illegitimate child as the person primarily responsible for their maintenance, Weir II, 819. The section is enacted to suit Indian conditions, 49 M.L.J. 335—26 Cr. L.J. 1597—80 Ind. Cas. 689. It is obvious from the statute itself that

persons aggrieved by Magisterial orders are expected to take their case to the Civil Courts. This section provides a speedy remedy and safeguards a deserted wife or child from starvation, but when other issues are raised they should be settled in the Civil Courts and nothing is to be gained by protracted litigation in the Criminal Courts and doubtless it is with that intention that no appeal has been allowed from orders under this section. 50 M.L.J. 34 at 45. The object of the section is to provide maintenance and not to enforce conjugal duties, 16 B. 269 at 275. In proceedings under this section the Magistrate has no power to appoint a guardian *ad litem* for a lunatic. The proceedings under this section may be quasi civil but they are wholly governed by the Code. When it is alleged that the husband or father is a lunatic, a judicial inquiry as to his sanity should be held and he must be kept under medical observation and if the Court finds him insane, it must postpone further proceedings until it is satisfied that he is capable of understanding the proceedings, 48 M. 388. The question of legal guardianship cannot be determined in proceedings under this section, 4 C. 374. The provisions of this section must override the personal law of the parties if it conflicts with them. 24 Cr. L.J. 368-72 Ind. Cas. 368. The Legislature has used the words "any person" in various parts of the section suggesting thereby that the person proceeded against is not an accused person under any disability under which accused persons labour. 48 M. 388; 25 Cr. L.J. 1091-81 Ind. Cas. 915. An application under this section is not a complaint and therefore compensation cannot be awarded under S. 250, 4 Ind. Cas. 1045.

SUB-SECTION (1); ANY PERSON HAVING SUFFICIENT MEANS.—The word 'means' does not signify only *visible means* such as real property or definite employment. If a man is healthy and able-bodied he must be taken to have the means to support his wife, 50 M.L.J. 44 at 45—(1926) M.W.N. 146-27 Cr. L.J. 380-92 Ind. Cas. 862. A person against whom an order for maintenance is made under the section must have *sufficient means*, but the fact that the husband may be of slender means, Weir II, 617, or that the father or husband is a professional beggar, Weir II, 616, or that he is an undivided member of a Hindu family, 13 M. 17, or that he is a student at school, 4 N.W.P.H.C.R. 123, does not justify absolute refusal of maintenance. The fact that the wife may have friends able and willing to maintain her will not relieve the husband from his obligation, Weir II, 616, followed in 4 Cr. L. Rev. 391. The *onus* will certainly be on the husband to show that he has not sufficient means. 13 Cr. L.J. 162-13 Ind. Cas. 914; 49 B. 582. The word used is 'any person'. An undivided son in a Hindu family must be taken to be able to utilise his joint interest as well, for his maintenance as that of his wife when necessary to do so. 13 M. 17.

NEGLECTS OR REFUSES TO MAINTAIN.—To give jurisdiction to a Magistrate an actual neglect or refusal to maintain must be established, Weir II, 630. Neglect or refusal may be by words or by conduct. It may be express or implied, 9 Bom. L.R. 359. Where a husband ill-treated his wife and turned her out of his house so as to make it impossible for her to live in the house, that would be neglect or refusal to maintain her, 5 Bom. L.R. 614. What gives jurisdiction to a Magistrate to award and entitles the children to receive maintenance, is not merely a formal refusal of the father to maintain, but also his neglect to do so. 19 L.W. 830—(1924) M.W.N. 468-25 Cr. L.J. 94-76 Ind. Cas. 80. With regard to children it is sufficient if neglect or refusal to maintain them is proved and on such proof the Magistrate can make an order for payment of monthly allowance for the child to such person as the Magistrate from time to time directs. An offer to maintain the children in the future is not sufficient by itself to debar the Magistrate from making an order; the Magistrate may be entitled to consider the circumstances in which the offer was made and whether it is right and proper that children if not in their father's custody be handed over to him. With regard to the maintenance of a wife there is a special proviso in this section, that if the husband offers to maintain her on condition of her living with him and she refuses to live with him the Magistrate may consider the grounds of refusal and make an order notwithstanding such refusal if he is satisfied there is just ground for doing so. The Legislature has not included children in that proviso for very good reasons. The *onus* should not be thrown on them of stating grounds of refusal which would have to be considered before making an order. Expression of willingness to maintain will not deprive the Magistrate of his jurisdiction if he is satisfied that the father has neglected or refused. 49 B. 582 at 585-586. A husband against

whom an order of adjudication is made cannot be held to have neglected to maintain, he being unable to pay and cannot be proceeded against for arrears due. 50 G. 867.

HIS WIFE OR LEGITIMATE OR ILLEGITIMATE CHILD.—A wife alone is entitled to claim maintenance under this section and proof of a valid marriage is necessary to enable a Magistrate to award maintenance. 16 B. 269; 19 A. 50. A concubine or kept woman cannot claim maintenance herself under this section although she is entitled to claim maintenance for her illegitimate child. A married woman is entitled under this section to claim a maintenance allowance for her illegitimate children from the putative father even during the lifetime of her husband, Weir II, 619; 18 B. 468; 18 A. 107. The word "child" means one who has not attained majority, 37 M. 565. In proceedings under this section for maintenance of an illegitimate child, the real question at issue is, whether the respondent is the putative father of the child. Mere assertion on oath by the mother that the respondent is the father, ought not to be acted upon without some independent corroboration of it, to satisfy the Court that her statement is true, 27 Cr. L.J. 1095=97 Ind. Cas. 359; "child" simply means son or daughter and reference to age is purposely omitted. Maintenance can be claimed so long as a son or daughter is unable to maintain itself, 11 Cr. L.J. 427=6 Ind. Cas. 960. An order awarding maintenance in respect of a child yet unborn, is illegal, Weir II, 618. If the wife fails to prove the marriage, maintenance can be recovered as for an illegitimate child if parentage is proved. 16 G. 781. A husband is bound to maintain his wife but he is not bound to do more than supply her with lodging, food and clothing; he is not bound to maintain her as his wife. 25 Cr. L.J. 1249; 16 B. 269. By maintenance it is not intended to go further than assure the wife or child, food, clothing and lodging and cannot include educational expenses. 28 Cr. L.J. 1249; 11 Cr. L.J. 40=4 Ind. Cas. 758. The word 'Child' is not defined in the Code and in the absence of any definition or anything contrary in the Code. Child is a person who has not reached full age. It is only then that the child becomes competent to enter into any contract or enforce its claims. A child which had not attained the age of majority is within the meaning of this section, 37 M. 565; 26 Cr. L.J. 535=85 Ind. Cas. 375. A husband alone is liable for the maintenance of the wife and not the father-in-law of the woman. 4 Cr. L. Rev. 6.

UNABLE TO MAINTAIN ITSELF.—The words 'unable to maintain itself' means unable to earn a livelihood for itself, that is to say, a complete livelihood such as an adult person might earn without depending on any other person. There is a continuing obligation upon a father who has sufficient means to maintain his child and he cannot contract himself out of that obligation. The fact that the child is not in a starving condition cannot be set up as an answer to an application for its maintenance. The essential point is that a man is bound to feed and clothe his minor offspring and he cannot be heard to say that the latter should help him to fulfil his obligation. The sum he should be ordered to pay is fixed according to his means, the status of the parties and the age of the child. No other consideration should come in. Were it otherwise, the Court in most cases will be obliged to enter upon calculations of some nicety as to the proportion of the expense which the child itself should bear. Every able-bodied boy or girl over ten years of age is a potent wage-earner. For instance, a town bred boy of twelve or fourteen, even if attending school, might easily in his spare time earn an anna or two by hawking newspapers, but it does not follow that this should be taken into consideration in giving the sum which his father should be ordered to pay for his maintenance. A father who has sufficient means is bound to maintain his child who is under the age of majority and in fixing the sum payable no regard should be paid to the fact that the child is able to contribute to its own support by means of labour or work. 26 Cr. L.J. 535=85 Ind. Cas. 375. There is some conflict of authority as to the interpretation of this expression. In 22 M. 246; 25 M.L.J. 355=1913 M.W.N. 997, it was held that the expression meant physically unable, on account of tender years, to earn a livelihood, and therefore unable to maintain itself, but in 39 M. 937 it was held that the expression meant unable for want of sufficient means to maintain itself. The inability contemplated by this section applies as much to the case of a child which has got means of its own or which is entitled in law to be maintained, and is being maintained as in this case by

some other person as to a child which is able to earn a living by its own exertions. This is a summary procedure provided by S. 488 and it does not cover entirely the same ground as the civil liability of a father to maintain a child. It does not seem to have been within the contemplation of the Legislature that a child which is well-to-do should be entitled under S. 488 to an order for maintenance against its father—*per Abdur Rahim, J.*, 39 M. 957 at 988. This view was followed in 37 M.L.J. 361 and 46 M.L.J. 324—19 L.W. 275—1924 M.W.N. 308—25 Cr. L.J. 370—77 Ind. Cas. 418. A child which is deaf and dumb is entitled to maintenance even after attaining majority, 5 N.W.P.H.C.R. 237. The mere fact that the girl to whom maintenance was awarded was subsequently married, will not necessarily make her able to maintain herself, if in spite of the marriage the husband is too poor to maintain, or for any other good reason the father's liability will still continue, 43 M. 503. All that has to be proved to give jurisdiction to the Magistrate is that the child is unable to maintain itself and the father neglected or refused to maintain it. Even a grown up child if unable to maintain itself, is entitled to maintenance from the father if he has the means, 49 M.L.J. 335 at 339. The law does not treat prostitution as a profession by which a girl may earn her livelihood and maintain herself. It is against public policy to do so. 37 M. 553; 2 Rang 682. A father cannot be compelled to educate a boy in a college and thus better his position. The liability is to maintain only, 24 Cr. L.J. 590—73 Ind. Cas. 334.

THE DISTRICT MAGISTRATE, ETC.—Under this section maintenance cases must be tried only by the classes of Magistrates therein mentioned and any order for maintenance passed by a Magistrate not empowered in this behalf shall be void, S. 590, cl. (n), *infra*.

UPON PROOF OF SUCH NEGLECT OR REFUSAL.—Before a Magistrate makes an order under this section he must find that the husband has neglected and refused to maintain his wife or child, 16 B. 259; 6 N.W.P.H.C.R. 205, neglect or refusal to maintain may be by words or conduct. It may be express or implied, 9 Bom. L.R. 359; 5 Bom. L.R. 614. Evidence must be recorded by the Magistrate himself and he is not competent to refer it to a Subordinate Magistrate for inquiry under S. 207, *supra*, Weir II, 617; 11 M. 199. Sub-section (6) provides that evidence shall be recorded as in summons-cases and S. 355, *supra*, regulates the mode of recording evidence. Proceedings cannot be conducted as in a summary trial, 20 C. 351. "Proof" means legal proof on oath, 13 W.R. (Cr.) 19, and similarity of features of the child with its alleged putative father is not sufficient evidence, 16 C. 781.

MAY MAKE A MONTHLY ALLOWANCE.—The use of the word "may" as distinguished from "shall" shows that the Magistrate has a discretion to decide in what cases the award of maintenance may properly be made. No doubt the discretion must be exercised judicially and reasonably and not capriciously, 31 M. 185. A man is bound to maintain his legitimate or illegitimate child but he is not bound to maintain the child of his wife by her former husband. 7 Lah. 365. The Magistrate 'may' and not 'shall' make an order. He has a discretion to consider and be guided by the social ideas and feelings of the community to which the parties belong. 20 M. 470 (F.B.) at 476, followed in 31 M. 185. Where the Magistrate exercised a judicial discretion in refusing maintenance, the High Court will not interfere with the order in revision, 31 M. 185. The proceedings of the Probate Division in England do not control the jurisdiction of the Magistrates in India, and the existence of an order to pay *alimony* is no bar to the Magistrate making an order under this section on the application of the wife if the husband neglects or refuses to maintain either by payment of *alimony* or otherwise, 49 M. 891 at 896. In fixing the amount, no luxury should be allowed, but only necessaries of life should be considered, according to the station in life of the applicant and the means of the respondent. 13 Cr. L.J. 55—13 Ind. Cas. 391. The payment must be a monthly payment and in cash. An order directing the giving of two clothes annually, Weir II, 627, or grain, Weir II, 626, 627, is not legal. So also an order directing a mixed payment in kind and in cash, 26 Bom. L.R. 186—25 Cr. L.J. 985—81 Ind. Cas. 613. An order directing the husband to give his wife twelve maunds of grain each harvest season and to provide her with a separate house is illegal, 25 Cr. L.J. 1271—82 Ind. Cas. 279. So also a conditional order that the husband do pay a fixed sum if after taking back the wife home he fails to maintain her or turns her out of the home, 7 Lah. 313 following Weir II, 630 and 16 Cr. L.J. 523—39 Ind. Cas. 496.

NOT EXCEEDING ONE HUNDRED RUPEES IN THE WHOLE.—The words 'in the whole' mean that only a sum of money not exceeding one hundred rupees should be ordered to be paid and no other payment either in the shape of fees or medical expenses, etc., should be ordered to be paid, nor can the Magistrate order the husband to provide a house for the wife. It is to prevent the Magistrate making an order that the husband should pay so much for the schooling of children or so much for clothing or so much for medical expenses, and so on, that the words 'in the whole' has been put into the section, 49 M. 891 at 896. Where a wife and her two children were awarded one hundred rupees each, in all amounting to rupees three hundred, it was held that the order was not *ultra vires* as the maximum of rupees one hundred fixed by the section is the maximum awardable to each of the applicants, 49 M. 891; 19 L.W. 580—1925 M.W.N. 465—25 Cr. L.J. 94—75 Ind. Cas. 30.

PAY TO SUCH PERSON AS THE MAGISTRATE FROM TIME TO TIME DIRECTS.—An order directing payment of a maintenance allowance into a public treasury is not legal. Weir II, 627.

SUB-SECTION (2).—The allowance can be made at the most from the date of the application for maintenance and cannot be given retrospective effect, Weir II, 635; 27 Cr. L.J. 610—34 Ind. Cas. 354. The Magistrate has no power to make an order under this sub-section for the payment of any sum for a period prior to the date on which the application for maintenance is filed, 7 Lah. 385.

SUB-SECTION (3).—The words "willfully neglect" have been omitted and the words "fails without sufficient cause" have been substituted for the same. The Legislature has deliberately used the expression "sufficient cause" obviously intending the Magistrate should be in a position to use his judicial discretion having regard to all the circumstances, and such judicial discretion should not be fettered or limited by any definite rule. The circumstances of each particular case should be considered in determining judicially whether there is or there is not sufficient cause, 43 M.L.J. 494—21 L.W. 702—26 Cr. L.J. 933—27 Ind. Cas. 105. A husband against whom an order has been made when adjudicated an insolvent cannot be proceeded against for failure to pay arrears due to the wife for maintenance; he being unable to pay his debts, his failure cannot be held to be a failure without sufficient cause. 50 C. 887. A Magistrate may himself issue a warrant for the collection of arrears of maintenance or refer the applicant to a Magistrate within whose jurisdiction the defendant is to be found, 4 M. 230, and the new proviso fixes a period of one year within which an application for arrears of maintenance should be made. The maximum imprisonment will be for one month and it shall cease on payment of the amount due. There is nothing in this clause which compels the Criminal Court to award separate maintenance to a wife whom the husband agrees to protect in a suitable manner because he refuses to co-habit with her, 42 M.L.J. 866—15 L.W. 583. Where the husband offers to maintain his wife, the Magistrate must comply with the requirements of this proviso, 27 Cr. L.J. 938—26 Ind. Cas. 394, where 16 B. 269 is approved. The first proviso to this sub-section does not apply to orders directing maintenance to children and such an order cannot be superseded by a decree for the restitution of conjugal rights against the wife, the father not being appointed guardian of the children, 1 Cr. L. Rev. 368. The offer of the husband to supply the wife with food, clothing and separate residence or to admit her into his own house is sufficient. He need not agree to keep the wife with him as his wife. No authority is given for the proposition that the words "as his wife" must be read into the section. Criminal Courts have no sufficient machinery to direct domestic arrangements, or control the domestic rules of *pater familias*, 16 B. 269 at 274-275. The second proviso enacts that no warrant for arrears of maintenance shall be issued unless the application is made within one year of the amount falling due.

MAY CONSIDER GROUNDS OF REFUSAL STATED BY HER.—In dealing with the question whether a wife is justified in living apart we must consider the civil law applicable to the parties, e.g., Hindu Law if the parties are Hindus. It is the duty of a woman to reside with her husband and it is her co-relative right to be maintained by him under his roof, 16 B. 269 at 275. Concubinage is within certain limits recognised by Hindu and

Mahomedan law and is not in all circumstances to be reprobated by the public opinion of the communities. Keeping a concubine is not necessarily and in all circumstances to be regarded by the Magistrate as a sufficient cause for a woman to refuse to live with her husband though it is equally clear that the Magistrate may in certain cases regard it as a sufficient reason and award separate maintenance. The Magistrate must be guided by all the facts and circumstances of each case and with due regard to the social ideas and customs of the community to which the parties belong, 20 M. 470 at 475 (F.B.) Amongst the Hindu community concubinage is recognised and it is possible for a concubine to have a certain status. If, therefore a husband keeps a concubine in his house apart from his wife, it is doubtful whether such an act would entitle the wife to separate maintenance. But if he kept such a concubine in the same house as his wife lived, and against the wishes, or in such a manner as to offend the self respect of his wife, that would entitle the wife to separate maintenance under this section, *Ibid.*, 472. The question in each case will be whether the conduct of the husband is such as the wife consistently with self respect and due regard to her position as wife, can live in the house of the husband. If this is possible and the husband is willing to receive her, the Magistrate may refuse separate maintenance, *Ibid.*, 475.

SUB-SECTION (4).—The provision of this sub-section does not authorise a Magistrate to entertain an application for separate maintenance by the wife who had, of her own accord, left her husband's house and protection. She must prove that there is just ground for her living away from her husband. The husband marrying a second wife is no ground for the wife living away from her husband, 7 M. 187. It was held in 20 M. 470 (F.B.) that adultery on the part of the husband may constitute a sufficient cause for the wife living away from the husband. Unless continuancy of conduct is established it cannot be inferred from a single act of adultery that the woman is living in adultery. Although a woman has given birth to an illegitimate child, it is open to a Magistrate to find that apart from that circumstance she is not living in adultery within this sub-section, 29 C.W.N. 637—26 Cr. L.J. 1154—88 Ind. Cas. 608. What the law contemplates by sub-section (4) is well recognized in *affiliation proceedings* between husband and wife under the English Law, *vis.*, where husband and wife have lived apart by a definite contract mutually made between them, then *affiliation proceedings* are inapplicable. A contract voluntarily and freely made between them and entered into by reason of the ill-treatment of the husband towards his wife would be an act of their own volition, if the parties separated under such terms, so that neither should molest the other and that both should be free to live and go where and whither they respectively wished, such an agreement would be a voluntary act and contract by the parties themselves unfettered by the decree or declaration of any tribunal, 4 Pat. L.J. 109 at 112-113. Where a husband and wife are living apart in obedience to the arbitration of a *panchayat* of their caste men by which the wife was given a stipend as maintenance, it cannot be said that they are living apart by mutual consent. When once it is proved that the parties are living separately by mutual consent the Magistrate has no jurisdiction to pass an order under this section.

SUB-SECTION (5).—This sub-section seems to deal with proof of facts which may have occurred subsequent to the order for maintenance being passed. Mere second marriage will not justify first wife's refusal to live with her husband, 27 Cr. L.J. 507—93 Ind. Cas. 871. Where a husband marries a second wife and offers to provide a separate residence for his first wife and she refuses to accept that offer, she cannot be said to refuse to live with her husband within this sub-section, 25 Cr. L.J. 453—77 Ind. Cas. 808. Adultery as contemplated by this section is the popular sense of the term, *vis.*, breach of the matrimonial tie by either party. The words "living in adultery" refer rather to a course of conduct or at least something more than a single lapse from virtue. The words point to a continuous course of conduct and not to isolated acts of immorality. Conduct which according to western notions could be condemned as a breach of marital obligation is not so condemned either by Hindus or Mahomedans, 20 M. 470 at 473, 475. Therefore a single act of adultery does not necessarily amount to "living in adultery" so as to disentitle the wife from applying for maintenance, 20 M. 332, where 20 M. 470; 26 A. 326 are referred to. But where a single act of adultery by the

wife was with a low caste-man entailing social excommunication from caste, it was held that the Magistrate was justified in refusing maintenance to the wife, 31 M. 185. An order for maintenance passed in favour of a wife may be cancelled on proof of adultery, 8 B.H.C.R. (Cr. Ca.) 124; 5 A. 224; 24 C. 638. A mere temporary stay of the wife with her husband for a few months though it may suspend the order for maintenance will not have the effect of cancelling it, 37 C.L.J. 180. See also Cr. R.C. No 230 of 1926 (M.H.C.).

SUB-SECTION (5).—Evidence ought to be taken in the presence of the father or the husband or his pleader unless he is wilfully avoiding the service of summons. The petition cannot be referred to a subordinate Magistrate to take evidence and report upon the facts stated in the petition and no order can be passed by a first class Magistrate for maintenance in the absence of the husband, 11 M. 199; 1 C.L.J. 102; Weir II, 628. Evidence should be recorded as provided in S. 355, *supra*, and the procedure is as in summons-cases. Any separate order for maintenance made may, for good cause shown on application made within three months from the date, be set aside. An order cannot be enforced after the death of the person against whom the order was passed. From the language of the sub-section it is quite clear that in the mind of the Legislature the instance of the deceased person, against whose estate arrears of maintenance may be claimed was never present, 2 Cr. L. Rev. 247 at 248—17 C.W.N. 1180.

SUB-SECTION (7).—Power is herein given to award costs as in proceedings under Chapter XII, S. 148, *supra*, but it was held in 48 M. 262 (F.B.) that the High Court in revision cannot award costs. The Magistrate passing the decision is alone entitled to award costs. Similarly the High Court in revision will not be entitled to pass orders as to costs and the question was not argued and considered in, 49 M.L.J. 335—26 Cr. L.J. 1597—90 Ind. Cas. 689, where costs were awarded. The reasoning of the Full Bench will apply to these proceedings also.

SUB SECTION (8).—The jurisdiction is to be exercised ordinarily in the District where the husband resides. It is the duty of the wife to reside with the husband and it is her correlative right to be maintained by him under his roof. "Reside" means primarily to have a settled abode for a time. But a man may reside or have a settled abode at a place where his family or his servants eat, drink, or sleep. In 1 A. 51, it was held that a soldier who travels about from place to place with his regiment has his dwelling place where his family lived and whither he had the intention of returning. A man may therefore be said to reside with his wife at any place where his wife has a settled abode and is not necessary that he himself should live there permanently or ordinarily, provided he has the intention of going there and living there when opportunity occurs. Though 'reside' connotes a stay for some time no minimum time has been laid down as a qualification. In 36 C. 964 the parties were held to have resided together for purposes of the Divorce Act at a Calcutta hotel for about a fortnight, they having no permanent residence. In the case of a kept mistress it cannot reasonably be demanded that the nature of the residence of the man should be more permanent than in the case of a lawful husband. A man may be said to reside with the mother of illegitimate children if he visits her only occasionally at her settled place so long as he has the intention to continue his visits. Two months was considered to be a sufficient stay to constitute residence for the purpose of this section, it being not shown that the woman had any permanent residence, 13 Cr. L.J. 522—15 Ind. Cas. 794. The first process must be sought against the husband in the District where the breach of obligation takes place, i.e., in the District where the husband resides, 9 B. 40 at 45. Temporary residences within jurisdiction of Magistrate when the application is made is sufficient to give jurisdiction, 21 C.W.N. 872; 8 M. 208; 36 C. 964. Where a wife returning from a short visit to her sister found her husband living with another woman in the house and left the house immediately for another District where she claimed maintenance, it was held that refusal to maintain was a breach committed at the place where the application was made and the Magistrate had jurisdiction to pass an order under this section, 13 A. 343; 5 N.W.P.H.C.R. 237. A Magistrate may himself issue a warrant for the collection of arrears or refer the applicant to the Magistrate within whose jurisdiction the man is to be found, 4 M. 230.

The words "last resided" occurring in this sub-section do not refer to a mere casual residence in a place for a temporary purpose with no intention of remaining there. Where a husband was employed as a carpenter in the Railway workshop at Lahore and has been residing there continually for several years, a temporary sojourn or a temporary stay at Lucknow with his wife will not confer jurisdiction on the Magistrate at Lucknow to entertain an application for maintenance. 27 Cr. L.J. 820—95 Ind. Cas. 596 where 32 A. 208 ; 26 C. 984 ; 45 B. 547 are referred to.

APPEAL AND REVISION.—No appeal lies from an order of the Magistrate under this section. The High Court in its revisional jurisdiction may set aside an illegal order. A District Magistrate is not competent to direct further inquiry when once the application has been rejected, 25 A. 545. The Magistrate is not entitled to review the final order made by him under this section. The rejection of an application in one District for want of jurisdiction is no bar to the renewal of the application in the proper District, 5 N.W.F.H.C.R. 237 ; 9 B. 40. When an application under this section was dismissed for default and not on the merits a second application will lie as there is nothing in the section which bars a second application, 30 C.L.J. 128.

489. (1) On proof of a change in the circumstances of any person receiving under section 488 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance as he thinks fit :

Alteration in allowance.

Provided that if he increases the allowance the monthly rate of one hundred rupees in the whole be not exceeded.

(2) *Where it appears to the Magistrate that in consequence of any decision of a competent Civil Court, any order made under section 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.*

AMENDMENT.—In sub-section (1) the monthly allowance has been raised to rupees one hundred consequent on the change in S. 488, sub-section (1). Sub-section (2) has been newly added to explain the change of circumstances recognising Civil Court's decree as a ground for cancelling or varying the order awarding maintenance which depended before, on judicial decisions under this section, 46 M. 721 ; 43 B. 885 ; 14 C. 276 ; 27 A. 483.

ON PROOF OF CHANGE OF CIRCUMSTANCES.—The change in the circumstances referred to is a change in the pecuniary or other circumstances of the party paying or receiving the allowance which would justify an increase or decrease of the amount originally fixed and not a change in the *status* of the parties which would entail the stoppage of the allowance, 19 A. 60 (F.B.) A Magistrate is entitled to alter the rate of monthly allowance, for example, when the child gets older, or the birth of another child or by the death of a child, 12 C. 533 ; 14 M. 398. The fact that a child in whose favour an order for maintenance is made is able to maintain itself or the fact that the amount available for a *farwad* becomes insufficient to maintain the children would be a sufficient change of circumstance, 37 M.L.J. 361 ; 19 L.W. 275. The fact that a Mahomedan wife got a decree for divorce after the order for maintenance and married a second husband will not be a change in the circumstances, absolving the first husband from his duty to maintain his children, 27 A. 11, nor is the fact that his wife might possibly be able to earn something by her own labour, a change in the circumstance, 1887 A.W.N. 107. An agreement by parties subsequent to an order for maintenance modifying its terms will entitle the party interested to apply and get the original order altered, 26 A. 166. The mere fact that a minor daughter who had been awarded maintenance has been subsequently married does not disentitle the Magistrate to cancel the order. The question will really be whether the altered circumstances are such that the child has become able

to maintain itself by reason of her marriage and cease to depend on the original maintenance. If in spite of the marriage the child still remains unable to maintain itself, either because the husband is too poor to maintain her or for any other good reason, the father's liability still subsists, 38 M. 503. Without proof of change of circumstances and without an application by a party a Magistrate of his own motion has no power to alter the order of maintenance to a lower scale, Weir II, 628.

THE MAGISTRATE MAY MAKE SUCH ALTERATION.—These words preceded by the word *wife* and followed as they are by a limitation as to the amount of the monthly allowance, clearly indicate that the *alteration in the allowance* contemplated by the section only refers to a power to alter the amount and not to a total discontinuance thereof, 5 A. 226 at 228; 5 C. 558; 1885 A.W.N. 29; 8 B.H.C.R. (Cr. Ca.) 95; 7 B. 180; 14 C. 276, but now under sub-section (2) total discontinuance is permitted. A Magistrate has no power to reduce the amount of maintenance under this section which has already accrued due. The reduction will be limited only to payments accruing due after the date of the order, Weir II, 650; 23 C. 291. When the parties make an agreement subsequent to the order modifying its terms, it will be competent to the party's interest to apply under this section and get the order altered, 25 A. 165. A Magistrate is competent when varying the rate of maintenance under this section to give effect to his order from the date of the application for maintenance, 27 Cr. L.J. 950—96 Ind. Cas. 396. The word "alter" is not used in any restricted meaning. The reduction of the maintenance awarded to nothing, would also come within the meaning of the "word alteration."

SUB-SECTION (2).—This is in accordance with the decisions in 36 M. 721; 18 L.W. 133; 5 C. 858; 14 C. 276; 7 B. 180; 43 B. 885; Weir II, 614 615; 27 A. 483; 15 A. 143; 23 B. 484; 33 M.L.J. 449 and various other decisions. Under this sub-section it is competent for a Magistrate to cancel or vary an order for maintenance, if he thinks that it should be cancelled or varied in consequence of any decision of a competent Civil Court. When the Civil Court gave a decree to the husband for restitution and he *bona fide* wished to execute it and the wife refused to obey the decree and return to him, that would be a good ground for cancelling the maintenance order. But where the husband did not wish to have his wife back but his real object in getting the decree for restitution was merely to get the maintenance order cancelled, then in the exercise of the discretion under this sub-section it would be wrong on the part of the Magistrate to cancel the order, 49 M.L.J. 269=22 L.W. 479—(1925) M.W.N. 465=27 Cr. L.J. 80=81 Ind. Cas. 62, See 27 Cr. L.J. 876=96 Ind. Cas. 124. See also 3 Rang. 150 where it was held that such decree for restitution will not necessarily be conclusive but is only to be taken into consideration along with other circumstances by the Court. See also 46 A. 377, where it was held that the weight to be attached to a decree for restitution must depend upon the circumstances of each case and no hard and fast rule can be laid down that the Civil Court's decree is for ever and always binding on the Magistrate or that his discretion is never fettered and when a husband enforcing the decree for restitution took the wife to the house and there ill-treated and drove her away the Magistrate's order for maintenance was held to be justified.

490. A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due.

SCOPE OF THE SECTION.—"It is not the intention of the Legislature that the Magistrate to whom the application is made to enforce an order for maintenance should take into consideration anything further than the identity of the parties and the non-payment of the allowance. It is true that in the Court one step further has been taken, and we have held

that it is open to the Magistrate to consider whether the person to whom the order of maintenance has been given at the time she makes the application, still holding the position of a wife, but I know of no further *step* relaxing the clear words of S. 490. To me the reason appears obvious. If a person against whom an order for maintenance has been made considers that such an order should no longer be in force against him, it is for him to apply under S. 489 and get the order altered. It does not seem suitable or expedient that it should be open to a second Magistrate to call in question an order duly given upon proof"—*per Knox, J.*, 25 A. 165 at 166-167. The conditions mentioned herein as to the identity of parties and non-payment of the allowance, have special reference to cases where enforcement of order is sought at a place other than the one where the order was originally passed or by a Magistrate other than the one who passed the order, and cannot be taken as exhaustive. Another material question for consideration will be whether the order sought to be enforced is still in force. *e.g.*, a decree for restitution of conjugal rights may supersede the order for maintenance. But an order for the maintenance of a child will not be superseded by such a decree against the wife, especially where there is no order appointing the father as guardian of the child, 1 Cr. L. Rev. 368. When proceedings under S. 488, *supra* ended in a compromise whereby the husband undertook to pay a fixed allowance to the wife and on his failure to pay the same, the wife applied to the Magistrate for recovery of the arrears, and warrants of attachment for the same was issued, it was held, that once a compromise is entered into there is no refusal to maintain and S. 488 *supra* had no longer any application, and any order passed by the Criminal Court regarding such compromise is without jurisdiction and the proper remedy lay in the Civil Courts to enforce the compromise, 27 Cr. L. J. 779—95 Ind. Cas. 315 following 2 Cr. L. J. 690.

MAY BE ENFORCED BY ANY MAGISTRATE.—A second class Magistrate of a place where the husband is at the time is competent to enforce the order for maintenance made against him and is a competent Magistrate on that behalf, Ratanlal 288. A Magistrate cannot refuse to enforce an order for maintenance on the ground that the amount is excessive, Weir II, 635, or on account of the defendant's inability to pay, Weir II, 635 but he may decline to enforce it if the claim has been released, 10 M. 13 ; 2 Cr. L. J. 690.

The words used are "any Magistrate" and therefore even a second class Magistrate is empowered to enforce an order for maintenance although he is incompetent to pass an order awarding maintenance under S. 488, *supra*. Ratanlal 288. The section does not deprive the Magistrate who originally passed the order, of the jurisdiction given him under S. 488. When the defendant is beyond his jurisdiction he may in his discretion exercise the jurisdiction or refer the applicant to the Magistrate having jurisdiction at the place where the defendant is to be found. 1 M. 230.

The new sub-section (2) to S. 489, *supra*, declares that when it appears to the Magistrate that in consequence of a decision of a competent Civil Court, any order under S. 488 should be cancelled or varied, he shall cancel or vary the order.

CHAPTER XXXVII.

DIRECTIONS OF THE NATURE OF A HABEAS CORPUS.

Power to issue directions of the nature of a Habeas Corpus.

491. (1) Any High Court may, whenever it thinks fit, direct—

(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 ;

(c) that a prisoner detained in any jail situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court;

(d) that a prisoner detained as aforesaid be brought before a Court-martial or any Commissioners acting under the authority of a Commission from the Governor General in Council for trial or to be examined touching any matter pending before such Court-martial or Commissioners respectively;

(e) that a prisoner within such limits be removed from one custody to another for the purpose of trial; and

(f) 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.

(2) The High Court may, from time to time, frame rules to regulate the procedure in cases under this section.

(3) Nothing in this section applies to persons detained under the Bengal State Prisoners Regulation, 1818, Madras Regulation II of 1819, or Bombay Regulation XXV of 1827, or the State Prisoners Act, 1850, or the State Prisoners Act, 1858.

AMENDMENT.—"Any High Court" instead of "any of the High Courts of Judicature of Fort William, Madras, Bombay, etc." are substituted. In sub-section (1) (a) for the words "ordinary original jurisdiction" the words "appellate criminal jurisdiction" are substituted,

SCOPE OF THE SECTION.—*Habeas Corpus* is the most celebrated writ in English law, being the great remedy which the law has provided for the violation of personal liberty. The most important species of *Habeas Corpus* is *Habeas Corpus ad sub iudicandum* which is the remedy used for deliverance from illegal confinement. This remedy is resorted to for deliverance of persons illegally confined and the writ is directed to any person who detains another in custody and commands him to produce the body of the person so confined. It is well settled in England that the Court hearing an application for a writ of *Habeas Corpus* is not a Court of Appeal from the Magistrate on questions of fact; but has only to see that he had such evidence before him as gave him authority and jurisdiction to commit. The Court will not review the decision of the Magistrate, if there was any evidence before him to justify a commitment. The sufficiency of such evidence is a question entirely for the Magistrate, but when there is no evidence before the Magistrate, the High Court will interfere, 39 C. 163 at 202. In every part of the British Empire every person has a right to be protected from illegal imprisonment by the issue of the prerogative writ of *Habeas Corpus*. The King's Bench Division in England exercised the power of issuing such writs throughout the British Empire till the statute known as the *Habeas Corpus* Act, 25 and 26 Vict., C. 20, was passed. By that Act the powers of the King's Bench are limited to England and such places outside England which have no local Court competent to exercise the power. The right to such a writ is an absolute right either from a Court in this country, and if there be no competent Court to grant it, from the King's Bench Division sitting in London. It is fully established that the High Court has all necessary powers and is competent to grant the writ. The High Court has succeeded under the High Courts of Judicature Act, 24 and 25 Vict., C. 104 and the Letters Patent issued thereunder, to all the powers of the Supreme Court of Madras and the Supreme Court had by its Charter of 1800, Art. 8, given to it the powers over all the territories which are now or hereafter may be, subject to, or dependent upon the Government of Madras aforesaid and to have such jurisdiction and authority as Our Justices of Our Court of King's Bench have and may

lawfully exercise within that part of Great Britain called England. These words give to the Supreme Court the right usually exercised by the King's Bench in England of issuing writ of *Habeas Corpus*, 33 M. 922 at 928-928; 6 B.L.R. 392; 35 M. 72. The High Court retains all the powers which the Court of the King's Bench in England can exercise and therefore has under its Common Law powers jurisdiction to issue a writ for the production of minor children outside British India, if it is satisfied that they are in the custody or control of a person within its jurisdiction and the Legislature by enacting this section has not in any way limited such Common Law powers for the issue of writs of *Habeas Corpus*, 80 B. 616; The discretionary powers vested in the High Court under the provisions of this section is not to be exercised when the applicant has another effective remedy open to him, say under the Guardians and Wards Act under which the rights of the parties can be more satisfactorily settled than by the summary proceedings under this section, 27 Cr. L.J. 737-95 Ind. Cas. 580. The Executive have certain special powers under the *Goondas Act* and the High Court can interfere under this section only when those powers have been exercised and the person arrested is illegally or improperly detained in public custody, 80 C.W.N. 791, but see 51 C. 460. Judging from the context of this section, the criminal appellate bench of the High Court, being the highest Court of criminal appeal or revision has got ample powers to deal with an application under this section. The terms of the section as it now stands give the Appellate Criminal Bench jurisdiction to entertain and dispose of the application, 52 C. 319 at 325. This section merely substitutes or adds a different form of procedure less cumbersome than the granting of a writ of *Habeas Corpus*. This section does not apply to the case of an accused convicted and sentenced by a Judge of the High Court at the Criminal Sessions of the High Court, 43 C. 723, but this decision is of a doubtful authority by the amendment in sub-section (1) (a). The writ of *Habeas Corpus* is distinguishable from the directions in the nature of a *Habeas Corpus* dealt with by this section, 39 C. 163. The real interest and well-being of a person brought up on a writ of *Habeas Corpus* ought to be not only the determining factor but the sole factor for consideration, 12 Bom. L.R. 891 at 896. It has been repeatedly held in England that the main consideration which ought to weigh with the Court of Chancery in issuing direction in the nature of *Habeas Corpus* is really the question of the welfare of the child. The jurisdiction arises from the power of the Crown delegated to the Court of Chancery and it is essentially a parental jurisdiction and is to be exercised for the benefit of the infant. It is also settled law that the welfare must be taken in its widest sense. The moral and religious welfare must be considered as well as its physical well being and due regard must be had to the ties of affection. The law rules as administered by the Court of Chancery in England is applicable to the Courts in India, and the Guardians and Wards Act recognises those rules and S. 17 of the Act enacts that the Court shall be guided by what appears in the circumstances to be for the welfare of the minor and where the minor is old enough to form an intelligent preference, the Court may consider that preference, 43 M. 399 at 301-302.

MAY WHENEVER IT THINKS FIT.—It is left entirely to the discretion of the Court whether it should or should not direct the person brought up before it to be dealt with according to law.

BE BROUGHT BEFORE THE COURT.—The Court contemplated herein is the High Court.

TO BE DEALT WITH ACCORDING TO LAW.—The underlying principle of every writ of *Habeas Corpus* (and proceedings under this section have substantially the same character) is to ensure the protection and well-being of the person brought before the Court under that writ. This is not only the determining, but the sole consideration. The expression "dealt with according to law" has a wide and general meaning that it is fairly open to many constructions, 12 Bom. L.R. 891 at 896.

SUB-SECTION (1) (b).—This sub-section cannot apply when children are not illegally or improperly detained. 21 M.L.J. 195 at 201-(1911) 1 M.W.N. 38-11 Cr. L.J. 641-8 Ind. Cas. 393; 80 C.W.N. 791. This sub-section provides the remedy which the Court gives;

vis., to set at liberty the person illegally or improperly detained in custody. Where after the apprehension of an alleged foreigner by the Commissioner of Police, no orders have been obtained from Government under S. 3 of the Foreigners Act 1915, the continued detention of the arrested person is an illegal or improper detention within the meaning of (1) (b) of this section or a person apprehended not being dealt with according to law within the meaning of (1) (a). 26 Cr. L.J. 438—85 Ind. Gas. 138. It is open to the Court within whose jurisdiction the children are to be found, to revoke the delegation of parental authority at any time if sufficient cause is shown for interference especially where children are in the custody of strangers going from place to place, 23 M. 288.

SHERIFFS RETURN OF CEPI CORPUS.—*Cepi Corpus* literally means "I have taken the body," *Cepi Corpus* is the abbreviated form of "*Cepi Corpus et portam habeo*" which means "I have taken the body and have it ready" such a return is made by the sheriff upon an attachment *Capius* when he has the person in his custody, indicating thereby that he has complied with the writ. The writ is directed to the sheriff commanding him to arrest a person named in the writ. The return is the endorsement on the writ by the sheriff setting forth what has been done by virtue of the writ or warrant.

SUB-SECTION (2).—Power is given to the High Court to make rules for regulating procedure in cases falling under this section.

SUB-SECTION (3).—The words "*or the Indian Extradition Act 1903*," was proposed to be added to meet the decision in, 48 C. 31, which held that this section did not apply to persons arrested under the Extradition Act, but the amendment was not carried. It was held in 39 C. 164 at 202, that the High Court had jurisdiction under this section to give directions of the nature of *Habeas Corpus* and to examine whether a person detained in public custody under the Indian Extradition Act, is legally detained and the jurisdiction of the High Court is not taken away merely because the Government of India had issued a warrant for surrender under the Extradition Act, 1903.

Bengal State Prisoners, Regulation 1818 was repealed in part by Act XVI of 1874 and amended by Act XII of 1891. Madras State Prisoners Regulation II of 1819 was repealed in part by Acts XVI of 1874 and XII of 1876. Bombay State Prisoners, Regulation XXV of 1827 was repealed in part by Acts III of 1858, XII of 1873, XII of 1876 and amended by Act III of 1886, Acts XXXIV of 1850 and III of 1858 regulate the custody and confinement of State prisoners.

APPEAL.—An order of a single Judge of the High Court directing a writ of *Habeas Corpus* to issue is not an order made in the exercise of criminal jurisdiction and is therefore open to appeal. Such an order cannot be said to be one made in the exercise of criminal jurisdiction, 50 B. 616 following 14 B. 555.

491A. *Any High Court established by Letters Patent may exercise the powers conferred by section 491 in the case of any European British subject within such territories, other than those within the limits of its appellate criminal jurisdiction, as the Governor General in*

Powers of High Court outside the limits of appellate jurisdiction.

Council may direct.

This section is new and deals with the powers which the High Court may exercise outside the limits of its appellate criminal jurisdiction in the case of any European British subject. This was added by Act XII of 1923, Racial Distinctions Act,

PART IX.

SUPPLEMENTARY PROVISIONS.

CHAPTER XXXVIII.

OF THE PUBLIC PROSECUTOR.

492. (1) The Governor General in Council or the Local Government may appoint, generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors.

Power to appoint
Public Prosecutors.

(2) The District Magistrate, or subject to the control of the District Magistrate, the Sub-divisional Magistrate may in the absence of the Public Prosecutor, or where no Public Prosecutor has been appointed appoint any other person, not being an officer of police below *such rank as the Local Government may prescribe in this behalf*, to be Public Prosecutor for the purpose of any case.

PUBLIC PROSECUTOR.—For definition of "Public Prosecutor" see S. 4 (1) (i), *supra*. The Crown represented by the Public Prosecutor is the party in criminal cases, 13 B. 339, and in a case conducted by the Public Prosecutor any pleader appearing for a private party can instruct the Public Prosecutor and act under his instructions, S. 493A. Public Prosecutor has the right to appear without written authority, S. 493, and without permission of the Court, S. 495, and he has the power to withdraw charge, S. 494. His duty is to assist the Court in the furtherance of justice and not to act as counsel for any particular person or party. He should not by his statement aggravate the case against the prisoners or keep back a witness because his evidence may weaken the prosecution. His only object should be to aid the Court in discovering the truth. He should avoid any proceeding likely to intimidate or unduly influence witnesses on either side. There should be on his part no unseemly eagerness for or grasping at conviction. He ought to endeavour to perform his duties with that calmness and impartiality which should ever characterise a Public Prosecutor, 8 B.H.C.R. 128. (F.B.) ; 26 Cr.L.J. 163, = 33 Ind. Cas. 723. In the case of Crown Prosecution in England, where the Attorney General or Solicitor General is conducting the case for the prosecution there is never the vestige of animosity or prejudice. The practice and procedure prevailing in England should be adopted in India, 8 C.W.N. xvii. The prosecutor's duty is to see that justice is done and is therefore not free to choose how much evidence he will bring before the Court. He is bound to produce all the evidence in his favour directly bearing upon the charge. It is *prima facie* his duty to call other witnesses who prove their connection with the transaction and also must be able to give important information. The only thing that can relieve him from calling such witnesses is the reasonable belief, that if called, they will not speak the truth, 8 C. 121 ; 10 C. 1070. It is the duty of the Public Prosecutor to conduct the case for the Crown fairly. His object should be not to obtain an unrighteous conviction, but to see that justice is vindicated, and in exercising his discretion as to the witnesses whom he should or should not call, he should bear that in mind. A Public Prosecutor should not refuse to call or put in the calendar as a witness for the crown, merely because the evidence of such witness might in some respects be favourable for the defence, 16 A. 84 (F.B.) There should be no unseemly eagerness on the part of a public prosecutor to grasp at conviction. He is to perform his duties with calmness and impartiality and not to aggravate the case against the accused. He is to aid the Court to discover the truth and it is his duty to do justice between the Crown and the prisoner. 25 Cr. L.J. 163 = 33 Ind. Cas. 723. Section 270, *supra*, provides that in every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor.

493. The Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal; and, if any private person instructs a pleader to prosecute in any Court any person in such a case, the Public Prosecutor shall conduct the prosecution, and the pleader so instructed shall act therein, under his directions.

Public Prosecutor may plead in all Courts in cases under his charge. Pleaders privately instructed to be under his direction.

Any private pleader engaged by a party cannot conduct the prosecution; and he shall act in the case under the directions of the Public Prosecutor who alone is entitled to conduct the prosecution. The Public Prosecutor may avail himself of the services of a pleader retained by a private party but under S. 417, *supra*, it is the Public Prosecutor that ought to prefer an appeal against an acquittal, 41 C. 425. The general conduct of the case vests in the Public Prosecutor, 11 B.H.C.R. 102.

494. Any Public Prosecutor may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases 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,—

Effect of withdrawal from prosecution.

(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*.

AMENDMENT.—The words “appointed by the Governor-General in Council or by the Local Government” have been omitted. After the words “withdraw from the prosecution of any person” the words “either generally or in respect of any one or more of the offences for which he is tried” have been added, and after the words “discharged and acquitted” the words “in respect of such offence or offences” have been added. All Public Prosecutors are now empowered to exercise the power of withdrawal from a prosecution.

ANY PUBLIC PROSECUTOR.—A person acting under the directions of the Public Prosecutor duly appointed for the District can withdraw. 30 C.L.J. 255.

MAY WITH THE CONSENT OF THE COURT WITHDRAW.—This section lays down that the consent of the Court must first be obtained. But the failure to obtain such consent to confine the prosecution to some of the charges only, is a mere irregularity which will not vitiate the proceedings, unless objection is taken at the beginning of the trial, 27 Cr. L.J. 1100—97 Ind. Cas. 363. The only Prosecutor who may, under the provisions of the Code, withdraw from a prosecution without obtaining the consent of the Court and without giving reasons, is the Advocate-General. No other Public Prosecutor is placed in that privileged position; and if the consent of the Court is to be regarded as a *ministerial act* or merely an *executive act* we do not understand why it should have been necessary for the Legislature to insert such a provision in this section. It is clear that, in either withholding consent or in according consent, the Court is acting in a judicial capacity, and, for its order as for every order judicially made, it ought to give and record its reasons. If the consent has been improperly recorded, it is clear that the

consequential discharge must also be looked upon as improper. When a Court acting under this section gives its consent to a withdrawal from a prosecution it must record its reasons in order that the High Court may be in a position to say whether the discretion has been properly exercised, 22 C.W.N. 69 at 71; 26 C.W.N. 880 followed in 38 C. 1108; 25 Cr. L.J. 229=71 Ind. Cas. 698; 24 Cr. L.J. 361=72 Ind. Cas. 361; 5 Cr. L.J. 1106=81 Ind. Cas. 930. It was held in 2 Pat. 708 at 710, that the Calcutta decision over-stated the law and this section does not expressly require the Court to give any reasons for consenting to the withdrawal, nor is there any provision which compels a Court to write a reasoned judgment establishing the propriety of an order. There are many final orders known to the Court for which no recorded judgment is required. See 5 M.L.T. 216=11 Cr. L.J. 192 & Ind. Cas. 1128, where it was held that the provisions of this section are to be regarded as a mere ministerial or executive act for which it is not necessary that Magistrates should set out any reason. In 1 Rang. 786 the Calcutta view was followed and it was held that in withholding or according consent the Court acts in a judicial and not in a ministerial capacity and ought to give and record reasons; if good and sufficient reasons are required in a case of discharge, they are all the more necessary in a case of acquittal in which case a remedy by way of revision is not ordinarily available; see also 2 Pat. 708 at 710 where the Calcutta rulings are not followed.

OF ANY PERSON.—When a public prosecutor is appointed to conduct a prosecution it means he is to conduct the whole case and therefore he has power to withdraw under this section from the prosecution of an accused person who was added subsequent to his appointment as public prosecutor, 18 Bom. L.R. 266.

BEFORE CHARGE, THE ACCUSED SHALL BE DISCHARGED OF SUCH OFFENCE.—There is nothing in law to prevent a Magistrate from entertaining a complaint after the discharge of the accused in a previous police case under this section. The explanation to S. 403 *supra* provides that an order of discharge is not an acquittal for the purposes of that section, (1924) Pat. 276=26 Cr. L.J. 129=83 Ind. Cas. 689; 2 Pat. L.J. 34; 40 C. 71. A formal order of discharge should be made, 33 C. 1383 and after discharge he is a competent witness, 47 C. 154.

AFTER SUCH WITHDRAWAL, THE ACCUSED SHALL BE ACQUITTED.—An acquittal is a matter of right to the accused after the Public Prosecutor has withdrawn from the prosecution with the consent of the Court. The opinion of the assessors need not be taken in such a case. It may be disregarded, Ratanlal, 307. As soon as the Public Prosecutor withdraws from the prosecution an accused person becomes a competent witness against the remaining accused even though the Court omits to record a final order of discharge, 47 C. 154; 21 Cr. L.J. 641; 18 C.W.N. 1213; 15 Cr. L.J. 693=26 Ind. Cas. 141; 33 C. 1383; 7 A.L.J. 86, and the evidence of discharged accused is admissible, 18 Bom. L.R. 266; 25 B. 422; 23 B. 213; 16 B. 661; 7 M. 102. S. 403 *supra* applies to an order of acquittal made under this section, see 18 Cr. L.J. 329. An order under this section was held good even though the avowed object of the prosecution was to secure the evidence of one accused against his co-accused, 25 B. 422. When the accused was discharged under this section an order for further inquiry made by a District Magistrate is unsustainable, (1911) 2 M.W.N. 74=12 Cr. L.J. 440=11 Ind. Cas. 624. This section controls the other sections of the Code relating to sessions trials, 24 Cr. L. J. 8=71 Ind. Cas. 53. This section, S. 495 and S. 403 do not apply to security proceedings and such proceedings cannot be withdrawn, 36 M. 315. The effect of an unauthorised withdrawal is that the result contemplated by this section does not follow, but the trial proceeds and an accused person cannot plead that he was discharged or acquitted in such a case. When an accused person accepts a tender of pardon he ceases to be an accused person and it is unnecessary for the prosecution to withdraw the charge against him, 10 M.L.J. 137. It was previously held that a Public Prosecutor is not competent to withdraw only one of the charges. If he withdraws at all, he must withdraw all the charges, 2 C L.J. xviii, Now he can withdraw all or any one of the charges.

REVISION.—The High Court will be slow to interfere in revision with an order allowing withdrawal when reasons are given by the Court below for allowing the same, 24 Cr. L.J.

5-71 Ind. Cas. 53, where a discretion has been exercised by a Court of competent jurisdiction which is not on the face of it arbitrary the practice of the High Court is that as a Revisional Court it will neither inquire into the reasons nor interfere, 2 Pat. 708. Where the Sessions Judge rejects an application by the Public Prosecutor under this section in a proper way the High Court will not interfere with his order in revision even though the reasons given by the Judge may not be the only reasons and on that ground it cannot be said that the Judge did not exercise a judicial discretion in granting or refusing permission to withdraw, 23 L.W. 101-27 Cr. L.J. 334-32 Ind. Cas. 750. But where a private complainant was permitted to conduct the prosecution and after charge was framed a Prosecuting Inspector was allowed without consulting the complainant to withdraw the prosecution and the Magistrate acquitted the accused, the High Court in revision set aside the acquittal, 46 A. 88.

495. (1) Any Magistrate, inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of police below the rank to be prescribed by the Local Government in this behalf but no person, other than the Advocate-General, Standing Counsel, Government Solicitor, Public Prosecutor or other officer generally or specially empowered by the Local Government in this behalf, shall be entitled to do so without such permission.

(2) Any such officer shall have the like power of withdrawing from the prosecution as is provided by section 494, and the provisions of that section shall apply to any withdrawal by such officer.

(3) Any person conducting the prosecution may do so personally or by a pleader.

(4) An officer of police shall not be permitted to conduct the prosecution if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted.

SCOPE OF THE SECTION.—This section applies only to proceedings which could end in an acquittal or discharge of the accused; and not to proceedings under Chapter VIII of the Code where there is no accused in the strict sense of the term and there can therefore be no discharge or acquittal. 36 M. 315. See also 12 Ind. Cas. 301. Sub-section (1) of the section does not in any way limit the scope of sub-section (3). There is nothing in this section to warrant the action of a Magistrate in taking the prosecution out of the hands of the complainant's pleader and handing it over to some other person who is not the Public Prosecutor. 25 Cr. L.J. 571-81 Ind. Cas. 59.

MAY PERMIT ANY PERSON.—It is doubtful whether the words "any person" in S. 495 of the Code would include an absolute stranger who had no connection in the remotest degree with the prosecution and whose desire to help the prosecution, was based on a personal grudge only, 11 A.L.J. 313 at 314-1 Cr. L. Rev. 202-14 Cr. L.J. 389-20 Ind. Cas. 213. The words "any person" includes persons other than certificated pleaders. It is however discretionary with the Criminal Courts in each case to permit such persons to conduct the prosecution, *M.H.C. Pro. dated 2nd Sep. 1892*. When a Magistrate has, after due consideration, exercised the discretion allowed by this section and allowed a particular person to appear for the prosecution, the High Court cannot as a Court of Revision set aside the order and direct the Magistrate to refuse to allow the person to appear, *Weir II, 655*. The officer who has a power to withdraw is the officer referred to in sub-section (1). A withdrawal by a Police Inspector not coming within sub-section (1) is no withdrawal, 9 M.L.T. 203-(1911) 1 M.W.N. 105-11 Cr. L.J. 722-8 Ind. Cas. 867. See also 10 Cr. L.J. 80-1 Ind. Cas. 132.

OTHER THAN AN OFFICER OF POLICE.—When a police-officer is himself the complainant in a case, the Court cannot refuse him the right to conduct his own case as a private citizen, 17 Cr. L. J. 486—38 Ind. Cas. 166.

SUB-SECTION (2).—When a private complainant is permitted to conduct the prosecution it does seem to be highly improper that after he had closed his evidence and a charge had been framed, the prosecution should suddenly drop without consulting him. If there was no evidence against the accused at all, the accused were entitled to have a clear acquittal and not an acquittal on the payment of a price at the instance of a Court Inspector who never went any where near the Court when the case was being tried and took no part in the trial and who was in no sense a Public Prosecutor. 46 A. 83

SUB-SECTION (3).—The scope of this sub-section is not in any way limited by sub-section (1). There is nothing in the section to warrant the action of a Magistrate taking away the prosecution out of the complainant's pleader's hands and entrusting the same to some one who is not the Public Prosecutor, 25 Cr. L. J. 371—81 Ind. Cas. 59.

SUB-SECTION (4).—In all important cases, especially in grave offences such as murder, dacoity, etc., the investigating police officer should be examined regarding the circumstances of the investigation and to ascertain what each witness stated during investigation. Hence the exclusion of investigating officers, Ratanlal, 173; 13 W.R. (Cr.) 16; 28 B. 533; but the violation of the provisions of this sub-section is not fatal unless it has occasioned a failure of justice, 26 B. 533.

REVISION.—The power of the High Court to interfere in revision with the discretion of a Magistrate giving his consent to the withdrawal of a prosecution, was left undecided in (1915) M.W.N. 776—18 Cr. L. J. 641—25 Ind. Cas. 841. It is submitted that when the discretion is arbitrarily exercised the High Court has power to interfere in revision.

CHAPTER XXXIX.

OF BAIL.

The word "bail" is not defined in the Code. "Bail" literally means either to carry or take away or to deliver or to give. In modern legal sense it means, "to deliver on trust on certain conditions" when it is said "a man is let on bail" we mean, he is released from the custody of the officers of law to the custody of private persons who are sureties, and bound to produce him whenever called upon. The object of bail is to save a man from being in custody before conviction where there is a reasonable doubt as to his guilt. Bail is not to be with held as a punishment. The requirements as to bail are merely to secure the attendance of the accused at the trial. The proper test of whether bail should be granted or refused, is whether it is probable that the accused will appear to take his trial. The test should be applied by reference to the following considerations. (1) The nature of the accusation. (2) The nature of the evidence in support of the accusation. (3) The severity of the punishment which conviction will entail. (4) Whether the sureties are independent or indemnified by the accused. It is not usual to grant bail on charges of murder. *Arch. Cr. Pl. and Pr. p. 87 (25th Edn.)*; 2 Rang. 546. The discretionary power of Court to admit to bail is not arbitrary but is judicial and is governed by established principles. The object of the detention of the accused being to secure his attendance to abide the sentence of law, the principal inquiry is whether a recognizance would effect that end. In seeking an answer to this inquiry, the Court must have considered the seriousness of the charge, the nature of the evidence the severity of the punishment prescribed for the offence, and in some instances, the character, means and standing of the accused. The discretion of the Court to grant bail under the amended Code is less fettered, 51 C. 402. The Code divides offences into two classes bailable and non-bailable. When the police arrest a person under S. 55 *supra* they are bound to give the person arrested, the option of bail and that bail shall be, as the Code requires, not excessive and in accordance with the position in life occupied by the person arrested.....To deprive any person of his liberty is a most serious step to take and it is

hardly too much to say that every step in the process should show extreme deliberation and care, and if a person has to be arrested previous to inquiry he should be given the option of release upon proper bail. 14 A. 45 at 47.

496. When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail :

In what cases bail to be taken.

Provided that such officer, or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided :

Provided, further, that nothing in this section shall be deemed to affect the provisions of section 107, sub-section (4), or section 117, sub-section (3).

AMENDMENT.—The proviso has been newly added.

OBJECT OF THE SECTION.—The detention of an accused under trial is not penal, but its object is to secure attendance. The seriousness of an alleged offence, and some evidence of its preparation by the accused would however justify detention, 36 C. 174 at 179; 2 C.W.N. cxxv. It is the intention of the law that when a person is arrested no needless impediments should be placed in the way of his being admitted to bail. The intention of the law undoubtedly is that a man is ordinarily to be at liberty; and it is only if he is unable to furnish such moderate security, if any, is required of him; as is suitable for the purpose of securing his appearance before a Court pending inquiry, that he should remain in detention. That is the almost universal application of law on this point, 20 Bom. L.R. 121 at 123. See also 6 N.W.P.H.C.R. 366.

OTHER THAN ACCUSED OF NON-BAILABLE OFFENCE.—The terms of this section are imperative and a Magistrate is bound to release on bail a person accused of a bailable offence, 32 C. 80; 31 M. 315 (F.B.) In all bailable offences bail may be claimed as of right and a Magistrate is not competent to refuse the same. Persons arrested under S. 55 *supra* should always be given the option of being let out on bail, 14 A. 45. In non-bailable offences owing to the serious nature of the offences and their likelihood of producing dangerous consequences to the safety of the public and the tranquillity of the state, as of right bail cannot be asked for. Persons accused of non-bailable offences should not be released on bail as a rule, but they may be released if there are reasons for believing that the case against them is such that it is not likely to succeed or if there are special grounds justifying bail under S. 499 and sub-section (3) of this section the High Court can set aside the order for bail and direct the accused to be arrested and committed to custody if there are no justifiable grounds for the lower Courts to grant bail, 26 Cr. L.J. 4=83 Ind. Cas. 483. It must be understood that while a wide discretion in granting bail in cases other than those involving capital punishments has been placed in the hands of the Magistrates they are bound when weighing the probabilities of the prisoner appearing at the trial to consider the nature of the offence charged, the character of the evidence against the prisoner and the punishment which if convicted is likely to be inflicted on him. Again while vague allegations that if the person be released on bail he will tutor witnesses should not be taken into account. The Magistrate will refuse bail where the prisoner is of such a character that his presence at large will intimidate witnesses or where there are reasonable grounds for

believing he will use his liberty to suborn evidence. 3 Rang. 538 at 532 ; 27 Cr. L.J. 1063—97 Ind. Cas. 39.

SHALL BE RELEASED ON BAIL.—In bailable offences there is no question of any discretion in granting bail. The words of the section are imperative, 32 C 80. The Court may call for a report from the police as to the sufficiency of bail when admitting a person to bail. But the ultimate duties of deciding the sufficiency or otherwise is with the Court itself and not with the police, 15 C. 455. At the time of granting bail, the Court is not called upon to conduct a preliminary trial of the case and consider the probability of the guilt or innocence of the accused person. It may have incidentally to look at the weight of evidence against the accused person. But its proper function is only to inquire whether the giving of bail as opposed to arrest of the accused might lead to a real danger of his absconding, and not appearing to take his trial or whether there is a real reason to suppose that he is likely to tamper with the witnesses who would be called against him. 22 L.W. 156—28 Cr. L.J. 1593—80 Ind. Cas. 665.

SAVE AS PROVIDED, ETC.—Section 107 (1) and S. 117 (2) permit the detention of an accused person until the completion of an inquiry and this section does not control those provisions. This has been made clear now and is in accordance with the decision in, 35 M. 474 ; 32 C. 80 and 12 Cr. L.J. 533—12 Ind. Cas. 801.

For form of bail, bond, see Form No. XLII in Schedule V.

BAIL.—This section coupled with Form No. XLII contemplates two kinds of security—(1) Simple recognizance of the principal, (2) security with sureties. The word “bail” is properly applicable to the second kind of security and that is the meaning which has been attached to the word in the practice and procedure of the Courts, 15 C. W.N. 736 at 737.

497. (1) When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station, or appears, or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty, of an offence punishable with death or transportation for life :

When bail may be taken in cases of non-bailable offences.

Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) *An officer or a Court releasing any person on bail under sub-section (1) or sub-section (2) shall record in writing his or its reasons for so doing.*

(4) *If at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court*

is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

(5) *A High Court or Court of Session and, in the case of a person released by itself, any other Court may cause any person who has been released under this section to be arrested and may commit him to custody.*

AMENDMENT.—To sub-section (1) a proviso has been added authorising the Court for reasons to be recorded to release on bail in a non-bailable offence any person under 16 years or any woman or sick or infirm person. Sub-section (4) is new and provides for bail to appear on the date fixed for pronouncing judgment; the opening words of sub-section (5) are new.

SCOPE OF THE SECTION.—In the case of under-trial prisoners the present policy of the law is to allow them bail rather than refuse it, 27 Cr. L.J. 302=92 Ind. Cas. 590. The amendment seems in the case of offences Punishable with death transportation for life, to limit rather than enlarge the powers of the Court in granting bail in non-bailable cases. In deciding the question of granting bail in non-bailable offences, the Magistrate must follow the provisions of this section but the High Court is not limited by the limitations specified in the section. It has an absolute discretion in the matter, but will not depart generally from the practice of refusing bail in cases punishable with death or transportation for life, 2 Rang. 546; 3 Rang. 538; 25 Cr. L.J. 1132=81 Ind. Cas. 986. In exercising a discretion under this section the Court should take into consideration, (1) the nature of the offence, (2) character of the evidence available, (3) position in life of the accused, (4) chance of the accused evading justice, (5) seriousness of the punishment which will be inflicted if found guilty. See 51 C. 402 at 416; 27 Cr. L.J. 1063=97 Ind. Cas. 39. The main question for consideration in determining matters of bail is whether there are reasonable grounds for believing the accused to be guilty of the offence charged. Other considerations must also arise in deciding the question and one of these which has always guided English and Indian Courts is whether there are any grounds for supposing the accused, would abscond and attempt to escape justice avoiding or delaying an inquiry or trial. Under this section the accused should ordinarily be released on substantial bail until reasonable grounds are made out for presuming his guilt, 36 C. 174 at 177 following 10 C.V.N. 1093. Certain *dicta* of Judges in England on the subject of releasing offenders on bail have been referred to showing the governing principles guiding the Courts. The section says nothing about the likelihood or non-likelihood of the accused absconding or any other matter except, whether or not there are reasonable grounds for believing that the accused has been guilty of the offences charged. It is no doubt, the High Court is not limited within these bounds and it has an absolute discretion in the matter, but the legislature having placed the initial stage of dealing with crime with Magistrates and having in effect enacted that persons accused of non-bailable offences shall be detained in custody, except when there are un-reasonable grounds for believing that the accused has committed the offence charged. The High Court is bound to follow the general law as a rule, and not to depart from it except under special circumstances especially in the initial stage of the case, 2 Cr. L. Rev. 34. As a rule persons accused of non-bailable offences should not be released on bail. But if there are reasons for believing the case against them will not stand and there are special circumstances justifying bail, they may be released on bail, 26 Cr. L.J. 4=83 Ind. Cas. 383. In considering an application for bail in a non-bailable offence the Court must be satisfied by examination of the investigation, inquiry or trial whether or not there are reasonable grounds for believing that the accused has committed such offence, 21 Cr. L.J. 161=53 Ind. Cas. 769; if after remand no incriminating evidence is forthcoming and the prosecution had sufficient time to adduce such evidence, the Court will reasonably come to the conclusion that such evidence was not forthcoming and should then release the accused on bail whatever be the nature of the offence, 36 C. 174; 6 M. 63. See also 51 C. 402. The law as it now stands does not say that bail ought to be

refused merely because an offence is non-bailable. That is now restricted to offences punishable with death or transportation for life, 26 Cr. L.J. 1286—89 Ind. Cas 180.

IF THERE APPEAR REASONABLE GROUNDS FOR BELIEVING.—This is certainly a matter for determination in each case according to the particular circumstances. The section does not say that in all non-bailable offences the Magistrate must refuse bail. It is left to the discretion of the Magistrate to release on bail, but the Magistrate shall not release an accused on bail if he is of opinion that there are reasonable grounds of believing that he has been guilty of the offences of which he is accused. See 36 C. 166 and 174. The rule in respect of non-bailable offences is that bail is not to be taken except in special circumstances, 3 Bom. L. R. 420. But the special power of the High Court and Court of Session under S. 49, *infra*, is not limited by this section, Wier II, 637.

OFFENCE PUNISHABLE WITH DEATH OR TRANSPORTATION FOR LIFE.—This phrase is not particularly an elegant one from a grammatical point of view and were it intended to be disjunctive, one could be inclined to favour the alteration of the phrase to "an offence punishable with death or with transportation for life." The phrase is however taken directly from the Indian Penal Code which deals with a number of offences in which either punishment may be inflicted at the discretion of the sentencing Court. The phrase must not be taken as extending to offences punishable with transportation for life only. 3 Rang. 538.

PROVISO TO SUB-SECTION (1).—This proviso is new and exception is made in the case of juveniles, women, sick and infirm persons. Women have always been given a certain amount of consideration in cases where a discretion is to be exercised; women also do not often figure in criminal Courts as accused; so also juveniles and sick and infirm persons.

SUB-SECTION (3).—A Magistrate may rearrest under this sub-section if further evidence calls for such a step, even if the accused has been released on bail.

SUB SECTION (5).—This sub-section empowers the High Court to revise the order granting bail and cancel the same if circumstances warrant or demand such a course. 22 L.W. 166. 26 Cr. L.J. 1893—19 Ind. Cas. 888.

REVISION.—It is open to the High Court to grant bail when two Lower Courts have refused bail, 36 C. 174. But in case where there is no order whatever by any Court refusing bail the accused living in Police custody and not produced before any Court the High Court has no power to direct the offender to be released on bail either under this section or S. 498 *infra*, 44 C.L.J. 134. Where a Sessions Judge granted bail, holding that there are no grounds for believing the accused guilty, the High Court will not go behind the order, 10 M. L.J. 311.

498. 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; and 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 to bail, or that the bail required by a Police Officer or Magistrate be reduced.

Power to direct admission to bail or reduction of bail.

SCOPE OF THE SECTION.—The Powers of the High Court or Court of Session under this section are not controlled by the statutory limitations under S. 497, *supra*, of refusing to release an accused person on bail if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life. The Powers under this section are not fettered by any of the rules defining the limits within which they should be exercised as in S. 497, *supra*. Though the exercise of the powers under this section is left entirely to the discretion of the Court without any fetter being imposed the Court will not act arbitrarily but only on judicial grounds, 25 Cr. L. J. 1132—81 Ind. Cas. 956; 2 Rang. 546. There is no reason why any restriction should be placed upon the wide powers of this section. 30 C. 252,

The provisions of this section are not controlled by those of the preceding section and it is open to the High Court or Court of Session to admit any person to bail for good and sufficient cause. The general rule, however, in respect of non-bailable offences is that bail is not to be taken except in special circumstances, *Weir II, 687, 8 Bom. L.R. 420; 1908 A.W.N. 195*, but in *32 C. 28*, it was held that the rule laid down in *S. 497, supra* is a rule founded on justice and equity which should be followed by the High Court as well as by every other Court unless anything appears to the contrary. The extended powers given to the High Court by this section are certainly not to be used to get rid of the very reasonable and proper provision of law. The Court will be very cautious in interfering with the discretion of a Magistrate in a case of bail under this section especially when the prosecution has not tendered evidence to connect the accused with the offence, *6 M. 63 and 69; Ratanlal 892*. The High Court's power is no way limited by *S. 497, supra*. It has an absolute discretion in the matter of granting bail in non-bailable cases: The legislature has placed the initial stage of dealing with crimes with Magistrates and having in effect enacted that persons accused of non-bailable offences shall be detained in custody except when in the opinion of the Magistrate there are no reasonable grounds for believing that he had committed the offence charged against him, the High Court is bound to follow the general rule of law and not to depart from it except under special circumstances especially in the initial stages of the case, *26 Cr. L.J. 427-85 Ind. Cas. 43*. Under this section the High Court has concurrent jurisdiction with that of a trying Magistrate and not merely a revisional jurisdiction, *36 C. 174 at 177*.

See *50 C. 835*, where it was held that the High Court has no inherent power after disposal of a case before it to grant bail pending appeal to Privy Council.

WHETHER THERE BE AN APPEAL OR NOT.—Whether there be an appeal or not, the High Court or Court of Session may release the accused on bail, but a Sessions Judge has no jurisdiction to release an accused person after convicting him on bail pending his appeal to the High Court. This section does not give him power in any way to alter or vary his order, *2 Bom. L.R. 55; 10 B. 176 (F.B.)* When a Sessions Judge after considering the evidence comes to the conclusion that there are no reasonable grounds for believing the accused to be guilty, and admits him to bail, the High Court will not go behind the finding and discharge the accused on bail, *10 M.L.J. 411*. The power of the High Court to grant bail to an accused person under this section is untouched by the provisions of the Criminal Law Amendment Act. But the conditions for release on bail provided by *S. 497, supra*, will apply, *27 C. 412 and 439*. Where there is a reasonable doubt as to the correctness and legality of the conviction had, or when the judgment is based on incorrect exposition of fact or law, or is based on mere surmises not warranted by the evidence on record or where the evidence is more consistent with the case set up by the accused, or where the sentence is unduly severe, or very short and will expire before the appeal is heard and decided, the appellate Court will be acting properly in releasing the appellant or bail.

IN ANY CASE.—These words cannot include a case in which the Court has reached finality and has no further jurisdiction to exercise, *50 C. 585 at 592*. The provisions of this section regarding admission to bail are particularly wide and a Sessions Court may in any case direct any person to be admitted to bail. When proceedings started against certain persons under *S. 110, supra*, and an order under *S. 118, supra* being made, they being unable to furnish the security demanded, the proceedings were laid for orders under *S. 123, supra*, before the Court of Session. When bail was applied for the Sessions Judge held he had no jurisdiction to grant bail. There are no words in *S. 123 (2)* controlling the provisions of this section. If a convicted person can apply for bail and a person against whom an order under *S. 118, supra*, is passed, can get the order revised by the Court of Session under *S. 123*, it stands to reason that if bail can be allowed to a convicted person on appeal it is allowable to one against whom an order under *S. 118, supra*, which is subject to revision by the Sessions Court. There is no reason why any restriction should be placed upon the wide provisions of this section. *50 C. 969*. When bail is granted by the High Court and the Magistrate receives reliable information thereof, by means of a telegram sent by the accused's counsel the

Magistrate is bound to act immediately though he had not received the High Court's order. The High Court also remarked, it must lay down most stringently that all bail orders must be issued on the very day on which they are pronounced irrespective of the written order on record, 38 C. 293 where 2 C.W.N. 498 is followed.

499. (1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the police-officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police-officer or Court, as the case may be.

Bond of accused and sureties.

(2) If the case so require, the bond shall also bind the person released on bail to appear when called upon at the High Court; Court of Session or other Court to answer the charge.

AS THE POLICE OFFICER THINKS SUFFICIENT.—The police officer need not necessarily be an officer in charge of a police station. Ss. 57 (2) and 59 (3) empower any police officer to release any person on execution of a bond; etc., for appearance in Court.

SUFFICIENT SURETIES CONDITIONED THAT SUCH PERSON SHALL ATTEND ETC.—The sureties are required to guarantee that the person released on bail shall attend at the time and place mentioned in the bond and nothing more. Unlike S. 112 *supra* the sureties do not make themselves liable for the good conduct of the person for whom they stand sureties. There is nothing illegal in requiring the accused to execute a bond conditioned on their appearing in Court everyday, 6 M.H.C.R. Appx. 38 at 39, but see 20 W.R. (Cr.) 23 at 29—11 B.L.R. Appx. 8 at 12. A surety who stands bail must be taken to know the date on which the accused has undertaken to appear, and if the accused does not appear the surety bond is liable to be forfeited, 19 Cr.L.J. 587—46 Ind. Cas. 47. It is perhaps greater hardship on a man of position brought up in luxury and holding a high position in society, to be subjected to jail rules, than it is to men who have to make their way in the world. In the absence, as yet, of convincing direct evidence, we are willing to yield to the petitioner's request to submit to conditions on being released on bail. He may be released on bail on condition of his being guarded at his own house and debarred from all communications with persons said, rightly or wrongly to be his associates in crime. 36 C. 168 at 172.

For Form of bond see Schedule V, Form No. XLII.

500. (1) As soon as the bond has been executed, the person for whose appearance it has been executed shall be released; and, when he is in jail, the Court admitting him to bail shall issue an order of release to the officer in charge of the jail, and such officer, on receipt of the order, shall release him.

Discharge from custody.

(2) Nothing in this section, section 496 or section 497 shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed.

501. If, through mistake, fraud or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it, and may order him to find sufficient sureties, and, on his failing so to do, may commit him to jail.

This section applies only to cases where there are sureties and where through mistake, fraud or otherwise, insufficient sureties have been accepted; it does not apply to a case where there are no such grounds, 38 M. 1088.

502. (1) All or any sureties for the attendance and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond, either wholly or so far as it relates to the applicants.

(2) On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him.

(3) On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as it relates to the applicants, and shall call upon such person to find other sufficient sureties, and, if he fails to do so, may commit him to custody.

SUB-SECTION (2).—When once an application is presented by a surety and received by a Magistrate, there is no option left to the Magistrate but to act under this section. There is no such thing as hearing of the application on the merits, and the presentation of an application for cancellation imposes a duty on the Magistrate to issue a warrant for the arrest of the accused. The surety need not do anything further, 9 Bom. L. R. 1285—6 Cr. L. J. 385; 27 Cr. L.J. 846—95 Ind. Cas. 768.

CHAPTER XL.

OF COMMISSIONS FOR THE EXAMINATION OF WITNESSES.

The issue of a commission to examine a witness is not a very satisfactory mode of proceeding either in civil or criminal cases. On the one hand the Court has no opportunity of noting the demeanour of a witness and on the other hand of controlling irrelevant and unnecessary or harassing cross-examination of the witness. This Chapter no doubt confers a wide discretion on the Court to issue a commission. But such discretion should be sparingly exercised and only in a case of real hardship and inconvenience, having due regard to the prejudice which is likely to be caused thereby to the opponent. O. XXVI, C. P. C., which provides for the issue of commission to examine a witness residing within the local limits of the Court are more specific and limited than those in this Chapter (Ss. 503 and 506) which refers to commissions to examine witnesses generally whether residing within the jurisdiction of the Court or not. Without in any way crystallising the grounds on which a criminal Court may issue a commission to examine a witness living within its local limits, in ordinary cases the provisions of O. XXVI R. 1, C. P. C., may be accepted as a safe guide by a criminal Court. This rule provides for the issue of a commission where the witness is either exempted under the code or where he cannot attend the Court on account of illness or infirmity. Under this rule *pardanashin* ladies, and women who lead a life of seclusion have been

exempted, unless the presiding Judge thinks it rightly desirable to note the demeanour of the witness. Personal attendance of Government officials are also dispensed with. A Mahant however high his position may be, cannot claim exemption except where he has been exempted by special notification of Government, 27 Cr. L. J. 89—91 Ind. Cas. 393.

503. (1) Whenever, in the course of an inquiry, a trial or any other proceeding under this Code, it appears to a Presidency Magistrate, a District Magistrate, a Court of Session or the High Court that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, such Magistrate or Court may dispense with such attendance and may issue a commission to any District Magistrate or Magistrate of the first class, within the local limits of whose jurisdiction such witness resides, to take the evidence of such witness.

When attendance of witness may be dispensed with.

Issue of commission and procedure thereunder.

(2) When the witness resides in the territories of any Prince or Chief in India in which there is an officer representing the British Indian Government, the commission may be issued to such officer.

(3) The Magistrate or officer to whom the commission is issued, or, if he is the District Magistrate, he or such Magistrate of the first class as he appoints in this behalf, shall proceed to the place where the witness is, or shall summon the witness before him, 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.

(4) Where the commission is issued to such officer as is mentioned in sub-section (2), he may delegate his powers and duties under the commission to any officer subordinate to him whose powers are not less than those of a Magistrate of the first class in British India.

SCOPE OF THE SECTION.—This section applies only to cases pending before Courts specified in this section, 10 Cr. L.J. 211. Therefore a special Judge under the Malabar Ordinance I of 1923, having only the powers of a Magistrate under S. 10, *supra*, cannot issue a commission for the examination of witnesses, 18 L.W. 899. An Additional District Magistrate authorised to exercise all the powers of a District Magistrate mentioned in Schedule III, Part IV (18) is empowered to issue a commission to a witness within his jurisdiction, 24 Cr. L.J. 822—73 Ind. Cas. 510. There is no provision for taking evidence in foreign countries, 10 Cr. L.J. 571—3 Ind. Cas. 400, and there is no apparent reason why the Legislature has not given to criminal Courts the same power that is given to civil Courts under the Civil Procedure Code to issue commissions. This section is primarily intended for the purpose of getting the evidence of witnesses other than the parties principally concerned although it may include any party to a proceeding. This section speaks of persons whose presence could not be obtained without an amount of delay and expense which under the circumstances of the case, the Court considers unreasonable, 19 C. 118 at 121; see also 19 B. 749. The terms of the section are wide enough to include not only an inquiry and a trial but any other proceeding which authorises the examination of any witness and the complainant is

certainly a witness, 42 C. 19 at 24. There is nothing in the language of the section to support the contention that the Court has no authority to issue a commission to examine a witness when he is within the jurisdiction, 5 B. 285 ; 24 C. 551. But the witness must be in British India or within the territories of a Prince or Chief in India in which there is an officer representing the British Government, 5 B. 338. The High Court has no authority either to issue a commission or a letter of request to the English Courts for the examination of a witness in England in a criminal case, 10 Cr. L.J. 571=3 Ind. Cas. 400 where 5 B. 388 is referred to. Witnesses in criminal cases should not be examined on commission except in extreme cases of delay, expense or inconvenience, 5 A. 92 ; 12 A. 69. It is most unsatisfactory to examine a witness in a criminal case on commission in the absence of the parties and the High Court directed that the witnesses be examined in the presence of the parties with liberty to put question to them, 27 Cr. L.J. 840=95 Ind. Cas. 760. Issue of a commission is entirely a discretion of the Court and in 8 C. 896 a commission to examine an old man of 63 years who was ill was refused, the Court holding that in a criminal case the issue of a commission would be most unsatisfactory and one dangerous to the interests of the prisoner. Taking of evidence on commission in criminal cases is unknown to English practice, 5 A. 92 at 94. The Magistrate is to consider whether it is necessary at all to examine the witness and whether it is a proper case for issuing a commission, 12 Cr. L.J. 398 ; where an expert witness is the principal witness in the case, his examination on commission should not be allowed, [1911] 1 M.W.N. 97=9 M.L.T. 334=12 Cr. L.J. 64=9 Ind. Cas. 347. A party who desires to have a witness examined on commission must apply for it after commitment either to the Court or to the [particular Judge exercising original criminal jurisdiction or to the Sessions Court as the case may be, 19 B. 749 at 756. A District Magistrate is given a discretion in the matter of issuing a commission. It may be issued for the examination of a witness if the evidence is necessary but his attendance cannot be secured without unreasonable expense, 25 Cr. L.J. 682=81 Ind. Cas. 140.

SUB-SECTION (1).—Expense or inconvenience or delay for securing the attendance of witnesses is no valid ground for issuing a commission. Under the circumstances of each case the Court will have to find them unreasonable, 5 A. 224. There is no provision in the Code which protects *pardanashin* ladies from appearing in a Court of justice and very rightly so, all necessary safeguards to protect their privacy that are reasonable, being adopted, but it is undesirable to compel their attendance. In the event of the Magistrate finding it absolutely necessary to examine a *pardanashin lady* he would do well to consider very seriously whether he should issue coercive process for the purpose of compelling her attendance, 12 A. 69 at 72. It will be a weakness to surrender as a general principle to be adopted in all cases that *pardanashin* ladies whose evidence is required in criminal trials are to be allowed to compel the Court to examine them in some place other than the Court house itself, 12 A. 69 at 72-73. If a witness secures a house or room in close proximity to the Court house, her evidence may be recorded there, regard being had to the *gosha* being observed, 12 Cr. L.J. 501=12 Ind. Cas. 221, or she may be examined in the chambers of the Magistrate or Judge, 12 Cr. L.J. 398=11 Ind. Cas. 562. Applications under this section are granted on the principle that in matters of procedure the custom and habits of people are to be taken into consideration, 15 C. 775 at 779. *Pardanashin* ladies may be examined on commission under this section, 9 Cr. L.J. 249. There is no express provision in the section for such a course. The word "inconvenience" may empower a Court to allow examination of this class of ladies who do not appear in public and whose attendance cannot be compelled according to the customs and manners of the country, 4 C. 20 ; 15 C. 775 ; Weir II, 669 ; 42 C. 19. The fact that a woman is the daughter of a prostitute does not *ipso facto* make her the less a *pardanashin* if she is lawfully married and observes *gosha* in fact, 1 Cr. L. Rev. 277. See 27 Cr. L.J. 89=91 Ind. Cas. 393, where a *Mahant* was allowed to be examined at his private residence.

SUB-SECTION (4).—This was introduced to meet the difficulty which existed that when a commission was issued to a Political Agent in a Native State he was not empowered to delegate it to a subordinate, but was bound to execute it personally. The power of delegation is expressly given by this sub-section.

504. (1) If the witness is within the local limits of the jurisdiction of any Presidency Magistrate, the Magistrate or Court issuing the commission may direct the same to *such* Presidency Magistrate, who thereupon may compel the attendance of, and examine, such witness as if he were a witness in a case pending before himself.

Commission in case of witness being within presidency-town.

(1A) *When a commission is issued under this section to a Chief Presidency Magistrate, he may delegate his powers and duties under the commission to any Presidency Magistrate subordinate to him.*

(2) Nothing in this section shall be deemed to affect the power of the High Court to issue commissions under the Slave Trade Act, 1876, section 3.

SUB-SECTION (1A) is new and permits delegation of powers and duties under the commission by the Chief Presidency Magistrate to another Presidency Magistrate.

WITHIN LOCAL LIMITS OF JURISDICTION OF PRESIDENCY MAGISTRATES.—

See S. 20 *supra* which defines the local limits of the Presidency Magistrate's jurisdiction. See 16 C. 238, where the Calcutta High Court issued a commission to the Chief Presidency Magistrate Calcutta to examine on commission, the captain and the second officer of a ship in a case in which a British sea-man was charged with murder of a fellow sailor on board a British ship on the high seas and the evidence so taken on commission was admitted at the trial and the accused was convicted on such evidence.

The Slave Trade Act, 39 and 40 Vict., Ch. 46, S. 3, enables the High Court to obtain evidence on commission in cases of offences relating to slave trade or abetment of such offences committed on the high seas as if such offences had been committed in any place in British India. See Ss. 370, 371, 376, I.P.O.

505. (1) The parties to any proceeding under this Code in which a commission is issued, may respectively forward any interrogatories in writing which the Magistrate or Court directing the commission may think relevant to the issue, and the Magistrate or officer to whom the commission is directed, or to whom the duty of executing such commission has been delegated, shall examine the witness upon such interrogatories.

Parties may examine witnesses.

(2) Any such party may appear before such Magistrate or officer by pleader, or, if not in custody, in person, and may examine, cross-examine and re-examine (as the case may be) the said witness.

This section enables witnesses being examined on commission on interrogatories and the only restriction is that such interrogatories have to be approved as relevant to the issue by the Magistrate or Court issuing the commission.

506. Whenever, in the course of an inquiry or a trial or any other proceeding under this Code before any Magistrate other than a Presidency Magistrate or District Magistrate, it appears that a commission ought to be issued for the examination of a witness, whose evidence is necessary for the ends of justice, and that the

Power of Provincial Subordinate Magistrate to apply for issue of commission.

attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, such Magistrate shall apply to the District Magistrate stating the reasons for the application; and the District Magistrate may either issue a commission in the manner hereinbefore provided or reject the application.

This section enables Provincial Subordinate Magistrates to apply to the District Magistrate for the issue of a commission stating the reasons for the application, and it is left to the discretion of the District Magistrate to grant the request or not. S. 503 applies only to cases pending before the Court specified therein.

507. (1) After any commission issued under section 503 or section 506 has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the Court out of which it issued; and the commission, the return thereto and the deposition shall be open at all reasonable times to inspection of the parties, and may, subject to all just exceptions, be read in evidence in the case by either party, and shall form part of the record.

(2) Any deposition so taken, if it satisfies the conditions prescribed by section 33 of the Indian Evidence Act, 1872, may also be received in evidence at any subsequent stage of the case before another Court.

SUB-SECTION (2).—It was held in 19 C. 113 that evidence taken on commission before a committing Magistrate, *viz.*, a Presidency Magistrate, in the course of a preliminary inquiry, cannot be used in evidence at the Sessions before the High Court, and this ruling was approved in 19 B. 749. To meet this difficulty, this sub-section was enacted making the deposition so taken admissible at a late stage of the case provided the conditions prescribed by S. 33 of the Indian Evidence Act have been complied with.

508. In every case in which a commission is issued under section 503 or section 506, the inquiry, trial or other proceeding may be adjourned for a specified time reasonably sufficient for the execution and return of the commission.

MAY BE ADJOURNED FOR A SPECIFIED TIME:—The adjournment contemplated by this section is for a specified time reasonably sufficient for execution and return of the commission and not limited to fifteen days at a time as under the proviso to S. 344, *supra*. The discretion given by the section must be exercised in a reasonable way so as not to subject the accused to unnecessary detention. In 19 C. 113 an application for adjournment of a trial for examining the *Nizam of Hyderabad* as a witness after the jurors were sworn in, in a sessions trial, was refused.

CHAPTER XLI.

SPECIAL RULES OF EVIDENCE.

508. (1) The deposition of a Civil Surgeon or other medical witness, taken and attested by a Magistrate in the presence of the accused, or taken on commission under Chapter XL, may be given in evidence in any inquiry,

trial, or other proceeding under this Code, although the deponent is not called as a witness.

Power to summon
medical witnesses.

(2) The Court may, if it thinks fit, summon and examine such deponent as to the subject-matter of his deposition.

SCOPE OF THE SECTION.—This section is enacted to obviate the great inconvenience which would result from a Civil Surgeon being summoned to give evidence in a Court at a great distance from his station, especially when his evidence is likely to be of a formal character. This section does not enact that deposition of a Surgeon shall be taken and attested by a Magistrate in the presence of the accused; what it does provide is that a deposition of a Surgeon, if so taken and attested, may be put in evidence. A Magistrate should take and attest a deposition in the presence of the accused and should also by the use of a few apt words on the face of the deposition make it apparent that he has done so, 10 A. 174 at 178-179 followed in 18 C. 129. This section does not in any way preclude a Sessions Judge from calling a Civil Surgeon and examining him in the Sessions Court and this should be done in every case where the deposition taken by the committing Magistrate is essentially deficient or requires further consideration.

TAKEN AND ATTESTED BY A MAGISTRATE.—The deposition may be taken by any Magistrate and not necessarily by a committing Magistrate who holds a preliminary inquiry, but it must be taken and attested by the Magistrate in the presence of the accused, 1893 A.W.N. 180. Where there is no attestation as required by this section the evidence is not admissible under this section, 4 C.W.N. 49 at 55. The defect can be cured by calling the committing Magistrate or any other person present in Court where the deposition was taken and able to testify to the facts under sub-section (2); the defect can also be cured by summoning and examining the deponent as a witness in the Sessions Court.

IN THE PRESENCE OF THE ACCUSED.—Except in the case provided for in S. 512, ~~the~~ the evidence of a medical witness should be taken in the presence of the accused. Otherwise the evidence is inadmissible against the accused when put on his trial, 8 C. 739; 9 A. 720; 10 A. 174; 18 C. 129.

510. Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government, 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.

Report of Chemi-
cal Examiner.

MAY BE USED AS EVIDENCE:—In order that the report referred to in this section may be used as evidence it must purport to be signed by the officer who detected, say poison, in the articles submitted to him for examination, and who from personal knowledge could certify to the correctness of the result embodied in the report, Weir II, 661. It must be the original report, bearing the signature of the Chemical Examiner and not merely a copy of the report that is evidence in the case, 6 B.L.R. (Appx.) 122—15 W.R. (Cr.) 49. An Additional Chemical Examiner's report was held to be inadmissible in evidence, as the section speaks of no such officer, 10 C. 1026. The law makes the contents of the report of a Chemical Examiner to Government, evidence and dispenses with the necessity of examining him as a witness, but such report can be of no use unless there is proof of the identity of the articles found during investigation and sent to the Chemical Examiner with the articles examined by him, 20 M.L.J. 657—(1910) M.W.N. 77—7 M.L.T. 314—11 Cr. L.J. 222—6 Ind. Cas. 81. The Chemical Examiner must be satisfied on the evidence that the substances examined were in fact what they were said to be, 18 C.W.N. 180—15 Cr. L.J. 147—22 Ind. Cas. 723. There is no provision in the

Code authorising the Court to send up articles for chemical examination or the procedure for submitting the same ; usually they are submitted during police investigation and the person who takes them is examined as a witness.

511. In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force—

(a) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was had to be a copy of the sentence or order, or,

(b) in case of a conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered

together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

This section deals with the mode of proving previous conviction or acquittal of an accused person.

PREVIOUS CONVICTION.—In order to support a charge of a previous conviction there should be on record a copy of some judgment, or extract from a judgment, or some other documentary evidence of the fact of such previous conviction. The examination by the Magistrate of the accused in respect of such previous conviction is without legal warrant or justification, 28 C. 689 ; 26 C. 49. But under S. 310 (b) the accused may at the stage indicated therein be asked whether he has been previously convicted. A Presidency Magistrate is not absolved from the ordinary rules of evidence in taking proof of previous convictions. 43 C. 1128. A previous conviction must be strictly proved in the manner provided by this section, 17 Cr. L.J. 179, and unless strictly proved, the Court cannot take into consideration the previous conviction, 17 Cr. L.J. 185. A finger-print expert, on a comparison of certain finger prints of accused taken in Court, with some other finger-prints on a paper which contained a record of such convictions which purported to be the convictions of the accused, pronounced them to be similar. It was held by the High Court that the previous convictions were not properly proved in the case as required by law, 21 C.W.N. 469. See also 5 Cr. L.J. 220. as to the value of finger impression evidence.

EVIDENCE AS TO IDENTITY OF THE ACCUSED.—The identity of the accused with the person so convicted or acquitted is every essential. The section does not say that the identity of the accused must be proved by calling witnesses or in any other particular way ; when some evidence as to the identity of the accused has been let in, the accused may be asked to explain the fact and if he admits, further proof is unnecessary, 9 Cr. L.J. 55.

512. (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him the Court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecutions and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against

Record of evidence in absence of the accused.

him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence, or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) If it appears that an offence punishable with death or transportation has been committed by some person or persons unknown, the High Court may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence. Any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of British India.

Record of evidence when offender unknown.

SCOPE OF THE SECTION.—The general rule is that statements given against a person in his absence cannot be used as evidence against him in a criminal trial. Exceptions to the rule can be created by statute and when a statute permits something to be done which, a fundamental rule prohibits, it can only be done by compliance with the statute which creates the exception. Where two witnesses gave evidence against certain persons then under trial who happen to refer to an absconding person, their statements at the subsequent trial of the person who had absconded cannot be read as evidence merely because the witnesses happened to be absent and cannot give evidence. Evidence given at a trial for one purpose cannot be converted by an *ex post facto* operation into an equivalent of what is called a deposition under this section, when at the time the witnesses gave their evidence the question of recording a deposition under this section was not contemplated. 38 A. 375. What this section requires is that it should be proved that the accused has absconded and there is no immediate prospect of arresting him and not that a finding to that effect should be recorded. 8 Lah. 489. This section is a departure from the ordinary rule that evidence must be taken in the presence of the accused and should therefore be construed strictly and every statement placed on record should be strictly proved. 1890 A.W.N. 100. A Court is given jurisdiction to record evidence in the absence of an accused person only in cases in which it has been proved (1) that the accused has absconded, (2) that there is no immediate prospect of arresting him. If these facts are not found, evidence recorded behind the back of the accused is inadmissible in evidence when he is put on his trial.

IF IT IS PROVED THAT A PERSON HAS ABSCONDED.—The word used here is "proved" and not has reason to believe "as in S. 87 *supra*. This section nowhere says that the Magistrate must record a finding as to the absconding of the accused and that there is no immediate prospect of his arrest. The Magistrate before recording evidence in the absence of the accused ought to satisfy himself first that the accused is absconding and that there is no immediate prospect of his arrest and it is certainly advisable that he should recite in his order that he finds this to be the case. If he fails to record clear findings on these questions although they may be clearly inferred from the evidence on record the provisions of the section have been complied with, 41 A. 60 where 38 A. 27, which took a narrow construction of the section was distinguished. See also 8 A. 672; 1896 A.W.N. 182 and 10 C. 1097. Under this section a Magistrate cannot decline to call for documents desired by the complainant or to record evidence on his behalf on the ground that the accused has absconded and no inquiry was, therefore, conducted by him. But he is bound by the provisions of this section to record all the available evidence to prevent the complainant becoming a victim of serious injury. 2 Bom. L.R. 707.

SUB-SECTION (2).—This sub-section was added in the Code of 1898 at the suggestion of the Bombay High Court. It applies only to cases of great gravity and should only be put

in force under the orders of the High Court, and mere delay, expense or inconvenience in obtaining the presence of the deponent contemplated by sub-section (1) should not be a sufficient ground for recording the evidence during the absence of the accused and subsequently using it against him. Under this sub-section a deposition recorded thereunder may on the arrest of the absconder be given in evidence against him at his trial but if the witness who gave the deposition actually appeared in Court and said that he did not remember details of the occurrence, it cannot be said that he is incapable of giving evidence. If a witness becomes dumb or insane he could properly be held to be incapable of giving evidence, and the proper procedure where the witness says he does not remember details is to refresh his memory under S. 159, Indian Evidence Act, by reading out the deposition previously recorded and without doing so the deposition cannot be admitted in evidence, 25 Cr. L.J. 95-76 Ind. Cas. 31. The deposition taken under this section may be given in evidence not only when the witness is dead but also in cases where after diligent search the witness could not be found or where he resides outside British India or has become incapable of giving evidence, e.g., has become a lunatic. But if the witness is living and his presence can be procured, it cannot be treated as evidence, 12 Cr. L.J. 214-10 Ind. Cas. 119; 25 Cr. L.J. 95-76 Ind. Cas. 31. A proceeding under this sub-section is not an inquiry or trial within S. 517, *infra*, 25 Cr. L.J. 656-81 Ind. Cas. 153.

CHAPTER XLII.

PROVISIONS AS TO BONDS.

513. When any person is required by any Court or officer to execute a bond, with or without sureties, such Court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix, in lieu of executing such bond.

Deposit instead of recognizance.

EXCEPT IN THE CASE OF GOOD BEHAVIOUR.—The object of law in providing for security for good behaviour is that a surety should be responsible for the good behaviour of the persons called upon to furnish security, while in the case of other bonds the object is merely to ensure attendance, in which case a deposit of cash security is permissible, 2 N.W.P. H.C.R. 295. See Ss. 109 and 119 *supra*.

PERMIT THE DEPOSIT OF A SUM OF MONEY, ETC.—The deposit of money allowed under this section is in substitution only of the bond which the principal himself would otherwise execute and not in substitution of any bond which his surety executes, 32 B. 449 at 453.

514. (1) Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or of the Court of a Presidency Magistrate or Magistrate of the first class,

Procedure on forfeiture of bond.

or, when the bond is for appearance before a Court, to the satisfaction of such Court,

that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid.

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same by issuing a warrant for the

attachment and sale of the moveable property belonging to such person or his estate if he be dead.

(3) Such warrant may be executed within the local limits of the jurisdiction of the Court which issued it; and it shall authorise the *attachment* and sale of any moveable property belonging to such person without such limits when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.

(4) If such penalty is not paid and cannot be recovered by such attachment and sale, the person so bound shall be liable, by order of the Court which issued the warrant, to imprisonment in the civil jail for a term which may extend to six months.

(5) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

(6) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.

(7) When any person who has furnished security under section 106 or section 118 or section 562 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under section 514B, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and, if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved.

EXTENT OF AMENDMENT.—The word "distress" in sub-section (2) is omitted and the word "attachment" is substituted. In sub-section (6) the words "but the party who gave the bond may be required to find a new surety" are omitted; a new sub-section (7) has been added, which provides that proof of a conviction should be conclusive as to the breach except where such conviction has proceeded solely on the plea of guilty in which case the surety should be allowed opportunity to disprove the guilt of the principal.

SCOPE AND OBJECT OF THE SECTION.—The object of these surety bonds is as far as possible to ensure that the accused person shall not evade justice in the ordinary course, say, by flying from the country or from the jurisdiction of the Court. But if he elects to die sooner than face his trial, that can hardly be a sufficient reason for forfeiting the surety bond since that was an event which the sureties could not have had in contemplation, and which is not of the kind which would impose upon them any moral obligation or responsibility to the Court, 18 Bom. L.R. 683 at 685. The principle of forfeiture of rights in consequence of default in procedure by a party to a cause is a principle of punishment in respect of such default, but the punishment of the dead or the ranking of death under the category of default does not seem to be very stateable, 35 A. 331 (P.C.) *referred to* in 47 M. 171 at 173. The provisions of this section apply to all bonds whether executed by principals, sureties of witnesses for appearance in Court, 2 M. 169. A bail bond must come under the second para of sub-section (1) of this section and therefore it is necessary that the forfeiture should be established to the satisfaction of the Court before which

the accused was bound by the bond to appear, and that is the Court to exercise the power. A bail bond cannot be forfeited on failure of the accused to appear in a Court to which the case is transferred when the obligation to appear in such Court is not specifically mentioned in the bond. A bail bond is to be construed strictly, 2 Rang. 581. But it has been held that a security bond taken in accordance with form XLII, Sch. V, is wide enough to include the successor of a Court in which the case originally was; any other view of the law would produce most inconvenient results since if an accused were on bail when a case was transferred it would in every case be necessary before transferring the case to order his arrest or to require him to give fresh sureties, 27 Cr. L. J. 377-92 Ind. Cas. 889. This section first deals with bonds generally and then with bonds for appearance and the procedure prescribed herein is an exception to the general rule that a person charged can be convicted only on evidence taken in his presence. If the person called upon to show cause why the penalty should not be paid then he should be afforded an opportunity of cross-examining the witness on whose evidence the rule to show cause is issued. If the accused had an opportunity already before the Magistrate to show cause in a proceeding for a breach of the peace or for any other offence then there is no necessity for giving him any further opportunity, 4 C. 865 (F.B.). Bonds taken under the City Police Act for appearance before the police are not bonds under this Code or for appearance before a Court and such bonds cannot be forfeited by a Presidency Magistrate purporting to act under this section, 42 B. 400; see 11 C. 77. Bond to secure attendance to an accused person before a Magistrate is not invalid for the reason that it was taken by a Magistrate other than the one before whom the accused is to appear, 2 Bom. L.R. 889. Where a person stood surety for the appearance of an accused person before a particular Magistrate before whom the case was being tried and the accused failed to appear before a Magistrate to whom the case was transferred subsequently, it was held that the surety did not commit a breach of the bond, 6 C.W.N. 885.

PROVE TO THE SATISFACTION OF THE COURT.—Breach of condition mentioned in the bond must be strictly proved before the bond is forfeited, 11 W.R. (Cr.) 52; 11 B.H. C.R. 170. An inquiry should be held before declaring a bond forfeited and the party must have an opportunity of cross-examining the witnesses upon whose evidence he was called upon to show cause why the bond should not be forfeited, 4 C. 865 (F.B.). In the case of a bond for appearance before a particular Court under this section proceedings to have the bond forfeited can be initiated only by that Court. This section in its opening clause deals first of all with bonds generally and then with a bond for appearance before a Court. So far as bonds generally are concerned there is a provision that action may be taken by the Court by which bonds have been taken or by the Court of a Presidency Magistrate or a Magistrate of the first class, 14 C.W.N. 289; 16 Bom. L.R. 84. Failure to appear before a Magistrate other than the one named in the bond cannot work a forfeiture, 30 C. 107. An attempt to poison another is not an offence which would probably occasion a breach of the peace working a forfeiture of the bond for keeping the peace, 15 Cr. L.J. 605-25 Ind. Cas. 817.

TO SHOW CAUSE WHY THE AMOUNT SHOULD NOT BE PAID.—Where a Magistrate recorded some evidence and came to a conclusion that a person under security had committed an offence within the period during which security was taken and then issued notice to the sureties to show cause why the bond executed should not be forfeited and on their failure to appear on the date fixed forfeited the bond acting solely on the evidence previously recorded, it was held, that the order for forfeiture was bad (1) because no evidence was recorded after notice to the sureties, (2) because the evidence recorded before notice was not such as would ground a finding of fact against the sureties or even against the person bound over that he had in fact been guilty of an offence, 44 C.L.J. 170. The wording of this section is indeed of the widest character, "whenever it is proved, etc". The order for forfeiture need not be passed at the time of convicting the person but may be passed at any subsequent stage, 27 Cr. L.J. 326-92 Ind. Cas. 742. The mere fact that no immediate action was taken under this section against a person under recognizance to keep the peace or against his surety on conviction of the former for an offence involving a breach of the peace is no bar to the taking of such proceedings at subsequent time, e.g., after the time for appealing had expired or after the appeal by the principal has been dismissed, 28 A. 202. If a criminal Court knowing

that a person charged before it is under security to be of good behaviour, in sentencing him takes no step to confiscate the security, it is not competent to that Court or any other Court in a subsequent or separate proceeding to take such steps. 25 Cr. L.J. 4=75 Ind. Cas. 692. After a conviction under S. 329 I.P.C. a bond for good behaviour can be forfeited and the amount of the bond can be recovered from the principal or surety, but not from both, 4 Lah. 362.

OR HIS ESTATE IF HE BE DEAD.—These words were newly added in the 1898 Code to meet certain rulings which held that the representative of a deceased surety is not liable to be proceeded against in a summary proceeding under this Chapter.

SUB-SECTION (5).—Where a person who has been let out on bail commits suicide the sureties are discharged from their obligation to produce him and no legal order forfeiting the bonds of the sureties could be passed, as in such a case, there is no neglect or default on their part to make them liable on the bond, 37 M. 155; 16 C.W.N. 550. Where a surety is unable to produce a person for whom he has given bail owing to some circumstance which was not really under his control, e.g. the impressment of the person bailed into the King's service or his arrest on a charge of felony or the like, the surety will not be compelled to discharge his bail in the ordinary circumstances. What constitutes discharge of the surety is discussed in 37 M. 155 and 16 C.W.N. 550, (1) act of God, (2) act of law, (3) act of parties. Since the person for whom the surety stood bail had been arrested on a charge of dacoity in another Province the case falls under "act of law" which includes also cases where a person is sent abroad under an Alien Deportation Act, becoming a peer, being sentenced to transportation or being impressed by the Press Gang, 4 Pat. 239; see also 18 Bom. L.R. 683. Where a person stands surety for the production of an accused person in Court when called upon and in default to forfeit a sum of money, the surety is not discharged from his obligation by the mere fact that the accused for whom he stood surety has paid the amount of his bail bond, 10 Cr. L.J. 294=3 Ind. Cas. 470.

SUB-SECTION (6).—Where a surety dies before the bond is forfeited his estate shall be discharged from all liability in respect of the bond. But where the bond taken for the principal's appearance from a surety was held enforceable when the principal failed to appear before the Magistrate even in a case in which the arrest under a warrant of the principal was found to be illegal and unauthorised. The nature of the obligation of the principal has no reference to the obligation of the surety. 2 Lah. 204.

514A. *When any surety to a bond under this Code becomes insolvent or dies, or when any bond is forfeited under the provisions of section 514, the Court, by whose order such bond was taken, or a Presidency Magistrate or Magistrate of the first class, may order the person from whom such security was demanded to furnish fresh security in accordance with the directions of the original order, and if such security is not furnished, such Court or Magistrate may proceed as if there had been a default in complying with such original order.*

This section has been newly added to meet cases where a surety to a bond becomes insolvent or dies. The person from whom security was demanded may be called upon to furnish fresh security in accordance with the directions of the original order and in case of default the Magistrate may proceed against him for breach of the condition of the original order.

514B. *When the person required by any Court or officer to execute a bond is a minor, such Court or officer may accept, in lieu thereof, a bond executed by a surety or sureties only.*

Bond required from a minor.

This section is new. It deals with a bond required from a minor. In such a case a bond executed by a surety or sureties only may be accepted.

515. All orders passed under section 514 by any Magistrate other than a Presidency Magistrate or District Magistrate, shall be appealable to the District Magistrate, or, if not so appealed, may be revised by him.

Appeal from, and revision of, orders under section 514.

This section provides an appeal from orders passed under S. 514, *supra* by any Magistrate other than a Presidency Magistrate or a District Magistrate. The District Magistrate is also given the power of revision, but the general power of the High Court to exercise revision under S. 439, *supra*, is not thereby taken away. The jurisdiction of a superior Court cannot be taken away except by express words or necessary implication. The general power of revision vested in the High Court, cannot be taken away because a power of revision is expressly given to the District Magistrate under this section. When a District Magistrate exercised his powers of revision under this section, the High Court has still power to revise such orders passed by the District Magistrate, 13 Cr. L.J. 31=13 Ind. Cas. 223 ; 4 B. 824. A bond taken for keeping the peace is not given to any particular person, but to the Court and a private person therefore is not entitled to appeal under this section against an order refusing to forfeit a bond. But it is open to the District Magistrate to exercise his judicial discretion in the matter, 25 Cr. L.J. 445=77 Ind. Cas. 733.

516. The High Court or Court of Session may direct any Magistrate to levy the amount due on a bond to appear and attend at such High Court or Court of Session.

Power to direct levy of amount due on certain recognizances.

SCOPE OF THE SECTION.—This section does not authorise the delegation of power to initiate forfeiture proceedings, but deals with the power of the High Court and Court of Session to direct the levy of the amount on a forfeited bond on failure to appear and attend the High Court or Court of Session and has nothing to do with the forfeiture which is a condition precedent to the levy. S. 514, *supra*, defines the procedure as to forfeiture, 13 C. W.N. 289=10 Cr. L.J. 248=8 Ind. Cas. 113.

CHAPTER XLIII.

OF THE DISPOSAL OF PROPERTY.

516A. *When any property regarding which any 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 such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy or natural decay, may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.*

Order for custody and disposal of property pending trial in certain cases.

This section has been newly added, empowering the Court to make orders as to the proper custody of property produced before it *pending inquiry or trial* and *in cases* where the property is subject to speedy or natural decay to sell or otherwise dispose of it.

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 the 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.

Order for disposal of property regarding which offence committed,

(2) When a High Court or a Court of Session makes such order and cannot through its own officers conveniently deliver the property to the person entitled thereto, such Court may direct that the order be carried into effect by the District Magistrate.

(3) When an order is made under this section, such order shall not, except where the property is livestock or subject to speedy and natural decay, *and save as provided by sub-section (4)*, be carried out *for one month*, or, when an appeal is presented, until such appeal has been disposed of.

(4) *Nothing in this section shall be deemed to prohibit any Court from delivering any property under the provisions of sub-section (1) to any person claiming to be entitled to the possession thereof, on his executing a bond with or without sureties, to the satisfaction of the Court engaging to restore such property to the Court if the order made under this section is modified or set aside on appeal.*

Explanation.—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.

EXTENT OF AMENDMENT.—In sub-section (1) the mode of disposal is indicated by addition of the words “by destruction, confiscation, delivery to claimant or otherwise.” Sub-section (3) is re-drafted. Sub-section (4) is new.

SCOPE AND OBJECT OF THE SECTION.—An order under this section does not decide the question of ownership but only the right to possession till a Civil Court decides the question of ownership, 20 Cr. L.J. 332—50 Ind. Cas. 668. To enable a Court to act under this section the property or document in question (1) must be produced before it, (2) must be in its custody, (3) it must appear that an offence has been committed regarding it, or (4) it must have been used for the commission of an offence; and at least one of these conditions must exist in an inquiry or trial in such Court. It is not necessary that an offence has been

committed in respect of the property, 34 C. 347. The essential of this section is that the property or document must be proved to have been used in commission of the offence or regarding which any offence appears to have been committed. So cash found on a person convicted of illegally importing opium cannot legally be confiscated, 23 Cr. L.J. 615-81 Ind. Cas. 103. So also cash which cannot strictly be said to be property except in so far as it is capable of being possessed and identified *in specie*. If actual coins found on thieves or receivers, are the actual coins which have been the subject of theft, then it is advisable to treat such cash as stolen property, 26 Cr. L.J. 1315-89 Ind. Cas. 259. The object of the section is to enable the Magistrate to direct it to be given to some person to whom it appears to belong or allow it to continue it in the possession of the person in whose possession it was found, 9 C.W.N. 597. The section does not limit the power of a Court which has omitted to pass an order for disposal of exhibits as part of its judgment convicting the accused so as to deprive it of all power to subsequently to pass orders for the disposal of property. The Court of appeal or revision is not so limited and S. 520 *infra* expressly authorises the separate consideration where necessary, of matters referred to in this section, 26 Cr. L.J. 818-85 Ind. Cas. 388 where 35 B. 253 is referred to. The Magistrate is invested with a discretionary power and it is a rule of law that such power should be exercised judicially, *i.e.*, according to sound principles of law and not arbitrarily. If there are materials, the Magistrate's discretion comes into operation, otherwise he should return the property to the person from whom it was produced, 11 Bom. L.R. 16-9 Cr. L.J. 1921-1 Ind. Cas. 103; 2 Bom. L.R. 748. This section is limited to the offences actually under investigation. Property used for the commission of an offence not under investigation, or property regarding which no offence appears to have been committed, cannot be dealt with under this section, Ratanlal 800. This section applies only to the property in respect of which an offence has been committed and not to which the stolen property exchanged or converted, 20 Bom. L.R. 605. The Magistrate is not entitled to proceed under this section when question of title is involved, 19 Cr. L.J. 788. This section applies only to moveable property and does not extend to immoveable property, 13 L. W. 227; 22 Cr. L.J. 110; 35 C. 44, 18 C.W.N. 1144; 1900 A.W.N. 81. This section cannot apply where the property has already passed out of the custody of the Court. [1921] Pat. 128. An order directing delivery of property to a person on his application into the absence of any criminal proceeding or inquiry before the Magistrate or any other Magistrate, is without jurisdiction, 6 C.L.J. 707. There is no time limit within which an application under this S. 520, *infra*, is to be made to a Court, 24 Cr. L.J. 713-73 Ind. Cas. 937. Where in the course of an investigation by the police in a case of dacoity certain persons produced, cash, jewelry etc. before them and also made certain statements concerning the discovery and production of the articles and they were charged with dacoity and convicted but acquitted on appeal on the ground that the articles produced were not proved to be part of the property lost in the dacoity it was held that the trial Court cannot make an order subsequently under this section relying on the statements made by the accused before the police at the investigation, making over the properties to the complainant. Although the statements could be relied on if they are proved as required by law it was not open to the trial Court to hand over the same to the complainant as the appellate Court found them not to form part of the property dacoited, but the articles should have been returned to the accused, complainant being left to his remedy in the Civil Court, 25 Cr. L.J. 737-86 Ind. Cas. 273.

INQUIRY OR TRIAL IS CONCLUDED.—An order can only be made at the conclusion of the inquiry and any order made after conclusion of the inquiry on the application of a party is without jurisdiction, 4 Lab. 460. An order cannot be made under this section before the conclusion of the trial, Ratanlal 937; 19 W.R. (Cr.) 3. When the person charged dies before trial no order can be made, 29 M. 375; 22 B. 844; 17 B. 748; 6 C.L.J. 707; 6 C.L. J. 229; but see 25 B. 552. A Magistrate is bound to hold an inquiry of some sort before he makes an order for the disposal of property seized and produced before him, 25 Cr. L.J. 666-81 Ind. Cas. 154.

MAY MAKE SUCH ORDER AS IT THINKS FIT.—Wide discretion is given to the Court and the discretion is a judicial discretion, 2 Bom. L.R. 768; 11 Bom. L.R. 16. Property should generally be restored to the person from whom it was taken, 1 B. 630;

9 M. 438; 24 C. 399; 10 B. 197; 17 B. 748; 22 B. 844; Weir II, 665, 666 and 667. There is no authority for the proposition that an order under this section can only be passed in favour of a person from whose possession the property was recovered. Such orders, would, in the majority of cases be confined to orders restoring stolen property to thieves or receivers. No order can be passed under this section until the case is concluded and after that and within a reasonable time, the Magistrate who heard the case is empowered to pass an order as to disposal of property. He may do so at the time of pronouncing his order or later on within a reasonable time. The words "at the time of passing such judgment" which occurred in the Code of 1869 has been deliberately omitted in the later Acts, 26 Cr. L.J. 1453-89 Ind. Cas. 978 where 4 Lab. 460 is *not followed*. Where conflicting claims to property before the Court was put forward, the proper order for the Court to make was one to keep it in Court subject to any order that might be made by a competent Court of Civil Jurisdiction. 28 C. W.N. 1094. When an accused is acquitted, the property seized from him should be restored to him, 1 C.W.N. 561; 3 M.L.T. 334; Weir II, 538, 665 and 669; 2 A. 276, but the Magistrate in special cases can order delivery of the subject-matter of the alleged theft to some party other than the party from whom it was taken, 34 M. 94; 11 Bom. L.R. 16, when property was used by the complainant for concocting a false case against the accused, the Magistrate is not bound to restore it to the complainant to whom it undoubtedly belongs, but he may confiscate the same. When the property was used by the complainant for concocting a false case of theft which ended in a dismissal under S. 208 *supra*, 24 M.L.J. 1. The objects found in the complainant's premises when complainant was convicted of preferring a false charge of theft under S. 192, I.P.C. can be confiscated, 9 C.W.N. 597. When a mother prosecuted a daughter of theft of jewels some which were joint family property and others self-acquisition of the daughter and the Magistrate discharged the daughter of theft and restored the jewels to the mother and daughter on their joint receipt, it was held that the order was good and the daughter, because of her discharge was not entitled as of right for the return of the jewels to her, 10 M.L.J. 425-11 Cr. L.J. 138. When an accused person is acquitted of cheating the Court has no power to restore property found in possession of the accused to the complainant. The proper order to be made in such a case will be that the property should remain in the possession of the person in whose custody they were, 27 Cr. L.J. 833-95 Ind. Cas. 933. A Magistrate cannot by his order direct a party to whom property is delivered to produce it when called upon to do so, 19 M.L.J. 516-11 Cr. L.J. 68-4 Ind. Cas. 875.

FOR THE DISPOSAL BY DESTRUCTION, ETC.—The different modes of disposal are now specified, *viz.*, destruction, confiscation, delivery to claimant, 34 C. 986, which held that disposal does not include forfeiture is no longer law. The power of confiscation has been given to the Magistrate by the amended Code and any order of confiscation made before the amendment was without authority, 28 C.W.N. 1094.

IF ANY PROPERTY OR DOCUMENT PRODUCED, ETC.—The word "property" means moveable property, 36 C. 44; 18 C.W.N. 1147; 12 L.W. 227-22 Cr. L.J. 110; 1900 A.W.N. 81; property produced in the course of an inquiry under S. 109 or S. 110 can be dealt with under this section, 42 M. 9; 34 C. 347; 21 Cr. L.J. 444-86 Ind. Cas. 62; so also property produced by a witness, 12 B.H.C.R. 217; 21 Cr. L.J. 444; a printing press in which seditious matters have been published cannot be dealt with under this section, 34 C. 986; a boat used for committing theft is not an instrument for committing theft and therefore cannot be dealt with under this section, 8 C.W.N. 887; but property produced under search-warrant can be so dealt with, 28 M. 525; money tied to a gambler's cloth but not actually staked cannot be confiscated, 41 M. 644; 26 B. 641; 26 A. 270.

USED IN THE COMMISSION OF OFFENCE.—These words must refer to cases of the nature of instruments like guns, swords, etc. produced in Court, a printing press being a remote instrument, 34 C. 986. Money used in bribing a public servant, Weir I, 834; Weir II, 669. But cash is not strictly speaking property except in so far as it is capable of being identified *in specie*, 28 Cr. L.J. 1315-89 Ind. Cas. 259; property used in concocting a false

charge against a person is within the section, 24 M.L.J. 1; 9 M. 448; 9 C.W.N. 397; Ratanlal 488. In 19 M.L.J. 255 it was held that a bottle of brandy smuggled by an accused person who was convicted under the Madras Abkari Act could not be forfeited. See also 3 C.W.N. 887 with regard to a boat used for committing theft.

SUB-SECTION (2).—This sub-section provides that when the High Court or Court of Session cannot conveniently deliver the property to the person entitled thereto the District Magistrate may be directed to carry out the order.

SUB-SECTION (3).—One month's time is specially mentioned now irrespective of the filing or the pendency of an appeal. An appeal from a sub-Magistrate's order lies to the District Magistrate and not to a sub-divisional Magistrate. 23 Cr. L.J. 387—67 Ind. Cas. 339.

SUB-SECTION (4) is new and provides for delivery to any person entitled on his executing a security bond for restitution, by producing it in Court when called upon. There was no express authority for restitution before the amendment, 19 M.L.J. 516, which held that under this section a Magistrate cannot direct a party to whom property is delivered to produce it when called upon, is no longer law.

EXPLANATION.—The words "conversion" and "exchange" must be taken in their ordinary meaning. They apply to acts such as melting down of gold and silver jewels and exchange of currency notes into cash, 12 Cr. L. J. 473. Current coins, property in which pass by mere delivery, cannot be the subject of an order under this section, 7 M. H. C. R. 233; 3 C. 379, but when the coin is not a current coin of the realm it can be dealt with under this section, 25 B. 702; see also 12 Cr. L. J. 397—11 Ind. Cas. 581.

REVISION.—The words "any proceedings in S. 495" are wide enough to empower the High Court to revise orders under this section, Weir II, 693 and 538; the discretion exercised by the Magistrate under this section is open to correction by the High Court when it has been exercised in violation of the accepted judicial principles, 17 Bom. L.R. 922; 15 Cr. L. J. 555. When at the time of acquitting an accused of theft the Magistrate makes an order restoring property, to the accused the District Magistrate had no jurisdiction to set aside such an order, 46 A. 623. Where a Magistrate directed delivery of certain property to the complainant merely upon complaint made to him, that an accused person is unlawfully detaining them, the High Court in revision set aside the order passed, as illegal, but refused restoration on the ground that it will be illegal to do so, 5 C. L. J. 229.

The Court before reversing an order under this section should not act without giving notice to the person in whose favour the order is made. It should not act on the mere representation of one of the parties, 35 B. 253 and 44 M. L. J. 56 at 59.

518. In lieu of itself passing an order under section 517, the Court may direct the property to be delivered to the District Magistrate or to a Sub-divisional Magistrate who shall in such cases deal with it as if it had been seized by the police and the seizure had been reported to him in the manner hereinafter mentioned.

Order may take form of reference to District or Sub divisional Magistrate.

An order under this section can be made only in respect of property (1) regarding which an offence appears to have been committed, or (2) which has been used for the commission of an offence, or (3) which has been produced before a superior Court, or (4) which has been in the custody of the superior Court, Ratanlal 496. The words "in the manner hereinafter mentioned" refer to B. 523, *infra*. When a Court makes no inquiry under B. 517, *supra* it is competent to make a reference under this section, 13 C.W.N. ccxx.

519. When any person is convicted of any offence which includes, or amounts to, theft or receiving stolen property, and it is proved that any other person has bought the stolen property from him without knowing, or having reason to believe, that the same was stolen, and that any money has on his arrest been taken out of the possession of the convicted person, the Court may, on the application of such purchaser and on the restitution of the stolen property to the person entitled to the possession thereof, order that out of such money a sum not exceeding the price paid by such purchaser be delivered to him.

Payment to innocent purchaser of money found on accused.

SCOPE OF THE SECTION.—Compensation under this section can be given only from money found on the person of the accused and it is not competent to award the same out of the fine imposed on a convicted person, 3 Bom. L. R. 764; Weir II, 671. A person who was convicted of stealing a pony and selling it to a third person was convicted and sentenced to a term of imprisonment and a fine of Rs. 20 and the pony was ordered to be returned to its owner on his receiving out of the fine Rs. 9 as compensation under this section. Held that the order is unsustainable and also no such conditional order can be passed, 3 Bom. L. R. 449, see also Ratanlal 631; Weir II, 672. Compare the provisions of S. 545, *infra* where unlike this section compensation can be given to be recoverable out of the fine imposed on the accused person.

520. Any Court of appeal, confirmation, reference or revision may direct any order under section 517, section 518 or section 519, passed by a Court subordinate thereto, to be stayed pending consideration by the former Court, and may modify, alter or annul such order and make any further orders that may be just.

Stay of order under sections 517, 518 or 519.

SCOPE OF THE SECTION.—This section applies only to orders passed under Ss. 517, 518 or 519 and cannot apply to an order made by a Magistrate when acquitting or discharging the accused in a case under S. 363, I. P. C., to the effect that a child alleged to have been kidnapped by the accused should be returned to her parents and a Sessions Judge had no jurisdiction to entertain an appeal from such an order under this section and set aside the order restoring the child. 27 Cr. L. J. 574—95 Ind. Cas. 142. The jurisdiction under this section is distinct from the appellate jurisdiction of a Court of appeal.

COURT OF APPEAL OR REVISION.—It was held in 3 C. 379 that the words "Court of appeal" are not necessarily limited to Courts before which an appeal is pending. It may very often happen that the question of the propriety of the order under S. 517 may, in no way, concern a convicted person, and it is unreasonable to construe this section in a way as shall make the power of the Judge to modify, alter or annul the order affecting one person contingent on the accident whether another person has or has not chosen to appeal. The same view was taken in, 9 M. 448; 2 A. 276; Weir II, 673. But in 42 B. 684 a different view was taken. It was held there, that when acquitting an accused person of theft, the Magistrate ordered the cattle, the subject of theft, to be returned to him. The Sessions Judge modified this order. The accused then applied to the High Court in revision, and it was decided that the Sessions Judge had no jurisdiction under this section as he was never a Court of appeal or revision, 35 B. 233 was followed and 9 M. 448 was disapproved. The Court of appeal within this section is the Court to which an appeal lies in the particular case and not the Court to which appeals would ordinarily lie from the Court deciding the particular case, 42 B. 684 at 686, followed in 46 A. 523 but see 12 Cr. L. J. 400—11 Ind. Cas. 585. The Court of revision in such a case will be the High Court and not the Court of Session. *Ibid.*

657; see also 48 M. 162 following 35 B. 233. Under this section the Sessions Court cannot be a Court of appeal reference or revision entitled to vary an order of a sub divisional Magistrate declining to direct the restoration of property to the accused on his acquittal in appeal from a conviction had by a second class, Magistrate. 47 M.L.J. 481—20 L.W. 521. A District Magistrate has no jurisdiction to set aside an order made under this section directing property to be restored to an accused person who was acquitted. He cannot be held to be a Court of appeal because no appeal lay to him against the acquittal. Nor is he a Court of confirmation, reference or revision as the only Court which could pass orders on reference or revision is the High Court, 46 A. 623.

COURT OF REFERENCE.—A Court of reference means a Court to which references are made and which on such references is entitled to go into the matters and dispose of them. The High Court is a Court of reference in jury cases where the Judge differs from the jury. 47 M.L.J. 481—20 L.W. 521—(1924) M.W.N. 806—25 Cr. L.J. 1247—82 Ind. Cas. 175.

MAKE ANY FURTHER ORDER THAT MAY BE JUST.—The intention of the Legislature in adding to the section “and may make any further order that may be just” was obviously to tenable a superior Court to give effect to an order setting aside the order of the Court of first instance if that order has been carried out by directing a restitution of the property. 13 Cr. L.J. 21—13 Ind. Cas. 213. This will enable a superior Court to give effect to an order setting aside the order passed by the Court of first instance if that order is carried out by ordering restitution. When a remedy is allowed by law, it must be assumed that the Legislature intends the tribunal invested with jurisdiction shall enforce the order in the manner it considers most suitable, even though there is no express provision for doing the same, 19 Cr. L.J. 995; 44 M.L.J. 56 at 59; 18 C.W.N. 939—15 Cr. L.J. 184—22 Ind. Cas. 760. Though this section does not say that the issue of notice to any person is necessary before making an order under this section, yet on general principles no order to the prejudice of a party should be made by any authority without that party being heard. 20 Cr. L.J. 823—53 Ind. Cas. 823; 35 B. 233; 46 M. 162; 13 Cr. L.J. 460. An accidental omission to make an order restoring property under this section can be subsequently corrected under S. 369, *supra*, 24 Cr. L.J. 159—71 Ind. Cas. 511.

REVISION.—Application to lower Court must precede the application to High Court in revision, 2 A. 276; High Court has ample powers to revise an order passed by the Appellate Court, 4 Lah. 49; 18 C.W.N. 939; 19 Cr. L.J. 995—48 Ind. Cas. 175. }

521. (1) On a conviction under the Indian Penal Code, section 292, section 293, section 501 or section 502, the Court may order the destruction of all the copies of the thing in respect of which the conviction was had, and which are in the custody of the Court or remain in the possession or power of the person convicted.

(2) The Court may, in like manner, on a conviction under the Indian Penal Code, section 272, section 273, section 274 or section 275, order the food, drink, drug or medical preparation in respect of which the conviction was had, to be destroyed.

This section relates to destruction of libellous matter, etc., on conviction. So also destruction of any noxious food, drink, drug, etc. When the conviction is set aside, the order passed also falls to the ground and the Court is entitled to act under S. 423 (1) (d), *supra*.

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 criminal intimidation, any person has been dispossessed of any immoveable property, the Court may, if it thinks fit, *when convicting such person or at any time within one month from the date of conviction, order the person dispossessed to be restored to the possession of the same.*

(2) No such order shall prejudice any right or interest to or in such immoveable property which any person may be able to establish in a civil suit.

(3) *An order under this section may be made by any Court of appeal, confirmation reference or revision.*

AMENDMENT.—In sub-section (1) after the word force "or show of force or criminal intimidation" have been added, and "when convicting such person or at any time within one month, from the date of conviction" have been newly added to give wider powers to the Court to restore possession. Sub-section (3) is newly added to give power to any Court of appeal confirmation, reference or revision to pass orders restoring possession.

OBJECT OF THE SECTION.—The object is to enable a Court by a summary order to restore the state of things which existed at the time of dispossession by a convicted person. It cannot go behind the state of affairs at the time of forcible ejection leading to the criminal prosecution. Sub-section (2) provides that the right of third parties cannot be affected and such third party in case of eviction under an order passed under this section must seek his remedy in a Civil Court. 5 C.W.N. 374, where 23 B. 494, is referred to when neither party is in actual possession this section cannot apply, Weir II, 675. This section is the only provision which enables a Magistrate to restore a dispossessed party and the power can be exercised only in cases in which there has been a conviction of an offence attended by criminal force or show of force or criminal intimidation, Weir II, 98; 25 M. 49; 31 C. 591; 36 C. 44; 25 A. 341. It is an essential ingredient of this section that the offence of which the person concerned is convicted must have been attended by criminal force or at the very least attended by criminal force, and when there was no finding that the offence was attended by criminal force but only an offence of criminal trespass, the order under this section was set aside, 21 A.L.J. 593—25 Cr. L.J. 42—75 Ind. Cas. 780. In S. 849, I.P.C. the term "force" is defined as being an application of force when used in connection with human body and under this section delivery may be made to the person who has been dispossessed, when accused is convicted of an offence attended by criminal force. Rioting need not necessarily be use of criminal force, but may be causing violence in prosecution of the common object, viz., violence to a fencing and uprooting the same, and not to any person, and in such a case no order under this section could legally be made. 18 C.W.N. 1160—7 Cr. L. Rev. 14—26 Ind. Cas. 163. But an order directing restoration of possession to the complainant can validly be made where it is found that the accused were putting a fence round the land where the complainant reached the spot and prevented the accused by show of force from taking possession. 27 Cr. L.J. 495—93 Ind. Cas. 395. By the new amendment the words "or show of criminal force or by criminal intimidation" have been added when a party takes possession of complainant's house and threatens to use force against him and is convicted under Ss. 448 and 143, I.P.C. the Court was competent to pass an order under this section restoring possession of the house to the complainant. 4 Pat. 438.

SHOW OF CRIMINAL FORCE.—It was held in 5 C. W. N. 250; 2 C. W. N. 305; 4 C. W. N. 307; 25 C. 434 that the term criminal force must be understood as defined in S. 350,

I.P.C. and to justify an order actual force must be used and not mere show of force. To meet these decisions the amendment is now made and show of criminal force is sufficient to give jurisdiction to order restoration possession of immoveable property under this section.

WHEN A PERSON IS CONVICTED.—To act under this section there must be a conviction, 12 C.W.N. 269. The discretion to pass an order or not, is vested in the trial Court by the section which says that the Court may pass such order *if it thinks fit*. There is no case in which a Court of appeal or revision has compelled a Court to pass such an order in a case in which, in the exercise of its discretion it has declined to do so. In 30 C. 690 it was held that a Court of appeal or revision has no power to do so. The High Court in revision will pass an order only in very exceptional circumstances, 48 A. 553 at 554. When the lower Court has failed to pass the necessary order the appellate Court had no jurisdiction, but the High Court in revision can pass the order where the case is a gross one and in the absence of such an order the complainant will be forced to institute fresh proceedings in a Civil Court soon after a successful litigation, 46 A. 92. Conviction for show of criminal force is newly added in accordance with the decision in 11 C.W.N. 467; 16 A.L.J. 489. There was conflict of authority about the validity of the order passed not simultaneously with the order of conviction, 16 A.L.J. 489; 4 C.W.N. 308; 23 B. 494; 14 Cr. L.J. 172. This is set at rest now by the new amendment; order can be passed within one month from date of conviction and any order passed more than one month from the date of conviction is illegal. But under sub-section (3) newly added any Court of appeal, confirmation, reference or revision may pass the order at any time however long after the conviction by the Magistrate and the High Court in revision is competent while setting aside the order of the Magistrate passed more than one month after conviction, to pass an order restoring possession to the party forcibly dispossessed. 4 Pat. 438.

SUB-SECTION (2).—This sub-section saves the civil rights of the parties which remains unaffected by any order passed by the criminal Court, 5 C. W. N. 374, but we find no such provision in S. 517 *supra*.

SUB-SECTION (3).—This sub-section is new and confers power of restoration on Courts of appeal, confirmation, reference or revision. The decisions in 39 C. 137 and 1050 and 13 Cr. L. J. 608=15 Ind. Cas. 176, which held that the appellate Court cannot make an order when exercising powers under S. 423 (1) (d) are no longer law. A party dispossessed by an order under the section may on acquittal be restored to possession, 25 C. 680; 27 A. 415; 1905 A. W. N. 19=2 Cr. L. J. 24. The High Court in revision may set aside the order in revision, 35 C. 44, but it will do so only in very exceptional cases, 45 A. 553; 28 Cr. L. J. 206=83 Ind. Cas. 910. An order restoring possession under this section is an order respecting possession of property within the meaning of art. 47 of Sch. I of the Limitation Act, and a suit for possession filed more than three years hereafter would be barred. 48 M. L. J. 372. An order under this section can only be binding between the parties to the order and can have no finality in favour of one who was not a party and did not claim under any party. 48 M. L. J. 372 following 6 C. L. R. 93 and 23 C. 731 (F. B).

523. (1) The seizure by any police-officer of property taken under section 51, or alleged or suspected to have been stolen, or found under circumstances which create suspicion of the commission of any offence, shall be forthwith reported to a Magistrate, who shall 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.

Procedure by police upon seizure of property taken under S. 51 or stolen.

(2) If the person so entitled is known the Magistrate may order the property to be delivered to him on such conditions (if any) as the Magistrate thinks fit. If such person is unknown, the Magistrate may detain it and shall, in such case, issue a proclamation specifying the articles of which such property consists, and requiring any person who may have a claim thereto, to appear before him, and establish his claim within six months from the date of such proclamation.

Procedure where owner of property seized unknown.

SCOPE OF THE SECTION.—The discretion given by the words "as it thinks fit" in this section must be exercised judicially. 5 Bom. L. R. 25 under this section the Magistrate to whom a report is made is competent to act on his own responsibility and it is only when action is to be taken under S. 524, *infra* that orders of the class of Magistrates mentioned therein are to be obtained, 26 Cr. L. J. 1048—87 Ind. Cas. 968. This section enables the Magistrate to inquire into the ownership of property seized by the police and deliver it to the person entitled to it instead of to the person from whom it is taken, 8 B. 338; Ratanlal 365; 30 C. 690; 1 C. W. N 561. This section does not apply to property produced before a Court under a search-warrant issued by itself under S. 96 *supra*. S. 517 applies to such a case. This section applies to property seized by the police of its own motion under Ss. 51, 54, 164 and 165, *supra* or under a warrant issued by a Magistrate, 26 B. 552, where 17 B. 748 is dissented. This section does not apply to standing crops, 23 B. 495. The Magistrate is bound to hold an inquiry and come to a finding as to the person entitled to possession but he is not bound to hold an inquiry simply for the purpose of deciding the ownership of the property when the person charged with an offence died before trial, 29 M. 375, but see 21 Cr. L. J. 551—57 Ind. Cas. 81. Where it was held that no judicial inquiry is necessary and all that the law requires is that the Magistrate should have materials before him to satisfy who he is entitled to the property. Property liable to decay can be disposed of by the Magistrate under this section even before a formal adjudication of the case before him 5 C. W. N. 415.

SUCH ORDER AS HE THINKS FIT.—The discretion given by this section must be judicially exercised and where there is nothing to show the right to the property produced, it should be ordered to be delivered to the person in whose possession it had been at the time of attachment, 5 Bom. L. R. 25; 22 C. 761. The use of the words "delivery to the person entitled" and "if such person cannot be ascertained" clearly point to the proper course to determine the matter as far as possible by exercising a sound judicial discretion. See 21 M. L. J. 1. A magistrate has no jurisdiction to vary an order once passed directing that the property taken by the police should be returned to the person from whom it was taken. 3 Bom. L. R. 12.

TO THE PERSON ENTITLED TO THE POSSESSION THEREOF.—The Magistrate does not decide the question of title but merely decides the question of possession. The fact that the accused had been in possession when the charge was made is not conclusive. The question will be, who is entitled to possession of the property, 12 Bom. L. R. 322—11 Cr. L. J. 339—5 Ind. Cas. 372; 17 B. 748. When a third party appears and alleges that the things seized by the police under a search warrant are his, the Magistrate is bound to hear him and if necessary to restore the property to him. There is a power inherent, apart from this section, in every Court to satisfy itself that the things produced before it under a search-warrant are the things which it is necessary or desirable should be kept in custody. 26 B. 552. When certain property was recovered from the house of a person charged with theft, but the complainant did not claim it as his, a Magistrate acts illegally in entering upon an inquiry as to how such person came to be in possession of the property. His duty is simply to restore the property to the custody of the person from whom it came. The fact that the account given by such person as to how he came by the property did not satisfy the Magistrate will not justify him to inquire and pass an order under this or S. 524, 17 Bom. L. R. 79.

DISPOSAL OR DELIVERY OF PROPERTY. The word "disposal" is something different from delivery, 12 Bom. L.R. 232-41 Cr. L.J. 339-5 Ind. Cas. 972. Disposal is more wider and delivery is one of the modes of disposal. The words "Disposal of such property or " were added to give wider discretion to the Court.

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, such property shall be at the disposal of the Government, and may be sold under the orders of the Presidency Magistrate, District Magistrate or Sub-divisional Magistrate, or of a Magistrate of the first Class empowered by the Local Government in this behalf.

(2) In the case of every order passed under this section, an appeal shall lie to the Court to which appeals against sentences of the Court passing such order would lie.

This section deals with the procedure to be adopted by the Court when no claimant appears within six months. The property is confiscated only when the person in possession is unable to show that it was legally acquired by him. The words "at the disposal of Government" mean that Government shall be free to sell the property or to hold it as a trustee for the true owner, 5 Pat. L.J. 321. It is only when action is to be taken under this section that orders of class of Magistrates mentioned herein are to be obtained while acting under S. 523, *supra* the Magistrate to whom a report is sent is competent to act on his own responsibility, 26 Cr. L.J. 1043-87 Ind. Cas. 963. See S. 529 (h), *infra*, which enacts that if a Magistrate not empowered sells property in good faith, his proceedings shall not be set aside merely because of his not being empowered to do so.

SUB-SECTION (2).—The appeal allowed by this section comes under Chapter XXXI of the Code and its provisions govern the appeal. It is a regular appeal on the merits and cannot be disposed of by the appellate Court in a summary way, 1881 A.W.N. 150. As this sub-section allows an appeal from the order passed under sub-section (1) it is doubtful whether the law allows a remedy by way of suit, 19 B. 663.

525. If the person entitled to the possession of such property is unknown or absent and the property is subject to speedy and natural decay, or if the Magistrate to whom its seizure is reported is of opinion that its sale would be for the benefit of the owner, or that the value of such property is less than ten rupees, the Magistrate may at any time direct it to be sold, and the provisions of sections 523 and 524 shall, as nearly as may be practicable, apply to the nett proceeds of such sale.

By the new amendment the Magistrate is given power to sell property when its value is less than ten rupees. Property of trifling value is put on the same category as property subject to speedy and natural decay. See S. 529, cl. (b) which validates sale by Magistrates in good faith when not empowered to do so.

CHAPTER XLIV.

OF THE TRANSFER OF CRIMINAL CASES.

High Court may transfer case or itself try it.

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 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, or

(d) that an order under this section will tend to the general convenience of the parties or witnesses, or

(e) that such an order is expedient for the ends of justice, or is required by any provision of this Code ;

it may order—

(i) that any offence be inquired into or tried by any Court not empowered under sections 177 to 184 (both inclusive), but in other respects competent to inquire into or try such offence ;

(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 other such Criminal Court of equal or superior jurisdiction ;

(iii) that any particular case or appeal be transferred to and tried before itself ; or

(iv) that an accused person be committed for trial to itself or to a Court of Session.

(2) When the High Court withdraws for trial before itself any case from any Court other than the Court of a Presidency Magistrate, it shall, except as provided in section 267, observe in such trial the same procedure which that Court would have observed if the case had not been so withdrawn.

(3) 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.

(4) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Advocate General, be supported by affidavit or affirmation.

(5) When an accused person makes an application under this section, the High Court may direct him to execute a bond, with or

without sureties, conditioned that he will, (if so ordered), pay any amount which the High Court has power under this section to award by way of costs to the person opposing the application.

(6) Every accused person making any 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.

Notice to Public Prosecutor of application under this section.

(6A) Where any application for the exercise of the power conferred by this section 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 costs to any person who has opposed the application any expenses reasonably incurred by such person in consequence of the application.

(7) Nothing in this section shall be deemed to affect any order made under section 197.

(8) If, in the course of any inquiry or trial, or before the commencement of the hearing of any appeal, the Public Prosecutor, the complainant or the accused notifies to the Court before which the case or appeal is pending his intention to make an application under this section in respect of such case or appeal, the Court shall adjourn the case or postpone the appeal for such a period as will afford a reasonable time for the application to be made and an order to be obtained thereon.

Adjournment on application under this section.

(9) Notwithstanding anything hereinbefore contained, a Judge presiding in a Court of Session shall not be required to adjourn a trial under sub-section (8) if he is of opinion that the person notifying his intention of making an application under this section has had a reasonable opportunity of making such an application and has failed without sufficient cause to take advantage of it.

AMENDMENT.—The closing words of sub-section (5) are new and empowers the High Court to direct a bond to be executed for the costs of the person opposing the application, and sub-section (6A) has been newly added empowering the High Court when dismissing the application to award costs incurred by any person opposing the application and such costs shall be recovered as if they are fines. By the amendment in sub-section (8) it is made clear that, if in the course of any inquiry or trial or before the commencement of the hearing of the appeal, it is notified to the Court of the intention to apply for transfer, the Court shall exercise the power of postponement of the hearing. A Sessions Judge shall not be required to adjourn a trial, if in his opinion the complainant or the accused has had a reasonable opportunity of making an application and has failed to do so without sufficient cause, but such a power is not conferred on Magistrates.

SCOPE OF THE SECTION.—The scope of the section has been considerably enlarged now and every case tried by a criminal Court comes within the purview of the amended section. The omission of the word *criminal* in sub-section (1) is very significant. Under the old Code there was a conflict whether proceedings under Chapter VIII or S. 145 of the Code could be called a criminal case. But all doubt on the subject has now been set at rest by deleting the word *criminal*, 27 Cr. L.J. 478—93 Ind. Cas. 700.

OBJECT OF THE SECTION.—The position of an accused person is at all times one of grave anxiety and Courts trying criminal cases should be specially on their guard not to do anything which may have the effect of increasing their anxiety, 20 Cr. L.J. 559—51 Ind. Cas. 347. This section is enacted to maintain full confidence in the administration of justice, which can only be done by giving every citizen an assurance so far as practicable that no one will be forced to undergo a trial before a Judge or Magistrate whom he has reasonable ground for suspecting to be prejudiced against him. The well known case of *Seargent v. Dale*, laid down the rule that if a Magistrate has any legal interest in the decision of a case he is disqualified in trying it, no matter how small that matter may be. The law does not measure the amount of interest which a Judge possesses. If he has any legal interest in the decision of the question one way, he is disqualified no matter how small the interest may be. The law in laying down this strict rule had regard not so much perhaps to the motive which might be supposed to bias the Judge as to the susceptibilities of the litigant parties. One important object at all events is to clear away everything which might engender suspicion and distrust of the tribunal, and to promote the feeling of confidence in the administration of justice which is so essential to social order and security, 20 C. 357 at 366; see also 23 C. 495; 8 C.W.N. 75; 10 C.W.N. 431 at 443; 26 Cr. L.J. 163—83 Ind. Cas. 723. No hard and fast rule can be laid down for transfer of criminal cases. The circumstances of one case would differ from those of another but the general principle is if there are circumstances in a case which raise a reasonable apprehension in the mind of an accused person that he will not have a fair trial, the case ought to be transferred to a calmer atmosphere, 25 Cr. L.J. 590—61 Ind. Cas. 78; 27 Cr. L.J. 802—95 Ind. Cas. 466. It is of paramount importance that persons arraigned before criminal Courts should have full confidence in the impartiality of those Courts and if a person has a reasonable apprehension that the Court before which he is to be tried is not completely free from bias, a transfer should be directed. What is reasonable apprehension, must depend on the degree of intelligence of the accused, 3 Lah. 433. One of the considerations for the transfer of a case will be the convenience of the parties concerned, 8 C.L.J. 39; 6 Lah. 336.

WHENEVER IT IS MADE TO APPEAR TO THE HIGH COURT.—One of the important duties of a High Court is to create and to maintain confidence in the administration of justice in the mind of the litigant public. And so power is given to the High Court to transfer cases on any one of the grounds mentioned in the section. The party applying to the High Court for transfer must have moved the local authorities. The High Court as a rule of practice does not interfere unless all the other remedies provided by law have been previously exhausted. When an order for transfer can be made by the District Magistrate under S. 528, *infra*, it is the duty of the person who considers himself prejudiced to go first to the District Magistrate before approaching the High Court for transfer under this section, 1 Cr. L. Rev. 475; see 18 L.W. 651; 43 A. 497; 26 C. 643; see also 26 Cr. L.J. 950—87 Ind. Cas. 112 where 11 A.L.J. 734 is followed; 4 Bom. L.R. 480, but where notices have been issued and the explanation of the Magistrate on the allegation made have been obtained and the matter argued on the merits, the case may be dealt with in spite of the objection raised to avoid further delay in the disposal of the case.

INQUIRY OR TRIAL IN ANY SUBORDINATE CRIMINAL COURT.—The High Court is empowered to transfer proceedings under S. 145, *supra*, 26 M. 188, where 25 B. 179, which took a different view is *dissented from*; the Calcutta High Court in 2 C.L.J. 614 took the same view as the Madras High Court and explained the doubt raised in 28 C. 709. The omission of the word "*Criminal*" in sub-clauses (ii) and (iii) has practically overruled the view taken by the Bombay High Court. Proceedings under S. 110, *supra*, have been held by the later

rulings of the Allahabad High Court to be transferable under this section, 12 A.L.J. 738 ; 32 A. 632, although the earlier rulings in 16 A. 9 ; 19 A. 291 and 30 A. 47 took a different view. The Madras High Court in 34 M. 186 applied the principle of the decision in 16 A. 9 and 30 A. 47 to applications for transfer of proceedings under S. 196, *supra*, and held that such proceedings could not be transferred as any transfer so made would be ineffective and futile unless the Court to which it was transferred was subordinate to such Court. An inquiry under the provisions of Act XIII of 1851 (Breach of Contract) is not outside the purview of this section and can be transferred by the High Court. The inquiry under the said Act is an inquiry by the Magistrate or Criminal Court within the Code. 45 A. 700 at 701.

FAIR AND IMPARTIAL INQUIRY CANNOT BE HAD.—In dealing with applications for transfer the High Court has to consider not merely whether there has been any real bias in the mind of the presiding Judge against the accused, but also whether incidents may not have happened, which though they may be susceptible of explanation, and may have happened, without any real bias in the mind of the Judge are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial, 8 C.W.N. 75 and 589. Of course it is not every apprehension of this sort that should be taken into consideration, but where the apprehension is of a reasonable character, then notwithstanding, there may be no real bias in the matter, the fact of the incident having taken place being calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer, 23 C. 495 ; 19 A. 64 ; 3 Lah. 443, 9 C.W.N. 619 ; 8 C.W.N. 77. Next in importance or deciding a case fairly and impartially is the importance of conducting oneself in such a manner as to inspire in the minds of the parties a confidence that nothing but absolute justice would be done to them. And if by reason of the words or conduct of a Magistrate or Judge before whom a case is pending, any party reasonably apprehends that there is a bias against him in the mind of the officer concerned, it would be expedient or the ends of justice to transfer the case from his file although there may not be actual bias, 28 C. 709 ; 25 C. 727 ; 20 Cr. L.J. 586—52 Ind. Cas. 84 ; 35 A. 5. Although the facts alleged do not show bias, or prejudice in the mind of the Magistrate yet if they are such as is likely to raise a reasonable apprehension in the mind of the accused that he is not likely to have a fair and impartial trial, it is advisable to order a transfer, 12 A.L.J. 738 ; 19 A. 64 ; 35 A. 5 ; 28 C. 297 ; 25 B. 179 ; Weir II, 678 ; 21 Cr. L.J. 504 ; 25 Cr. L.J. 590—81 Ind. Cas. 78 ; 25 Cr. L.J. 638—81 Ind. Cas. 126. To decide what is reasonable, regard must be had to the degree of intelligence possessed by the accused, 3 Lah. 443. It is difficult to lay down any hard and fast rule under which a transfer should be made for the circumstances of one case might differ from those of another. The principle underlying the decisions of the various cases go to establish that if there are circumstances in a case which raise a reasonable apprehension in the mind of the accused person that he would not receive fair dealing at his trial, the case should be transferred to a calmer atmosphere, 5 Pat. L.T. 63—25 Cr. L.J. 590—81 Ind. Cas. 78 ; 24 Ind. Cas. 951 ; 35 A. 5. The use of strong language by a Court is never calculated to satisfy the litigant public before it. An officer is sometimes bound to feel strongly on particular occasions but as soon as he expresses himself strongly he gives himself away and if he raises by his language an apprehension in the mind of a party that an officer is prejudiced he has only himself to thank. Besides, a calm state of mind is absolutely essential for the disposal of all cases, 25 Cr. L.J. 538—85 Ind. Cas. 378. The High Court while making an order in a transfer application cannot take into consideration the effect its order would have on the authority and reputation of the officer concerned. The High Court will not transfer the case merely in deference to the susceptibilities of the accused. The application for transfer must be based on the ground that the applicant will not have a fair and impartial trial, and the apprehension must be shown to be reasonable, 10 C.W.N. 441 ; Weir II, 678 ; 36 A. 239 ; 10 Cr. L.J. 244—3 Ind. Cas. 88. What would amount to reasonable apprehension would depend on circumstances of each case and should be decided with reference to the incidents of the case and the surrounding circumstances. In determining whether the application is reasonable, it is the duty of the Court to place itself in the position of the accused and consider the facts and circumstances attending his position. Abstract reasonableness ought not to be the standard, 33 C. 1183. Confidence in the administration of justice is an essential element in good government, and

a reasonable apprehension of a failure of justice in the mind of the accused should be taken into consideration on an application for transfer, 36 C. 908. The Court in considering whether the apprehension of the accused is reasonable, will have to try and place itself in the position of an accused person and look at the matter from that point of view. The matter does not depend on the way in which the Judge would regard it himself. 39 C.L.J. 380—23 Cr. L.J. 924—81 Ind. Cas. 880. There is no rule of law against a pleader appearing in the Court of his father the presiding officer, and the mere fact that the son of the Magistrate appears as a pleader in a case before him cannot be urged as a valid ground for transfer and the case from the Magistrate's file, 26 Cr. L.J. 440—88 Ind. Cas. 186. But the Calcutta High Court in 26 Cr. L.J. 1183—88 Ind. Cas. 607, held that it was undesirable that a member of the legal profession should practice in a Court presided over by a near relation and where one of the practitioner's engaged is a near relation of the presiding Magistrate, the case ought to be transferred from that Court to that of some other Magistrate. The position of an accused person must always be one of anxiety and suspense and it is not right that the painfulness of such a position should be enhanced by anything that could suggest to him that his guilt is a foregone conclusion in the mind of the Magistrate who is to try him. The accused or his counsel should not be put to the necessity of removing any impression from the Court which is not based on any evidence in the trial. It is important that all parties should have confidence in the tribunal before which they appear. It is also important that nothing should be done to encourage any want of confidence when there is no sufficient foundation for that want of confidence, 6 Bom. L.R. 856. It is inadvisable for a Magistrate to offer a seat on the dais while he is trying a case, to a private person more especially if he is interested in the case. It is unfortunate for Judges and Magistrates to invite their friends to come to Court while the Court is sitting and give them seats on the dais. The practice is one that should be discouraged for a Court of law is not a place of amusement. A Magistrate will be ill-advised in receiving visits from the parties before him, as by so doing he lays himself open to an imputation which no doubt may not contain a grain of truth. Judicial officers should be careful to avoid the opportunity of having such imputations made against them, where a Magistrate trying a case has been acting indiscriminately in the manner stated above, it will certainly give rise to a reasonable apprehension of not having a fair trial and it is desirable that the case should be transferred to some other Magistrate, 27 Cr. L.J. 498—93 Ind. Cas. 968. The trying Magistrate accepting in ignorance the hospitality of the complainant's son in a case before him will raise a reasonable apprehension in the mind of the accused that he will not have a fair and impartial trial before the Magistrate, 27 Cr. L.J. 565—94 Ind. Cas. 133. The apprehension that a Subordinate Magistrate will be influenced by the ill-will which his superior Magistrate bore towards an accused is no ground for transferring a case outside a sub-division. To allow such transfers would, as observed in 10 C.W.N. 441—3 Cr. L.J. 379, be to encourage a distrust in the integrity and independence of the Magisterial Courts in this country which would amount to a serious evil, 27 Cr. L.J. 802—95 Ind. Cas. 456. See also 9 Cr. L.J. 281. Granting bail in a non-bailable offence is a matter of discretion with the Court and failure to grant bail is no ground for transferring the case to another Court, 27 Cr. L.J. 859—95 Ind. Cas. 939. A case should not be transferred where the apprehension in the mind of the accused that he will not have a fair and impartial trial is created by the accused himself in casting grave aspersions on the character of the trying Magistrate in the transfer application itself, 27 Cr. L.J. 939—96 Ind. Cas. 395. Granting of unnecessary adjournments on several occasions for enabling the complainant to appear is no ground for transferring a case, 27 Cr. L.J. 1022—96 Ind. Cas. 878. Where a Magistrate had interested himself in a case pending before him in the way of obtaining a settlement by the parties, it was to the interest of both parties and also fair to the Magistrate himself that he should not hear the case, 47 A. 411 where 18 C.L.J. 180—14 Cr. L.J. 602—21 Ind. Cas. 474 is followed; 26 Cr. L.J. 1317—89 Ind. Cas. 261. The fact that the Magistrate of the District may be cited as a witness for the prosecution in a case tried before another Magistrate in the same district will not afford a valid ground for transfer of the case as it will not prejudice the accused in any way. 27 Cr. L.J. 344—92 Ind. Cas. 856. Counter cases should be tried simultaneously and contemporaneously. But they should be dealt with wholly separately from each other, each on its merits and upon facts and circum-

stances appearing therein; judgment in both cases should be pronounced if possible after both the trials are completed at one and the same time, 28 C.W.N. 487—26 Cr. L.J. 65—83 Ind. Cas. 625. The Code is silent with regard to the procedure to be adopted in such circumstances and it should not be laid down as a rigid rule of law that a particular course should be adopted, 26 Cr. L.J. 1815—90 Ind. Cas. 719; and if a Magistrate in trying counter cases makes an emphatic pronouncement in one case so as to prejudice the defence in the counter case on the merits, it will afford a good ground for the transfer of the case left undisposed of to some other Magistrate, 30 M. 233; 9 M.L.T. 162—1910 M.W.N. 735—11 Cr. L.J. 702; 13 Cr. L.J. 532—15 Ind. Cas. 804 but see 1 C.W.N. 426; 6 Bom. L. R. 1092 and also 33 A. 383 where it was held that the fact that a court before which two cross cases of rioting were tried, expressed opinions to some extent unfavourable to the accused in the second case is no ground for holding that the court was incompetent to try the second case. The fact that in a similar case the Magistrate came to a particular conclusion on the evidence in that case is no ground for a transfer, 36 C. 903. Where a Hindu Mahomedan dispute is involved in a criminal case, it is desirable that the District Magistrate himself should inquire into it, 26 Cr. L.J. 1036—87 Ind. Cas. 976; 16 Cr. L.J. 213—27 Ind. Cas. 337.

SOME QUESTION OF LAW OF UNUSUAL DIFFICULTY IS LIKELY TO ARISE.—In 7 Bom. L.R. 637 the Bombay High Court transferred a case on the file of a Magistrate on the sole ground that it was quite possible that some questions or several questions of law of unusual difficulty may arise, and directed the commitment of the case to the Court of Session remarking that the trying Magistrate is as competent as any other Magistrate in India to try the case.

VIEW OF THE PLACE IS NECESSARY; SUB-SECTION (1) (c).—Ss. 539B and 556, *infra*, permit a Magistrate to view the place in which an offence is alleged to have been committed and such inspection should be made for the purpose of enabling the Magistrate to understand better the evidence which is laid before him and it must be strictly confined to that and he should then invariably be accompanied by both parties or their representatives, 19 M. 263 at 265; 45 M.L.J. 279—18 L.W. 113; 37 C. 340; 19 A. 302.

TEND TO THE GENERAL CONVENIENCE OF PARTIES OR WITNESSES; SUB-SECTION (1) (d).—When a complainant chose to go to a particular district and as the accused also wished to be tried there only, it was held that the High Court could under this section direct that the trial might be proceeded with before the Sessions Judge of that district although the offence was alleged to have been committed in another district, 2 Bom. L.R. 393, and in 8 C.W.N. 75, when a transfer was made at the instance of the accused the complainant pleaded poverty and alleged that the transfer would subject him to unnecessary expense which he could not afford to incur, the Court directed that the expense of the witnesses should be borne by the Crown; convenience of the parties is one of the chief considerations for a transfer, 8 C.L.J. 59. For purposes of transfer under this section it is the convenience of the accused rather than that of the complainant that ought to be taken into consideration, 27 Cr. L.J. 563—94 Ind. Cas. 131.

ORDER EXPEDIENT FOR THE ENDS OF JUSTICE OR REQUIRED BY SOME PROVISION OF LAW; SUB-SECTION (1) (e).—This clause refers to the expediency for the ends of justice and not to expediency from any political point of view. It is the duty of the High Court to have due regard for the importance of securing the confidence of the public generally, and of every section of the community interested in the result, in particular in the fairness and impartiality of the trial that is going to be held; but it is equally its duty to see that no undue regard is shown to abnormal susceptibilities of any section of the public from an apprehension of ulterior consequences. If that were done it would result in the obvious injustice of showing greater consideration to the less peaceful than to the more peaceful, 25 C. 727 at 731. The importance of having a fair and impartial trial ranks very much higher than the convenience of parties and witnesses and the convenience of the Court in having a local inspection, *ibid.* at 735. See also 23 C. 493.

Courts are established for the due administration of justice and they must be prepared to make every sacrifice to bring it about. Delay, expense, inconvenience or public policy are nothing before it. Everything must be done subject to the one object of rendering justice. The fact that an accused person finds it unable to secure the attendance of a competent practitioner of the locality for his defence on account of the influence wielded by the complainant was held to be a good ground for transfer, 25 Cr. L.J. 1272-88 Ind. Cas. 1058. Counter cases should be tried simultaneously and contemporaneously. But they should be dealt with wholly separately from each other each upon its own merits and upon facts and circumstances appearing therein; the judgment in both cases, should it possible be pronounced at the same time after both the trials are over, 28 C.W.N. 487-26 Cr. L.J. 65-88 Ind. Cas. 825. The Code is silent with regard to the procedure to be adopted in such circumstances and it should not be laid down as a rigid rule of law that a particular course must be adopted in all cases, 26 Cr. L.J. 1615-90 Ind. Cas. 719. If a Magistrate in trying counter cases makes an emphatic pronouncement in one case on the merits so as to prejudice the defence of the accused in the other case it will afford a good ground for the transfer of the case left undisposed of to some other Magistrate for the ends of justice, 30 M. 223; 13 Cr. L.J. 532-15 Ind. Cas. 804; 4 C. W. N. 824, where a Magistrate was present, a search made by the police during investigation and in all probability he came to know at some facts in connection with the case it is expedient that the case should be tried by some other Magistrate, 3 C.W.N. 831. See also 27 Cr. L.J. 844-95 Ind. Cas. 764.

See the provisions of Ss. 191, 487 and 556 where a transfer is necessitated by the provisions of the Code.

SUB-SECTION (1), (ii): ANY PARTICULAR CASE OR APPEAL.—This section which clothes the High Court with power to transfer any case from one Court to another controls Ss. 195 (3), 476A and 476B, *supra*, 28 Cr. L.J. 798-86 Ind. Cas. 428. The High Court can transfer only appeals actually existing, Ratanlal 973. A case which has not been validly instituted before an inferior Court cannot be transferred by the High Court to another Court so as to confer jurisdiction on the latter Court to try the case, 17 L.W. 69 following 9 A. 191 (P.C.); 7 Bom. L.R. 121. The High Court can transfer under this section an appeal from one district to another district,

SUB-SECTION (1), (iii): MAY BE TRANSFERRED TO AND TRIED BEFORE ITSELF.—The High Court can transfer an appeal filed in the Sessions Court to itself for hearing, 8 M. 32; Ratanlal 110.

SUB-SECTION (2).—This sub-section deals with transfer to itself from Courts other than the Court of a Presidency Magistrate, and prescribes the procedure to be followed in the trial of such cases by the High Court, which is to be the same as that which would have been followed by the lower Court. The exception is that contained in S. 267, *supra*, which lays down that the trial before the High Court is to be by jury.

SUB-SECTION (3).—This sub-section enables the High Court to pass an order for the transfer of a case on a reference made to it by an inferior Court, or on the application of a party or it may act *suo motu*. The Crown, the accused, and the complainant are the only persons entitled to apply under this section. A person who merely lodges information and who is not a complainant in the case has no *locus standi* to apply under this section, 4 Pat. L.J. 656-20 Cr. L.J. 648-52 Ind. Cas. 425; 5 Bom. L.R. 889. A person at whose instance a case is instituted, say, by the police, is a party interested within the meaning of this section. But he is not a complainant within the meaning of sub-section (3) of this section. If the Legislature intended that the words "party interested" should have the same meaning as the word "complainant" occurring in sub-section (3) there is no reason why different words are introduced in the two sub-sections. Therefore the right of a person interested to apply for a transfer is subordinate to that of the Crown, *i.e.*, if the Public Prosecutor or other person conducting the prosecution on behalf of the crown is unwilling to have the case transferred, the person at whose instance the case was launched, has no right to get the case transferred, 26 Cr. L.J. 1259-88 Ind. Cas. 998 where 4 Pat. L.J. 656-20 Cr. L.J. 648-52 Ind. Cas. 425, is followed. See also 27 Cr. L.J. 411-93 Ind. Cas. 75.

SUB-SECTION (4).—This sub-section lays down the manner in which an application under this section is to be made by a private party, and is in accordance with the decision in **1 C. 219 (F B.)**. Every application is to be by motion supported by an affidavit or affirmation. The Legislature undoubtedly intended to protect an accused person from the ordeal of examination as a witness and to render him incapable of making false statements on oath or otherwise as long as his case is subjudice, **19 A. 200** at **201**. It is an unusual practice for Courts to receive affidavits or statements on oath of the accused persons for the purpose of applications for transfer and the practice even if it be legal is not altogether a convenient one, and it would be a better practice certainly, if such affidavits setting forth the grounds of transfer are made by persons other than the accused, **28 A. 331** at **332** where **19 A. 200** is followed. The affidavit of an accused person cannot be accepted as a proper one, as no oath could be administered to him, and no prosecution for perjury will lie with regard to the allegations in his affidavit, **Wels II, 888**. It is an invariable practice of the Madras High Court not to accept the accused's affidavit in support of application for transfer. But it was held in **3 Lah. 46** that the prohibition contained in **S. 342, supra**, evidently referred to the statement made by the accused in answer to questions put to him by the Court and did not preclude the accused from making an affidavit in support of an application under this section. An application for transfer is not a part of the defence of an accused person and statements made by an accused in an affidavit in support of a transfer application do not enjoy the immunity conferred by **S. 342, supra**, upon answers to questions put to accused by the Court trying the case. This view was taken in **3 Lah. 46** where the Allahabad view was considered and dissented from, **6 Lah. 31**. No affidavit is necessary when an application for transfer is made by the Advocate General.

SUB-SECTION (5).—Before the amendment, the High Court's power to direct the accused to execute a bond for payment of costs to the person opposing the application was conditioned on the conviction of the accused. By the new amendment an order can be made without any reference to the accused being convicted in the case.

SUB-SECTION (6).—This sub-section enacts that twenty-four hours' notice in writing to the Public Prosecutor is necessary before hearing an application under this section.

SUB-SECTION (6A) is new and empowers the High Court to award reasonable costs in favour of the person opposing the application when dismissing the same as frivolous or vexatious. This sub-section enables the Public Prosecutor to claim costs in the High Court.

SUB-SECTION (7).—**S. 197, supra** refers to prosecution of judges and public servants, and, under that section, and the Government is empowered to determine the Court in which the trial is to be held.

SUB-SECTION (8).—This sub-section has been redrafted and considerably modified to benefit the accused. An application for the adjournment of a case could now be made at any stage in the course of an inquiry or trial. Before the amendment, the accused was to notify his intention to apply for transfer before the commencement of the hearing, and the Court was bound to adjourn the case only before the accused was called to enter on his defence. Before the amendment a Magistrate may record the whole of the prosecution evidence before adjourning the case, but he is not entitled to do so now. The reference in this clause to 'inquiry or trial' is clearly intended to apply to those inquiries or trials which are specially referred to in the earlier portion of the Code and it cannot apply to such things as the recording of a complaint which is not the intention of the law. It may be that **S. 526** applies also to certain cases of quasi-civil nature such as inquiries into disputes about immoveable property but that does not in any way touch the question, **5 Pat. 229**. In this sub-section the expression "before the accused is called on for his defence" which occurred before the amendment is now omitted. Therefore it is the duty of the Court when the accused notifies his intention to apply for a transfer to postpone the hearing at once. The Magistrate is not entitled to record any evidence after an application is made for an adjournment to move for a transfer, but should at once adjourn the case. **26 C.L.J. 139—83 Ind. Cas. 699, See 22 A.L.J. 430**, where it was held that it was the duty of the Court under the amended Code to postpone the

case at once. The language of the sub-section is imperative now, and the words "before the accused is called on for his defence" have been omitted. The restriction as to the application being made before the hearing of an appeal still exists. The wording of the section, so far as the inquiry and trial, is imperative; and subsequent proceedings after the application for adjournment will certainly be void, 8 C.W.N. 77; 29 C. 211; 31 C. 715; 33 C. 1183. See 25 M. 701, as to the meaning of the words "commencement of hearing" which now applies to appeals only. Application for transfer ought to be filed at the earliest opportunity after the occurrence of whatever facts and circumstances which are alleged as affording reasonable basis for such application. If an accused person with materials in his hand for a transfer elects to sit quiet and allows the trial to proceed, and a charge is framed against him, he has only himself to thank, 15 Cr. L.J. 536—25 Ind. Cas. 848; see also 17 C.W.N. 536; 8 C.W.N. 910; 31 C. 715; 19 M. 375; 14 Cr. L.J. 382—20 Ind. Cas. 142. When a party applies to a Magistrate under this sub-section for the postponement of the hearing to enable him to make an application for transfer to another Court, it is highly improper for the Magistrate to hold an inquiry into the grounds of transfer himself, as such a course would naturally cause apprehension in the mind of the party that he is not likely to have a fair and impartial trial, 27 Cr. L.J. 382—92 Ind. Cas. 894.

SUB-SECTION (9) is new and it is enacted that a trial before the Sessions Court need not be adjourned if the presiding Judge is of opinion that the applicant having had a reasonable opportunity of moving the High Court had failed to do so.

526A. (1) *Where any person subject the Naval Discipline Act or to the Army Act or to the Air Force Act is accused of any offence such as is referred to in proviso (a) to section 41 of the Army Act, the Advocate General shall, if so instructed by the competent authority, apply to the High Court for the committal or transfer of the case to that High Court and thereupon the High Court shall order that the case be committed for trial to or be transferred itself and shall hereafter proceed to try the cases by jury.*

High Court to transfer for trial to itself in certain cases.

(2) *The Governor General in Council may, by notification in the Gazette of India, declare any officer to be the competent authority for the purpose of issuing instructions under sub-section (1) in regard to any class of cases specified in the notification.*

This section has been newly added by Act XII of 1923 empowering the High Court to transfer to itself certain cases on the application of the Advocate General.

527. (1) *The Governor General in Council may, by notification in the Gazette of India, direct the transfer of any particular case or appeal from one High Court to another High Court, or from any Criminal Court subordinate to one High Court, to any other Court of equal or superior jurisdiction subordinate to another High Court, whenever it appears to him that such transfer will promote the ends of justice, or tend to the general convenience of parties or witnesses.*

Power of Governor General in Council to transfer cases and appeals.

(2) The Court to which such case or appeal is transferred shall deal with the same as if it had been originally instituted in, or presented to, such Court.

This section empowers the Governor General in Council to transfer a case or appeal from one High Court to another High Court or from any Court subordinate to one High Court to another Court subordinate to a different High Court for the ends of justice or the convenience of the parties or witnesses. The intention of this section is not to confer any rights upon litigant parties but its sole object is to give the Governor General in Council some control over the Courts subject to his authority for the furtherance of justice. When objection was raised to the refusal of the Governor General to transfer the case in the application for leave to appeal, the Privy Council in rejecting the application for leave remarked thus :—It is in the power of the Governor General of India, if he thinks fit that in the state of feeling a fair trial could not be obtained in the place where the offence would ordinarily be tried, to order that the trial be held elsewhere. When an application was made to the Governor General to so order and refused, to ask the Privy Council to declare that such a refusal of the Governor General, who had the advantages of being in the country and of judging of the real state of public feeling, amounted to a violation of the principles of natural justice is nothing less than preposterous, and their Lordships cannot too strongly qualify the impropriety and uselessness of such a demand, 30 C.W.N. 857 (P.C.),—43 C.L.J. 67 at 69—49 M.L.J. 834—27 Cr. L.J. 228—92 Ind. Cas. 212. It is under this extraordinary power of the Governor General in Council that the *De la Hey murder case* against the *Kadambur ward* was transferred from the Madras High Court Sessions to the Bombay High Court Sessions. So also a case was recently transferred to the Presidency Magistrate, Madras, from Behar within the jurisdiction of the Patna High Court. The Governor General in Council recently refused to transfer the *Bawla murder case* from the Bombay High Court Sessions.

Sessions Judge may withdraw cases from Assistant Sessions Judge.

528. (1) Any Sessions Judge may withdraw any case from, or recall any case which he has made over to any Assistant Sessions Judge subordinate to him,

District or Sub-divisional Magistrate may withdraw or refer cases.

(2) Any Chief Presidency Magistrate, District Magistrate, or Sub-divisional 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.

Power to authorise District Magistrate to withdraw classes of cases.

(3) The Local Government may authorise the District Magistrate to withdraw from any Magistrate subordinate to him either such classes of cases as he thinks proper or particular classes of cases.

(4) Any Magistrate may recall any case made over by him under section 192, sub-section (2), to any other Magistrate and may inquire into or try such case himself.

(5) A Magistrate making an order under this section shall record in writing his reasons for making the same.

(6) The head of a village under the *Madras Village-police Regulation, 1816*, or the *Madras Village-police Regulation, 1821*, is a Magistrate for the purposes of this section.

EXTENT OF THE AMENDMENT.—Sub-sections (1) and (4), and inclusion of Regulation 1816, in sub-section (6) are new.

SCOPE OF THE SECTION.—The Crown is as much a party before a Sessions Judge as an accused person. Any motion that has to be made before the Sessions Judge under this section should be through the Public Prosecutor and not by an official or demi-official letter from the District Magistrate. The proper course for the District Magistrate should be to instruct the Public Prosecutor to make an application to the Sessions Judge. 22 A.L.J. 1103—26 Cr. L.J. 367—84 Ind. Cas. 719. When a District Magistrate has referred a case for trial to a particular Sub-divisional Magistrate the latter has no power to transfer it again to any other Magistrate subordinate to him and such order of transfer is *ultra vires*, 3 Cr. L. Rev. 184; 23 A.L.J. 133. It is true that the powers given by this section are very large but for this very reason they should be most carefully exercised, and Magistrates of Districts should use the extensive discretion given to them to divert the course of procedure from its ordinary channel, only when it is absolutely necessary in the interest of justice that they should do so, 3 A. 749; 20 Cr. L.J. 402. A case may be transferred at any stage, 24 W.R. (Cr.) 4; Welw II, 631. The provisions of this section are applicable to security proceedings under Chapter VIII, proceedings under Chapter XII, and maintenance proceedings under S. 488, 8 C. 851; 22 C. 898; 28 C. 709; 5 C.W.N. 686; 26 M. 183; 31 C. 350; 35 C. 243; 39 C. 164; 20 C. 513; 41 M. 246; 24 A. 161; 10 C.W.N. 1096; 37 C. 91, but this section is not applicable to proceedings submitted under S. 349, *supra*, 38 B. 719; but see Welw II, 630 and also the transfer of a case remanded by a Sessions Judge for further inquiry is not permitted, 8 C.L.J. 241; 11 C.W.N. 316.

SUB-SECTION (1).—Power is expressly given to the Sessions Judge to withdraw a case or to recall a case made over by him to an Assistant Sessions Judge subordinate to him. There was a doubt as to whether he could withdraw or recall a case once made over to an Assistant Sessions Judge for trial. Any application to the Sessions Judge is not to be by an official or demi-official letter from the District Magistrate as representing the Crown but by the Public Prosecutor moving in open Court for transfer under this section, 22 A.L.J. 1103—26 Cr. L.J. 367—84 Ind. Cas. 719.

SUB-SECTION (2).—A Magistrate who is subordinate to the Sub-divisional Magistrate is also subordinate to the District Magistrate for purposes of this section, 14 M. 399. A District Magistrate and a Sub-divisional Magistrate have co-ordinate authority over Magistrates subordinate to the latter; and therefore where Sub-divisional Magistrate refused to transfer a case, a District Magistrate can entertain an application for transfer and also transfer the case; but in so doing he cannot examine the reasons given by a co-ordinate authority and find that authority to be wrong and has transferred or refused to transfer on insufficient grounds, 26 M. 130; 13 Cr. L.J. 782—17 Ind. Cas. 414; 8 L.W. 372; 40 M. 791; 14 M. 399. Under this section a Sub-divisional Magistrate has power to withdraw any case pending before a Subordinate Magistrate. But the section cannot be so read as to imply that after a District Magistrate has transferred a case from one file to the file of another Magistrate, a Sub-divisional Magistrate who is subordinate to the District Magistrate, has jurisdiction to nullify that order by ordering a fresh transfer of the case to his own file. There is a clash of jurisdiction and authority in a case like this and the order of transfer by the Sub-divisional Magistrate was *ultra vires*, 47 A. 388. An Additional District Magistrate is subordinate to the District Magistrate for purposes of this section, 34 C. 218. An Additional Chief Presidency Magistrate is subordinate to the Chief Presidency Magistrate who has power under this section to make an order withdrawing a case made over by the former to another Presidency Magistrate for disposal, 31 C. 820 where 40 M. 791 and 14 M. 399 are relied on and 26 M. 130 not followed. It is only after withdrawing a case pending before a subordinate Magistrate, that a District Magistrate can pass orders in the case, 30 C. 449. The transfer of a case means the whole-

case. After the transfer of the case a Magistrate ceased to exercise any jurisdiction and had no power to issue warrants, 22 C. 898; 27 C. 979; 30 C. 449; 4 C.W.N. 242; 3 C.W.N. 480; 3 C.L.J. 87, but see 39 C. 119 which took a different view. Before a case is transferred the question has been often raised whether notice should be given to the parties concerned; there is nothing in the section as to the giving of notice but on the general principle, no order to the prejudice of a party should be made without hearing him; all the High Courts are agreed that notice should be given and an order passed without notice is liable to be set aside, 39 M.L.J. 714; 6 M.L.T. 14; 8 M.L.T. 222; 22 Cr. L.J. 199; Weir II, 691, 692; 22 B. 549; 21 Bom. L.R. 276-20 Cr. L.J. 320-50 Ind. Cas. 496; 6 Bom. L.R. 886; Ratanlal 580, 460, 655; 8 C. 393; 7 C.W.N. 114; 8 C.L.J. 241; 7 C.W.N. 97; 28 A. 421; 3 A. 749; 13 Cr. L.J. 32-13 Ind. Cas. 224. Omission to issue a notice to the accused before ordering transfer is irregular, but not illegal. The section is general and although as a rule of practice it is desirable that notice should be given, it cannot be said that the law is mandatory on the point and omission to do so is in itself a reason for setting aside the order of transfer, 2 Pat. 333; 27 Cr. L.J. 411-93 Ind. Cas. 75, but when a transfer is made *suo motu* by the Magistrate for administrative purposes no notice is necessary, 24 M. 317.

SUB-SECTION (4).—This sub-section is newly added and gives wider powers by way of recalling a case made over by him under S. 192 (2) and inquire into it himself.

SUB-SECTION (5).—It is imperative under this sub-section to record reasons for making the order of transfer and when an order is made without giving notice it is liable to be set aside by the High Court, 6 M.L.T. 14-1 Ind. Cas. 889; Weir II, 686; 16 Cr. L.J. 626-30 Ind. Cas. 450; 26 Cr. L.J. 221-83 Ind. Cas. 1005; 21 L.W. 384; (1924) M.W.N. 873 but it was held in 34 C. 918 that the omission to state reasons is only an irregularity and is not a material ground for setting aside the order, see also 9 Cr. L.J. 310-1 Ind. Cas. 553; 28 A. 421; 12 Cr. L.J. 437-11 Ind. Cas. 621; 11 Cr. L.J. 150-4 Ind. Cas. 1025.

SUB-SECTION (6).—The power of transfer was limited before to the case of petty thefts which a village-headman was empowered to try under Regulation IV of 1821, 26 M. 394; 15 M. 94, but Regulation XI of 1816 is also included now. Trivial cases relating to abusive language and inconsiderate assaults or affrays before village-headman can be transferred under this section and the hardship of parties moving the High Court for the transfer of such petty cases is removed now.

CHAPTER XLIVA,

SUPPLEMENTARY PROVISIONS RELATING TO EUROPEAN AND INDIAN BRITISH SUBJECTS AND OTHERS.

This Chapter is new, and was added by Act XII of 1923 (Racial Distinctions). It contains provisions relating to European and Indian British subjects in cases in which Chapter XXXIII of the Code does not apply. Under this Chapter the accused might claim the *status* of European British subject with a view to a limited sentence, or with a view to the right conferred by S. 275, *supra* of claiming a European Majority on the jury. Under this Chapter it is for the accused to claim the *status* of European British subject, but if he fails to do so, his failure will not debar him from urging that the conditions mentioned in clauses (a) or (b) of S. 443 (1), *supra* exist. These clauses refer not only to the *status* of the accused person, but to the *status* of the two persons; one of them cannot be the accused person and the second clause neither, need be. It seems unreasonable that the omission of the accused person to avail himself of the right to claim the benefit of S. 528A concludes the matter. The right of appeal given to Local Government under S. 449 (1), *supra*, supports this view. What is therefore required is proof of conditions mentioned in S. 443, *supra*, and not evidence that any person concerned has preferred and substantiated a claim to particular *status*, 52 C. 317.

From a consideration of S. 275, *supra*, this chapter the following propositions may be deduced: (1) An Indian British subject claiming to be dealt with as such must put forward his claim before the Magistrate and this applies all Magistrates including Presidency Magistrates. (2) If the Magistrate rejects the claim and tries the accused, from the sentence or order an appeal lies. This applies to the Presidency Magistrates also. (3) If the Magistrate rejects the claim and commits the accused, such claim may be repeated at the Court of Session, but not in the High Court exercising Ordinary Original Criminal Jurisdiction, the High Court not being a Court of Session within the Code. (4) If the Court of Session rejects the claim, and tries the accused, the decision, shall form a ground of appeal from the sentence or order passed. (5) If the claim is made before a Presidency Magistrate and rejected, and the accused committed to the High Court, there is no provision of law for putting forward the claim again and under S. 275, *supra* he cannot claim for being tried by a jury the majority of whom should be Indians or Europeans as the case may be. (6) When no such claim was put forward before the Magistrate the claim cannot be made before the High Court and S. 529B is a bar to the assertion of the claiming in any subsequent stage, 51 C. 980 at 989.

528A. (1) *Where, in any case to which the provisions of Chapter XXXIII do not apply, any person claims to be dealt with as an European or Indian British subject, or where any person claims to be dealt with as an European (other than an European British subject) or an American, he shall state the grounds of such claim to the Magistrate before whom he is brought for the purpose of the inquiry or trial; and such Magistrate shall inquire into the truth of such statement and allow the person making it a reasonable time within which to prove that it is true, and shall then decide whether he is or is not an European British subject or an Indian British subject, or an European or an American, as the case may be, and shall deal with him accordingly.*

Procedure of claim of a person to be dealt with as European or Indian British subject or as European or American.

(2) *When any such claim is rejected by the Magistrate and the person by whom it was made is committed by the Magistrate for trial before the Court of Session, and such person repeats the claim before such Court such Court shall, after such further inquiry, if any, as it thinks fit, decide the claim, and shall deal with such person accordingly.*

(3) *When any Court before which any person is tried rejects any such claim as aforesaid, the decision shall form a ground of appeal from the sentence or order passed in such trial.*

This section is expressly limited in its operation to a case to which the provisions of Chapter XXXIII do not apply, and the next section 529 B relates only to such cases as are contemplated by this section and S. 449, *supra* under which the right of appeal is claimed, is under Chapter XXXIII; consequently this and the next section can have no application to S. 449, *supra*, 52 C. 317.

SUB-SECTION (3).—Unlike in S. 449 (2), *supra*, the rejection of the claim to be dealt with as a European or Indian British subject is not open to appeal immediately but is subject to a ground of appeal from the conviction.

528B. *If in any such case an European or Indian British subject or an European (other than an European British subject) or an American does not claim to be dealt with as such by the Magistrate before whom he is tried or by whom he is committed, or if, when such claim has been made before and rejected by the committing Magistrate, it is not repeated before the Court to which such person is committed, he shall be held to have relinquished his right to be dealt with as an European British subject or an Indian British subject, or an European or an American, as the case may be, and shall not assert it in any subsequent stage of the case.*

Failure to plead status a waiver.

An European British subject who waived his right to be dealt with as such may re-consider and cancel the waiver before he is called on to enter upon his defence. There is no provision to the effect that a right once waived cannot be re-asserted. 50 C. 689; see also 52 C. 337. The effect of a waiver is that the trial is to be held under the ordinary law.

528C. *Where a person, not being an European British subject, is dealt with as an European British subject or, not being an Indian British subject, is dealt with as an Indian British subject or, not being an European (other than an European British subject) or American, is dealt with as an European or American, and such person does not object, the inquiry, commitment, trial, or sentence, as the case may be, shall not, by reason of such dealing, be invalid.*

Trial of person as belonging to class to which he does not belong.

528D. (1) *Unless there is something repugnant in the context, all enactments made by the Governor General in Council or the Indian Legislature which confer on Magistrates or on the Court of Session jurisdiction over offences shall be deemed to apply to European British subjects, although such persons are not expressly referred to therein.*

Application of Acts conferring jurisdiction on Magistrates or Courts of Session.

(2) *Nothing in this section shall be deemed to authorise any Court to exceed the limits prescribed by this Code as to the amount of punishment which it may inflict on an European British subject or to confer jurisdiction on any Magistrate, of the second or third class for the trial of such subjects.*

See S. 29A *supra* as to the trial of European British subjects by second and third class Magistrates.

CHAPTER XLV.

OF IRREGULAR PROCEEDINGS.

529. *If any Magistrate not empowered by law to do any of the following things, namely:—*

Irregularities which do not vitiate proceedings.

(a) *to issue a search-warrant under section 93;*

(b) to order, under section 155, the police to investigate an offence;

(c) to hold an inquest under section 176;

(d) to issue process, under section 186, for the apprehension of a person within the local limits of his jurisdiction who has committed an offence outside such limits;

(e) to take cognizance of an offence under section 190, sub-section (1), clause (a) or clause (b);

(f) to transfer a case under section 192;

(g) to tender a pardon under section 337 or section 338;

(h) to sell property under section 524 or section 525; or

(i) to withdraw a case and try it himself under section 528;

erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.

SCOPE OF THE SECTION.—This section deals with irregularities which do not vitiate proceedings. The remedying of irregularities is familiar to most systems of jurisprudence, 25 M. 61 (P.C.) An irregularity may be a non-compliance in a minor matter or it may be a non-compliance in a substantial matter. In the former case the defect in the proceedings will generally be cured, but in the latter they cannot be cured. This section deals with acts done by a Magistrate in no way empowered by law to do those acts. It has no reference to a Magistrate empowered otherwise under the Code to do things but not possessing jurisdiction over the particular offence, 20 A. 30.

CLAUSE (a).—Section 98, *supra* deals with search of house suspected to contain stolen property, forged documents, false seals or counterfeit stamps or coin or instruments for counterfeiting coins, stamps or for forgery.

CLAUSE (b).—Section 155 (2) refers to investigation in non-cognizable cases by a police-officer receiving an order to do so from a Magistrate. When a police-officer receives information of the commission of a non-cognizable offence he may report the case to the Magistrate for orders and the Magistrate may without taking cognizance order an investigation. S. 155 (2) read with this clause leaves no doubt in the matter, 6 M.L.T. 289.

CLAUSE (c).—This sub-section saves only proceedings before a Magistrate taken on a complaint of which cognizance is taken without authority. But this will not have the effect of making the complainant liable for prosecution for a false complaint by reason of the Magistrate's having taken cognizance of it without power to do so. 5 Pat. 347.

CLAUSE (f).—If a Magistrate not empowered to transfer a case from the file of one Magistrate to another does so this clause will cure such an irregularity. 35 C. 869; 4 C.W.N. 821; 16 C.W.N. 835; *Wair* II, 152 and 699; transfer of security proceedings by a Magistrate not empowered to do so was held to be cured by this clause, 35 C. 243. So also proceedings under S. 145 *supra*, 35 C. 370; 2 C.L.J. 814; 5 C.W.N. 866.

CLAUSE (g).—When a pardon was tendered and accepted in good faith, the fact that the Magistrate had no power to tender such a pardon is a defect which could be cured under this clause. Where a Magistrate had no jurisdiction to tender a pardon in respect of offences inquired into in a different district, it was held that his action in that respect was not cured by this clause, 20 A. 30.

GOOD FAITH.—Section 9 (20) of the General Clauses Act X of 1857 defines good faith thus. A thing shall be deemed to be in *good faith* when it is in fact done honestly whether

it is done negligently or not. S. 52, I.P.C. defines *good faith* thus : " Nothing is said to be done or believed in good faith which is done or believed without due care and attention" and S. 4 (2), *supra*, enacts that all words and expressions used herein and defined in the I.P.C. and not herein before defined shall be deemed to have the same meanings respectively attributed to them by that Code.

Irregularities
which vitiate pro-
ceedings.

530. If any Magistrate, not being empowered by law in this behalf, does any of the following things—
namely :—

- (a) attaches and sells property under section 88 ;
 - (b) issues a search-warrant for a letter, parcel or other thing in the Post Office, or a telegram in the Telegraph Department ;
 - (c) demands security to keep the place ;
 - (d) demands security for good behaviour ;
 - (e) discharges a person lawfully bound to be of good behaviour ;
 - (f) cancels a bond to keep the peace ;
 - (g) makes an order under section 133 as to a local nuisance ;
 - (h) prohibits, under section 143, the repetition or continuance of a public nuisance ;
 - (i) issues an order under section 144 ;
 - (j) makes an order under Chapter XII ;
 - (k) takes cognizance, under section 190, sub-section (1), clause (c), of an offence ;
 - (l) passes a sentence under section 349, on proceedings recorded by another Magistrate ;
 - (m) calls, under section 435, for proceedings ;
 - (n) makes an order for maintenance ;
 - (o) revises, under section 515, an order passed under section 514 ;
 - (p) tries an offender ;
 - (q) tries an offender summarily ; or
 - (r) decides an appeal ;
- his proceedings shall be void.

SCOPE OF THE SECTION.—This section deals with irregularities which vitiate proceedings unlike the last section. If any of the acts mentioned in this section is done by a Magistrate not empowered by law so to do his proceedings are void and the opening words of S. 537 *infra* subject to the provisions hereinbefore contained refer to the provisions of this section. See 1 Bom. L.R. 27. It refers only to Magistrates mentioned in the last four classes of Criminal Courts mentioned in S. 6 *supra*, and makes no reference to the first class of Criminal Courts, namely, Court of Session. If a Sessions Judge tries an offender or decides an appeal not empowered in this behalf, his proceedings may come under this section, even though this section in terms does not apply to him.

CLAUSE (d).—A defect in the issue of a preliminary notice is not one of mere irregularity but falls under this section being a question of jurisdiction, 41 M. 216 ; (1913) M.W.N. 751 ; 31 C. 350 ; 25 A. 151.

CLAUSE (e).—This clause deals with discharge of a person lawfully bound to be of good behaviour. It is not clear why no similar provision is made dealing with the discharge of a person bound over to keep the peace. Clauses (c) and (d) deal with demands to keep the peace and demands to be of good behaviour. But in the case of a discharge of a person, bound over to keep the peace there is no corresponding provision.

CLAUSE (f).—In S. 125 *supra* the words "or of good behaviour" were added in the 1898 Code. But perhaps through some over-sight these words were not added in this clause after the words "to keep the peace". Thus we find no provision made in cases where a Magistrate not being empowered by law cancels a bond to be of good behaviour.

CLAUSE (j).—This clause refers only to cases where a Magistrate is not competent by virtue of the position he holds or powers vested in him to try a case of the character referred to in S. 145. 5 C.W.N. 683.

CLAUSE (k).—Taking cognizance of an offence *suo motu* would render the proceedings void if the Magistrate is not empowered to do so, 1 C. W. N. 105. See 23 C.W.N. 518; 39 C. 119; 29 C. 412 as to taking cognizance of a second complaint when the first is still pending.

CLAUSE (l).—The Magistrate to whom the records are sent up must deal with the case himself. He cannot transfer the case to another Magistrate and if he does so, the proceedings of the latter are void, 2 Cr. L. J. 464.

CLAUSE (o).—An order for forfeiture of a bond made by a Court other than the Court which took the bond is void under this clause, 16 Bom. L. R. 84.

CLAUSE (p).—Trial by a Court not duly empowered is a nullity, 8 B. 307; a commitment made without jurisdiction is void and need not be set aside, 11 C. L. R. 85; conviction by a Bench of Magistrates all the members of which did not hear the evidence is void, 38 M. 304. Where the facts disclosed an offence within the jurisdiction of the Magistrate it is a complete fallacy to say he is not empowered by law to try the person charged for the offence which is within his jurisdiction, because the facts disclosed a more serious offence which is beyond his jurisdiction. He is expressly so empowered; whether in doing so he adopts a proper course, is another question. No doubt it is improper on the part of the Magistrate to intentionally ignore circumstances of aggravation which show that an offence beyond his jurisdiction was in fact committed as well as an offence within his jurisdiction. But in such a case the proceedings would not be void, 2 Rang. 455 at 458 where 13 B. 502; 24 M. 675 are followed and 23 C. W. N. 518 distinguished.

CLAUSE (q).—Where a Magistrate deliberately disregards the offence actually complained of and tries the case summarily there is no question of irregularity but his proceedings are void, 5 C. W. N. 282; 24 M. 675; 26 Cr. L. J. 1589—90 Ind. Cas. 439. No tribunal can properly clutch at jurisdiction by intentionally ignoring facts of aggravation which make the offence really cognizable only by a higher tribunal; 25 Cr. L. J. 1193—62 Ind. Cas. 57.

CLAUSE (r).—An accused was sentenced to five years' rigorous imprisonment by a Magistrate specially empowered under S. 80 *supra* and his petition of appeal was sent from jail, to the Sessions Judge instead of the High Court under S. 408 (b) *supra* and was summarily rejected by the Sessions Judge under S. 421 *supra*. It was held that under the provisions of this clause the proceedings of the Sessions Judge were void and he acted without jurisdiction and the accused had a right of appeal to the High Court. 2 Rang. 386.

531. No finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, Proceedings in trial or other proceeding in the course of which it wrong place. was arrived at or passed, took place in a wrong sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice.

SCOPE OF THE SECTION.—This section applies solely to cases in which there is no jurisdiction by reason of the inquiry, trial or other proceeding being held in wrong local area, 16 B. 200, and refers to districts, divisions, sub-divisions and other local areas, 16 C. 687. The policy of the Code is to uphold in most cases the orders passed by Criminal Court which were lacking in local jurisdiction or which had committed illegalities or irregularities unless a failure of justice has been occasioned or is likely to be occasioned through such want of jurisdiction or such illegalities or irregularities, 42 M. 791 at 792, 793. This section applies to a case where a Magistrate has authority to commit but has no territorial jurisdiction in the place where the offence is alleged to have been committed, 26 M. 640 at 643. The manifest intention of the section is to provide against the contingency of a finding, sentence or order regularly passed by a Court in the case of an offence committed outside its local area, being set aside when no failure of justice has taken place. There is nothing in the language of the section to confine its operation to cases where the offences committed within the jurisdiction of a Court are tried by such Court outside the limits of the local area of its jurisdiction, 30 M. 94. A point of jurisdiction can be raised at any stage, 26 Cr. L.J. 49-83 Ind. Cas. 577. This section only applies to defects as to local jurisdiction and does not apply to cases where the order, is passed by a Court not empowered make such orders unless covered by S. 529, *supra*, 16 Bom. L.R. 84-15 Cr. L.J. 295-23 Ind. Cas. 503.

TRIAL IN A WRONG SESSIONS DIVISION, ETC.—The policy of the Criminal Procedure Code as shown by Ss. 531-538 is to uphold in most cases the orders passed by the Criminal Court which was lacking in local jurisdiction or which has committed illegalities or irregularities unless failure of justice has been occasioned through such want of jurisdiction. In 35 M. 387 it was held that if a Sessions Court to which a commitment has been made has no local jurisdiction over a place where the offence took place, such commitment should be quashed (though of course after the trial had taken place to its termination), S. 531 might cure the defect, 42 M. 791 at 792-793. The Madras High Court in this case upheld a commitment to the High Court Sessions by the Chief Presidency Magistrate with regard to an offence which took place in the Chingleput District within the cognizance of the Sessions Court of Chingleput. See also 26 M. 640; 17 M. 402; 8 B. 312; 16 B. 200; 10 B. 274 and 18 A. 350. An order of commitment to the Sessions Court is an order under this section and when the Sessions Court had no jurisdiction to try the offence the High Court in revision can set aside such commitment, 26 Cr. L.J. 49-83 Ind. Cas. 577.

SESSIONS DIVISION, DISTRICT, ETC.—See sections 7 and 8 *supra*.

LOCAL AREA.—See section 188 *supra*. The expression "other local area" in this section was added in consequence of the decision in 13 B.L.R. Appx. 4-21 W.R. (Cr.) 55.

TRIAL OR OTHER PROCEEDING.—It is a general and well known rule that all judicial acts exercised by persons whose judicial authority is limited to a particular locality should be done within the locality to which such authority is limited. Where a criminal appeal was presented to a Sessions Judge at the place within his division but was heard and disposed of by him within the limits of his civil but outside the local limits of his criminal jurisdiction, it was held that this section was applicable, as no failure of justice has been occasioned by such irregularity, 17 A. 35 (F.B.). An order passed under S. 107 *supra* against a person is not invalid merely on the ground that there was no evidence on record to show that the person informed against was residing within the local limits of the Magistrate's jurisdiction when proceedings were initiated, No objection having been raised in the trial Court, irregularity, if any, is cured by this section. 27 Cr. L.J. 1132-97 Ind. Cas. 652.

UNLESS THE ERROR HAS OCCASIONED A FAILURE OF JUSTICE.—If it appears that the constitution and procedure of the Court in which the trial ought to have taken place are different from the constitution and procedure of the wrong Court in which the trial was held the accused would necessarily be prejudiced, 13 B.L.R. Appx. 4; where no objection as to the jurisdiction of the Court was taken and the accused failed to show that he had been prejudiced in any way the High Court declined to interfere, 21 W.R. (Cr.) 83; 15 M.L.J. 330. The fact that objection was taken as to jurisdiction at a comparatively early stage of the

proceeding was not conclusive proof that the accused was prejudiced by the irregularity, 35 C.L.J. 200. See the explanation to S. 537, *infra* on this point.

532. (1) If any Magistrate or other authority purporting to exercise powers duly conferred, which were not so conferred, commits an accused person for trial before a Court of Session or High Court, the Court to which the commitment is made may, after perusal of the proceedings, accept the commitment, if it considers that the accused has not been injured thereby, unless, during the inquiry and before the order of commitment, objection was made on behalf either of the accused or of the prosecution to the jurisdiction of such Magistrate or other authority.

When irregular commitments may be validated.

(2) If such Court considers that the accused was injured, or if such objection was so made, it shall quash the commitment and direct a fresh inquiry by a competent Magistrate.

SCOPE OF THE SECTION.—This section applies to a case where a Magistrate or other authority purporting to exercise the powers duly conferred, which are not so conferred, has committed an accused person for trial to a Court of Session and does not apply to a case where the Court of Session considers that a commitment made to it by a competent Magistrate is illegal, 43 B. 147 at 153. This section applies only to a commitment to a Court of Session. It cannot apply to the case of a want of certificate of the political agent to try an offence in British India when the trial begins, 12 Bom. L.R. 637—11 Cr. L.J. 513—7 Ind. Cas. 934. It does not deal with cases in which the defect in the committal arises from want of territorial jurisdiction, 20 Cr. L.J. 316—51 Ind. Cas. 176, this section refers to cases where the Magistrate is competent to deal with the case within his local jurisdiction but has no power to commit for some reason other than that of local jurisdiction, 16 B. 200; 26 M. 640; 17 M. 402. Where a person has been put on his trial and pleaded to the charge, the commitment cannot be quashed on account of any irregularity in the commitment. The Sessions Judge has jurisdiction to try a case which has been committed to him for trial and if the trial is legally held any irregularity in the commitment would not vitiate the proceedings of the Sessions Judge. 26 Cr. L.J. 1560—90 Ind. Cas. 440 where 12 C.L.R. 120 is followed.

PURPORTING TO EXERCISE POWERS DULY CONFERRED.—These words occurring at the beginning of the section appears to have reference to S. 206 of the Code and to signify "power to commit for trial," 17 M. 402 at 404; the defect contemplated is one personal to the Magistrate, *i.e.*, not being empowered to commit and not to a defect in his proceedings. When a Magistrate is duly empowered to commit, this section has no application whatever. Where a second-class Magistrate not being empowered to commit the case referred to a superior Magistrate under S. 346 *supra* and that Magistrate without examining the witnesses *de novo* committed the accused to the Court of Session it was held that the commitment was not illegal and this section had no application, 12 C.W.N. 136—6 Cr. L.J. 329.

SUB-SECTION (2).—Where a trial has been held under an erroneous commitment and no actual failure of justice has been occasioned by such error the judgment will not be reversed, 7 C. 662. The law contemplates that in serious cases of which a Court of Session may take cognizance commitment made on it, the accused person should have some information of the case he has to answer.

533. (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 tendered or has been received in evidence, finds that **Non-compliance with provisions of section 164 or 364.** any of the provisions of either 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; and, notwithstanding anything contained in the Indian Evidence Act, 1872, section 91, such statement shall be admitted, if the error has not injured the accused as to his defence on the merits.

(2) The provisions of this section apply to Courts of Appeal, Reference and Revision.

SCOPE AND OBJECT OF THE SECTION.—This section occurs in the Chapter relating to irregular proceedings and their effect, and it is not intended to override the law of evidence. The object of the section is to prevent justice being defeated by the Magistrate's failure to comply with the provisions of S. 164 or S. 364 *supra* and to prevent the exclusion of the recorded statement defective in form and to permit oral evidence to be adduced to remedy the defect. It is quite plain that this section can only be invoked when there is some written record but that record is defective through some error in not strictly complying with the provisions of S. 164 or 364. The object apparent from the words of the section is to take such records out of the excluding provisions of S. 91 of the Indian Evidence Act, 45 M. 230 at 235. This section is intended to apply to all cases in which the directions of law have not been fully complied with. It gives legal sanction to the maxim *omnia præsumentur rite esse acta*, 23 B. 221 at 223; 26 Cr. L.J. 1458=89 Ind. Cas. 1026. A defect in form is curable, but a defect in substance is not. If the warning is given under sub-section (3) of S. 164, but the Magistrate failed to embody the fact in his memorandum such a defect is curable. But if the warning had not been in fact given the defect cannot be cured under this section as such a statement could not be held to have been duly made. 27 Cr. L.J. 515=93 Ind. Cas. 978. See also, 26 Cr. L.J. 1074=88 Ind. Cas. 18. It is more than doubtful whether an omission to prepare a record of the examination of an accused person under S. 364, *supra* can be cured by this section, 5 Pat. L.J. 430 at 436. This section does not apply to a case where no record whatever has been made of a confession. 35 A. 260.

CONFESSION RECORDED OR PURPORTING TO BE RECORDED.—Under S. 164, *supra* it is not obligatory on a Magistrate holding an investigation or preliminary inquiry to record in writing a confession made to him by an accused person and such confession may be proved by oral testimony of the Magistrate, 45 M. 230.

PROVISIONS OF EITHER OF SUCH SECTIONS HAVE NOT BEEN COMPLIED WITH.—Failure to warn an accused before recording a confession is a defect which can be cured by this section, 22 Cr. L.J. 200=60 Ind. Cas. 56; 9 C.L.J. 55; 40 C. 873; failure of a Magistrate to append the memorandum at the foot of a confession as to its voluntary character can be cured, 22 M. 15; 8 C.W.N. 22, but where the Magistrate recording a confession certifies that the confession was not voluntary, this section cannot apply, 17 Bom. L.R. 898. Where the confession is recorded in a narrative form without recording every question put and every answer given in the exact language used, the defect can be cured by examining the Magistrate, 9 C. L.J. 55 following 14 C. 539. When the defect in the recording of the confession or other statement of an accused is *one not of substance but of form only*, this section applies, 2 C.W.N. 702. No distinction can be drawn between omissions to comply with the law and infractions of it. This section is intended to apply to all cases in which the directions of the law have not been fully complied with, 23 B. 221 at 223. This section is not limited to any particular

kind of non-compliance with S. 364, 21 B. 495 ; 3 Pat. L.J. 291. This section will not render a confession admissible when no attempt at all had been made to conform to the imperative provisions of S. 164, 9 M. 224 ; 23 B. 221 ; 15 C. 595 ; 17 C. 862.

IF ERROR HAS NOT INJURED THE ACCUSED IN HIS DEFENCE.—This section so far from affording a remedy for a defect expressly excludes from the operation of the section errors which have injured the accused in his defence on the merits. The question whether the accused has been injured has to be determined on the merits of each particular case, 23 B, 221.

Omission to give information under section 447. **534.** *An omission to inform under section 447 any person of his rights under Chapter XXXIII shall not affect the validity of any proceeding.*

The change in the language of the section was due to the Amending Act XII of 1929. Chapter XXXIII deals with special rights of European and Indian British subjects and S. 447 makes it imperative to inform the accused of his special rights. See 3 Rang. 220.

535. (1) No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed, unless, in the opinion of the Court of appeal or revision, a failure of justice has in fact been occasioned thereby.

Effect of omission to prepare charge.

(2) If the Court of appeal or revision thinks that a failure of justice has been occasioned by an omission to frame a charge, it shall order that a charge be framed, and that the trial be recommenced from the point immediately after the framing of the charge.

This section and S. 292 *supra* seem to cover the same ground S. 292 *supra* deals also with the absence of a charge and applies to courts of confirmation. The procedure to be followed in cases where prejudice is shown by the accused is not clearly laid down in S. 292 *supra* as in this section. This section is not limited to trials where no charge at all has been framed but is also applicable to cases in which no charge has been framed for the offence of which a person has been convicted, 41 C.L.J. 475—28 Gr. L. J. 1279—88 Ind. Cas. 1055. This section is intended to legalise convictions had without framing a charge, but a mis-joinder of charges will not be cured by this section, 24 C.W.N. 758. When an accused person did not object at the trial on the ground of omission to draw up a separate charge for each offence but clearly understood what he was being tried for, and was not in any way prejudiced, this section was held applicable, 41 C. 66.

The words "*merely on the ground that no charge has been framed*" mean a case where the offence being a petty one and the evidence being fairly taken the Court framed no charge at all. But where the Court frames a charge however erroneous, then it cannot be said that the conviction is invalid merely on the ground that no charge was framed bringing the case under this section, 40 C. 168.

Trial by jury of offence triable with assessors. **536.** (1) If an offence triable with the aid of assessors is tried by a jury, the trial shall not on that ground only be invalid.

- (2) If an offence triable by a jury is tried with the aid of assessors, the trial shall not on that ground only be invalid, unless the objection is taken before the Court records its finding.

Trial with assessors of offence triable by jury.

SCOPE OF THE SECTION.—In enacting this section, the Legislature must be taken to have had in mind cases where the procedure had been wrong throughout. Literally read, sub-section (2) of this section covers only cases where objection is taken, but not to cases where there was no opportunity to take the objection. 22 Bom. L. R. 1241.

SUB-SECTION (1).—Where an offence triable by assessors is tried by a jury the trial is not on that ground only invalid, but the Judge's charge to the jury is to be treated as his judgment in the case, 24 W. R. (Cr.) 30, and an appeal from the conviction will lie on facts, 25 M. 243—*Per Benson, J.* but the other learned Judge who heard the appeal, *Bhashyam Ayyangar, J.*, took a different view, and held that no appeal lay on facts but only on a point of law under S. 419, *supra*. The two learned Judges however agreed as to the reduction of the sentence passed on the appellant while confirming the conviction, and the case did not go before a third Judge on the question on which the two learned Judges differed. In an earlier case in *Wair II, 709* a Bench of the Madras High Court held that when a case triable with the aid of assessors was wrongly tried by a Judge with a jury, the proper course for the appellate Court was to treat the charge to the jury as the opinion of assessors or to order a re-trial if there was a possibility of the jury having gone wrong on the facts. See S. 269 (3) where the jurors are to sit as assessors in a case in which the accused is charged in the same trial with several offences some of which are triable by jury and some with the aid of assessors. The law makes no difference as to the procedure at the trial, between a trial by a jury and one with the aid of assessors except as to summing up in the case of the former, and the manner in which the verdict in the former and the opinion of the assessors in the latter or respectively taken. It is at this latter point there is a departure of ways and if the accused who is tried does not interfere at that crucial point and get the procedure applicable to trials with the aid of assessors enforced, he cannot be heard to complain, 33 B. 423.

SUB-SECTION (2).—The words used in the section are "offence triable by a jury" while in section S. 419, *supra* the words used are "trial was by jury" Trial by jury is a privilege carrying with it certain liabilities. If an offence triable by a jury is tried with the aid of assessors, then provided objection is taken before the Court records its finding, the trial will be invalid. The accused has been deprived of a valuable privilege which is open to him up to the last stage of the case to preserve. But the converse is different. If the accused obtains the privilege to which strictly speaking, he is not entitled, it is not presumed that he will take any objection. He has the chance of a verdict which can only be upset under certain special circumstances. If the verdict is against him he cannot turn round and claim an appeal on matters of fact. 25 B. 680 at 689. See 27 Cr. L. J. 1180 at 1103—27 Ind. Cas. 364. Assessors can never act as a jury although the jurors can act as assessors. See S. 269 (3), *supra*. So trial with assessors of an offence triable by jury will be a valid trial with the aid of assessors.

UNLESS THE OBJECTION IS TAKEN.—Where an offence was tried with the aid of assessors without any objection being taken and the assessors were for acquittal but the Judge differing from their opinion convicted the accused and it was contended in appeal that the trial ought to have been by jury and that the accused were prejudiced because the assessor's opinion ought to be treated as the verdict of the jury which was conclusive, the High Court overruled the objection thus: "It was contended in appeal that full effect is to be given to the words of the sub-section (2), only in the case in which the assessors agree with the Judge in finding the accused guilty. If it had been the intention of the Legislature so to limit the operation of the sub-section, they would have used words such as are used in the next S. 537 *infra* to make it clear that the omission to take the objection at the trial is to conclude the prisoner only in the case above stated. The omission is fatal to the appellant's contention". 23 M. 632 at 635.

Finding or sentence when reversible by reason of error or omission in charge or other proceedings.

537. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account—

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or

* * * * *

(c) of the omission to revise any list of jurors or assessors in accordance with section 324, or

(d) of any misdirection in any charge to a jury

unless such error, omission, irregularity, or misdirection has in fact occasioned a failure of justice.

Explanation.—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.

AMENDMENT.—Clause (1) (b) has been omitted as also the word "want" in sub-section (d) as unnecessary. The illustration which gave rise to unnecessary difficulty in construing the section has been omitted now.

SCOPE AND OBJECT OF THE SECTION.—The remedying of irregularities is familiar to most systems of jurisprudence but it would be an extraordinary extension of such a branch of administering of Criminal Law to say that when the Code positively enacts that such a trial as that which has taken place shall not be permitted, that this contravention of the Code comes within the description of error, omission or irregularity. It is impossible to hold a disobedience of an express provision of law as to the mode of trial as a mere irregularity, 25 M. 61 (P.C.) In all penal matters the utmost strictness as to procedure, has to be observed. This section does not apply to an infringement of a statutory requirement. It only applies to errors, omissions or irregularity of a formal character which may happen by accident or oversight and does not cover a substantial departure from the mode of conducting a trial in accordance with law, 4 Lah. 376; 25 Cr. L.J. 68—75 Ind. Cas. 980. There is a distinction between a case in which the trial itself is contrary to law in which event it is no trial at all under the Code, and a case in which the trial is in accordance with law but irregularities occur in the method of conducting it. In the latter case the provisions of this section apply, and the finding can be reversed if the irregularity has in fact occasioned a failure of justice, 26 B. 523; when an order is not made by a Court of competent jurisdiction this section has no application 16 Bom. L.R. 84; 19 Cr. L.J. 961—47 Ind. Cas. 813. This section refers to errors of procedure and not to substantive errors of law, 3 B. 200. This section deals merely with irregularities in procedure so far as such irregularity involves breaches of the rules of procedure provided by the Code itself. 5 Pat. L.J. 61 at 63. A material irregularity proceeding from the disregard of the express provision of the law, is nothing short of an illegality, and as such is not curable, under this section. 53 C. 159; 28 C.W.N. 119. This section is not happily worded, but it was never intended to allow a Magistrate to override the clear provisions of the Code. It is intended to prevent a mere technicality from interfering with the course of

justice, the error, omission, etc., being one which had escaped all parties at the beginning of the proceeding, 13 A.L.J. 345. The object of the section is to cure mere irregularities and not to excuse a total disregard of law as this section is expressly made subject, to the provisions hereinbefore contained, in the Code, 9 C.W.N. 909; and this section is not intended to apply to a case which has not been finally disposed of, 23 C. 983. This section is not intended to allow a Magistrate to override the clear provisions of the Code. It was intended to prevent a mere technicality from interfering with the course of justice, the error, omission, etc., being one which had escaped the parties at the beginning of the proceedings, 37 A. 283; 29 M. 149; 33 M.L.J. 78 but it cannot be used to repair irregularities which has not occasioned a failure of justice, and it cannot be invoked to make legal what is illegal, 28 M.L.J. 381; 29 M.L.J. 101; 21 Cr. L.J. 621=5 Pat. L.J. 81. When a thing is directed to be done and the thing is in effect done but in the *wrong way*, the error amounts to an irregularity and not an illegality, 19 C.W.N. 972. The safest guide when a mandatory provision of law is disregarded by a court is the well known ruling of the Judicial Committee in 28 M. 61 (P.C.) to the effect that a disobedience of an express provision of law as to a mode of trial is not a mere irregularity cured by this section but an illegality, 51 M.L.J. 687=24 L.W. 649 *dissenting* from 6 Lah. 553. This section cannot be availed of, in an appeal against acquittal so as to justify the Court in convicting the accused on the appeal, 29 M.L.J. 101 (F.B.)=(1915) M.W.N. 504=18 M.L.T. 93=16 Cr. L.J. 893=30 Ind. Cas. 143. The test to be applied in considering whether a particular infringement of the provisions of the Code is one which does or does not come within the purview of this section appear to be these . . . Does the error go to the whole root of the trial? Does it in effect vitiate the proceedings? Has the Court assumed an authority which it does not possess? Has it broken the vital rules of procedure? If the error is of such a nature the proceedings are vitiated in their very inception this section has no application. But the mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of that provision vitiates the whole proceeding. In fact in order to create an error there must be some breach of an imperative rule, for, if the matter were discretionary it would appear that no opportunity for error could arise, 35 A. 124 at 127; 27 Cr. L.J. 669=24 Ind. Cas. 717; 3 Rang. 129; 4 Pat. 388. The test to be applied in deciding whether mandatory enactments shall be considered directory only or, obligatory with an implied nullification for disobedience, is this. In each case we must take to the subject-matter, consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in this aspect decide whether the matter is what is called imperative or only directory. 51 C. I. (F.B.) at 17-18 followed in 32 C. 159. This section was certainly not inserted in the Code for being invoked on any and every occasion as a shield against irregularities perpetrated by the subordinate criminal Courts. The only way to secure the proper observance of the law by the subordinate Courts is for the High Court to interfere whenever any departure from the established procedure, comes to its notice. For example, the observance of the provisions of B. 342 *supra*, is one of paramount importance and non-compliance with it cannot be passed over on the ground of technicality, 29 C.W.N. cxviii. It was held in 50 B. 680, *following* 53 C. 46 that there is no universal rule that a disobedience of a mandatory provision in a statute, has the consequence of nullification of all proceedings irrespective of any question of prejudice, and the provisions of this section cures the defect unless the omission has in fact occasioned a failure of Justice. See 6 Lah. 594; 27 Cr. L.J. 431=23 Ind. Cas. 159. But see 51 M.L.J. 687=24 L.W. 649 which takes a different view. Consent on the part of an accused will not cure an irregularity, for an accused person can consent to nothing in a criminal trial, 46 M. 117; 1 L.R. (P.C.) 520; 18 M.L.J. 380; 12 W.R. (Cr.) 69; 16 W.R. (Cr.) 69; 23 W.R. (Cr.) 69; 2 C. 23; 6 C.W.N. 202; 28 M.L.J. 329=(1915) M.W.N. 229; 21 A.L.J. 89; 4 Lab. 875. An accused person right to have his defence witnesses examined by the court which disposes of his case, is a right which has been secured to him by the Code and where the action of the Court has deprived him of this right, it must be held that a failure of justice is the natural result of the irregularity. The fact that the accused finding that he could not have his way and that the Court would not summon his witnesses made the best of a bad job by putting interrogatories to examine witnesses on commission is immaterial. 18 L.W. 893 at 902.

SUBJECT TO THE PROVISIONS HEREINBEFORE CONTAINED.—"What is the effect of the words "subject to the provisions hereinbefore contained in S. 537?" I do not think it can possibly be taken to be that the section is to have no application if there has been any departure from any of the previous sections of the Code. Such an interpretation would render the words "error, omission or irregularity" in other proceedings absolutely nugatory. The Code is exhaustive as to procedure. I think the opening words of the section must be read as having reference to Ss. 529 to 536. The Chapter in which these sections are included is headed "of irregular proceedings" and Ss. 529 to 536 deal directly with the effect of various irregularities including some cases of want of jurisdiction. In some cases, the irregularity is fatal, in others not. Then follows S. 537, a general saving section which is, however, limited by the foregoing sections in the same Chapter," 19 C.W.N. 972 at 979. See also 27 C. 839; 6 C.W.N. xivl; 28 C. 217; 26 B. 80 at 84; 31 M. 80; 20 M. 149; 17 M.L.J. 523 but a contrary view was taken in 22 C. 176 and 23 C. 983. The repeal of sub-section (b) and the illustration supports strongly the view expressed in 19 C.W.N. 972 as the decisions to the contrary relied strongly on the repealed sub-section (b).

NO FINDING SENTENCE OR ORDER.—This section does not purport to cure any sort of proceedings at any stage. It applies only to finding, sentence or order already arrived at and under consideration by a superior Court. The case should have been finally disposed of, 23 C. 983; this section and the ruling in 25 M. 81 (P.C.) in no way touches on the effect of an error of procedure antecedent to trial or the jurisdiction of the Court, 38 M. 275.

COURT OF COMPETENT JURISDICTION.—These words must be taken to mean a Court of competent jurisdiction in respect of the particular offence charged, 10 B. 319. A Magistrate who is disqualified from trying a case though he may be authorised generally to try cases of the same class cannot be said to be a Court of competent jurisdiction, 23 C. 328 and 442. So also a Magistrate who takes cognisance under S. 190 (1) (c) and tries the case, 13 A. 315; 28 A. 212; when a jury is not properly empanelled as required by law but in disregard to Ss. 276, 277, 278, 279 and 326, *supra*, the trial cannot be said to be by a Court of competent jurisdiction, 7 C.W.N. 138; 26 A. 211. Similarly when the Court is not properly constituted as regards the required number of assessors, 25 B. 694; 15 B. 514; 21 A. 108; 14 A. 354; 24 M. 523.

REVERSED OR ALTERED UNDER CHAPTER XXVII.—Chapter XXVII deals with submission of sentences by lower Court to the High Court for confirmation and the powers of the High Court in dealing with such cases.

IRREGULARITY IN THE COMPLAINT.—A complaint is not intended to give information to the accused and failure to set out the speeches or alleged seditious words, the subject-matter of a subsequent charge in a complaint is only an irregularity cured by this section, 32 M. 3 at 11. (1) Failure to examine the complainant on oath under S. 200 *supra*, 9 A. 636; 35 M. 608; 11 M. 443; 18 A. 221; 20 Bom. L.R. 1018; 46 C. 807; 23 C.W.N. 484; 20 Cr. L.J. 247; 30 C. 928; (2) failure to take the signature of the complainant, 6 C.W.N. 810; (3) failure to reduce a complaint to writing, 7 M.H.C.R. Appx. 25; (4) failure to record reasons for distrusting a complaint, 25 M. 536; 14 C. 141 are curable under this section, but trial without a complaint is illegal and cannot be cured, 4 B.H.C.R. (Cr. Ca.) 4; (1904) A.W.N. 286. Irregularity in a complaint of Court, etc., under Ss. 195 and 476, *supra*, are not cured by this section. 26 Cr. L.J. 781—86 Ind. Cas. 287.

IRREGULARITY IN SUMMONS, WARRANT, CHARGE, PROCLAMATION, ETC.—Omission of particulars in summons or warrant, 9 C. 723; 31 B. 611, is curable. So also a defective search-warrant, 33 C. 1076. Failure to record reasons for issuing a warrant is curable, 28 C. 789, but in 38 M. 1088 it was held that it was a necessary preliminary for the exercise of the powers under S. 90 *supra* that reasons should be given in writing, and failure to do so vitiates the warrant; omission to serve a preliminary order under S. 145, *supra* is not fatal, 33 C. 68 (F.B.) and 33; 30 A. 41; but see 9 C.W.N. 909; 25 Cr. L.J. 682—81 Ind. Cas. 170; when proceedings are started under S. 145, *supra* but there was nothing in the police-report or other information upon which the case is started to justify them, this section

has no application, 20 C. 520. An irregularity such as omission of actual words used in a charge is curable under this section, 32 M. 385. This section covers only an error or omission in the charge and has no application to a case where there is a total absence of a charge; omission to specify intention in a charge is not fatal, 10 B.H.C.R. 373; 23 C. 391 and 276; 15 B. 491; 5 A. 203; 4 C.W.N. 196; but see 39 C. 731; 33 C. 295. A joinder of charges not permitted by Ss. 233 and 235 is fatal and cannot be cured, 23 M. 61 (P. C.); 41 C. 722 and 662; 30 M. 328; 26 A. 195; 29 B. 449; 29 M.L.J. 101 (F.B.); 29 C. 385; 28 C. 7 and 10; 10 C.W.N. 520; 6 Bom. L.R. 725; 4 Bom. L.R. 537. Misjoinder of charges and accused is not cured by this section, 28 M.L.J. 397; 33 M. 302; 42 A. 24; 27 B. 185; 8 M.L.T. 296; 43 B. 147; 29 C. 385; 7 M.L.T. 367; 26 M. 454 and 125; 4 Bom. L.R. 440; 32 A. 57; 41 C. 66; 35 C. 164; 46 C. 741. 51 M.L.J. 692—24 L.W. 848. See notes under S. 239 at p. 498. A charge stating that the accused did a particular act to commit a certain offence, or "any other offence punishable with imprisonment" is improper as it does not give the accused knowledge of the specific offence with which he is charged. When however he does not suffer a prejudice, the defect in the form is cured by this section, 25 Cr. L.J. 1186—82 Ind. Cas. 50.

IRREGULARITY IN JUDGMENTS.—(1) Omission to state grounds of decision, 6 B.H.C.R. (Cr. Ca.) 58; 6 C. 379; 13 C. 272; 20 C. 333; 27 Cr. L.J. 1183—97 Ind. Cas. 737. (2) pronouncing judgment before writing it, 23 C. 503; 20 C. 353; 21 C. 121; 25 Cr. L.J. 705—81 Ind. Cas. 437 but see 27 M. 237; 14 A. 242; (3) omission to sign and date judgment, 47 A. 284. So also omission to sign a judgment written with his own hand is also cured by this section, 23 A.L.J. 8—26 Cr. L.J. 688—86 Ind. Cas. 64 omission to pronounce written judgment before sentencing the accused, 25 M.L.J. 445; *Weir II*, 711, are cured by this section, but a judgment not in accordance with the imperative provisions of Ss. 367 and 424. *supra* cannot be cured, 17 Bom. L.R. 1085; 35 C. 138; 21 Cr. L.J. 52. Absence of a judgment cannot be said to be an irregularity cured by this section, 27 Cr. L.J. 1513—97 Ind. Cas. 737.

IRREGULARITY IN PROCEEDINGS BEFORE OR DURING TRIAL.—Omission to examine the accused before making an order of commitment under S. 209, *supra* is cured, 23 M. 536. See also 28 A. 421; but omission to call on the accused to enter on his defence occasions a failure of justice and cannot be cured, 23 C. 252; 25 C. 863 as to significance of the word "trial." The decision of the Privy Council in 25 M. 51 does not compel the Court to hold that in no case a misjoinder of charges or failure to try charges separately can be an irregularity within this section. This section cannot be availed of in an appeal against acquittal so as to justify the conviction of the accused on the appeal, 29 M.L.J. 101 (F.B.)—(1915) M.W.N. 504—18 M.L.T. 95—16 Cr. L.J. 593—20 Ind. Cas. 145. This section does not cure the defect in a trial where a case triable with a certain number of assessors is tried with a less number of assessors than the required number, the error is such as vitiates the whole trial and this section cannot cure such a defect, 25 Cr. L.J. 459—77 Ind. Cas. 811. Where a case which was made triable by a Court of Session under the new Code was tried by the Magistrate after the new Code came into force instead of committing the accused to the Court of Session which ended in a conviction, it was held the trial was illegal, and the illegality cannot be cured by this section, 26 Cr. L.J. 549—83 Ind. Cas. 645.

IRREGULARITY IN OTHER PROCEEDINGS UNDER THE CODE.—Failure to follow the strict provisions of S. 145 when the parties had their case fully heard is curable, 30 A. 31, and omission to state grounds of being satisfied as to likelihood of a breach of the peace in the initial order is an irregularity, 33 C. 68; 23 M.L.J. 499; 33 C. 352, but trying together two rival parties to proceedings under S. 107 is illegal, 8 C.W.N. 180; 11 C.W.N. 472; 9 C.W.N. 358; 31 M. 276; 11 C.W.N. 472. Under the amended Code sanction under S. 195 has been abrogated; irregularities in proceedings under S. 476, *supra*, are not cured by this section now. So any want of a complainant of a Court or public servant or any irregularity in making the same cannot be cured by this section, 26 Cr. L.J. 751—86 Ind. Cas. 287; 969—27 Cr. L.J. 96 Ind. Cas. 521. Failure to give the accused an opportunity to adduce evidence to rebut the additional evidence and to hear arguments on such evidence is not cured, 26 Cr. L.J. 1035—87 Ind. Cas. 923; 4 Lab. 376.

SUB-SECTION (b) relating to proceedings under Ss. 195 and 476 have now been omitted. Therefore want of a complaint of Court cannot be cured under this section and such an illegality will vitiate the entire proceedings, 27 Cr. L.J. 969—98 Ind. Cas. 521.

SUB-SECTION (c).—This sub-section means that the omission referred to herein must be treated as a mere irregularity, but when the provisions of the law as to empannelling of a jury is violated such a contingency is not provided for in this sub-section. Such a breach of law must be treated as an illegality vitiating the whole trial which must be set aside for that reason alone, *e.g.* in 26 A. 211 a jury trial was set aside because seven jurors were not empannelled instead of five as fixed by notification on the ground that the trial was not by a tribunal constituted according to law. Again, where the provisions of Ss. 276 to 279 and S. 263 *supra*, as regards selecting jurors were not followed, it was held in, 7 C.W.N. 188 that this sub-section did not apply to such an irregularity. See also 33 A. 383 and 35 A. 481 and 4 Lab. 382. In all the above cases the trial was set aside on account of illegalities committed therein without reference to any misdirection obviously on the ground that there was no valid trial in which a verdict of the jury had been returned. This is how the law must be interpreted 27 Cr. 193—95 Ind. Cas. 393.

SUB-SECTION (d).—The provisions of this section require that before a verdict of a jury can be reversed on the ground of misdirection, the High Court must be satisfied that the verdict is erroneous and a failure of justice has been occasioned, 25 C. 230; 21 C.W.N. 33; 14 Cr. L.J. 688. If improper questions have been admitted at a trial by jury, it is for the Crown to show that their improper effect has been set right by the Court. Either the jury should be told at once to disregard the statements or else the charge should contain a similar warning to them expressly telling them not to consider the statement as involving a contradiction or otherwise damaging the evidence of the witness. Under sub-section (2) of section 423, *supra*, and this sub-section it must be seen whether such improper admission of evidence has in effect led to a miscarriage of justice to entitle the High Court to set aside the verdict of the jury. If a Judge is of opinion that it will be difficult for the jury in spite of his express warning to disregard the evidence wrongly admitted, it is preferable that there should be a new trial before another jury, 28 Bom. L.R. 281—27 Cr. L.J. 481—93 Ind. Cas. 881. A material misdirection or failure to lay down the law by which the jury is to be guided is not covered by this section. 3 C.W.N. 576; 5 M.L.T. 134; 30 M. 44; 23 C. 252; 16 M.L.J. 250. Total absence of direction by the Judge as to the law cannot be cured by this section 11 Cr. L.J. 840—5 Ind. Cas. 981; 8 M. L.T. 82—11 Cr. L.J. 432—7 Ind. Cas. 401; 11 Cr. L.J. 222—6 Ind. Cas. 74; 7 M.L.T. 191—11 Cr. L.J. 385—6 Ind. Cas. 938; 9 M.L.T. 345—(1911) 1 M.W.N. 190—12 Cr. L.J. 140—9 Ind. Cas. 788; 40 C. 387. A conviction obtained on a trial by jury would not be had merely because the charge to the jury was not happily expressed or that there was misdirection in the charge if otherwise there had been no failure of justice and the case will be covered by this section, 12 A.L.J. 149—14 Cr. L.J. 688—21 Ind. Cas. 688. See commentaries under Ss. 297 to 308 *supra* at pp. 419 to 439.

UNLESS SUCH ERRORS ETC., HAS IN FACT OCCASIONED A FAILURE OF JUSTICE.—Before proceedings can be set aside it must be shown that by reason of the irregularity the true facts have not come out or that there is a danger that they will not come out, 14 C. 358; 10 A. 414. The onus is on the appellant to show that there has, in fact been a failure of justice owing to the irregularity, 24 M. 523. The words "in fact" were introduced in the 1898 Code apparently in order to emphasise the duty of the Court to go into the merits before interfering in consequence of a misdirection or other error, but the duty existed just the same before, 26 M. 1. It is impossible to decide whether there has been a failure of justice in fact without looking to see what the facts are. In order to determine whether the verdict is erroneous and if so which of the powers conferred on the High Court by S. 423 (2) should be exercised, it is absolutely necessary to go into the facts, 26 M. 1. "In facts" is equivalent to "really" or "in reality." The expression "unless it has in fact occasioned a failure of justice" means unless it has unfairly affected the petitioner's defence on the merits, 31 B. 614 at 625. See also 11 B.H.C.R. 237. An error which in no way prejudices a convicted person, and is not fatal to the validity of a decision and is concerned with

the proceedings rather than the mode of trial, may be condoned under this section, 24 Cr. L. J. 67=71 Ind. Cas. 115.

EXPLANATION.—Effect should be given if the objection is promptly raised and wrongly overruled by the lower Court. The explanation applies only when an objection is raised as to averment of an *irregularity*; an illegality affecting the jurisdiction of the Court can be raised in the appellate Court, 11 C.W.N. 1128, and an accused person cannot waive his rights in a criminal proceeding, or the benefit of legal provisions, 18 M.L.J. 330; 2 C. 23; 6 C. 98; 56 M. 117; 12 W.R. (Or.) 89; 16 W.R. (Or.) 69; 23 W.R. (Or.) 59; 2 C. 23; 6 C.W.N. 202; 28 M.L.J. 329=(1915) M.W.N. 229; 21 A.L.J. 89; 4 Lah. 376.

Attachment not illegal, person making same not trespasser for defect or want of form in proceedings.

538. No *attachment* made under this Code shall be deemed unlawful, nor shall any person making the same be deemed a trespasser, on account of any defect or *want* of form in the summons, conviction, writ of *attachment* or other proceedings relating thereto.

The word "distress" has been omitted and the word "attachment" has been substituted in its place. This section cures defects in the formal proceedings of Courts.

CHAPTER XLVI.

MISCELLANEOUS.

539. Affidavits and affirmations to be used before any High Court or any officer of such Court may be sworn and affirmed before such Court or the Clerk of the Crown, or any Commissioner or other person appointed by such Court for that purpose, or any Judge, or any Commissioner for taking affidavits in any Court of Record in British India, or any Commissioner to administer oaths in England or Ireland, or any Magistrate authorised to take affidavits or affirmations in Scotland.

Courts and persons before whom affidavits may be sworn.

This section deals with affidavits and affirmation to be used before the High Court or any officer of such Court. It requires that such affidavits should be sworn and affirmed before such Court or clerk of the Crown or any commissioner or other person appointed by such Court for that purpose or any judge, etc. A Magistrate is a judge within S. 19 I.P.C. read with S. 4 (2), *supra* only when he is exercising 'jurisdiction in a case pending in which he is empowered to give a definitive judgment in the case and not when he is only empowered to commit; where a Magistrate has not the *sessis* of the case and he could not pronounce any judgment in respect of that case, he is not a judge within the meaning of the term in this section and a reference to S. 539A will show that a Magistrate may not come within the meaning of the term 'judge' in this section. The Magistrate here is differentiated from the officers mentioned in this section and is not empowered to have an affidavit sworn before him. S Pat. 110. An affidavit sworn before a Presidency Magistrate of Calcutta is not admissible for the purposes of moving the Patna High Court in revision. [1926] Pat. 74. This section applies only to affidavits to be used in the High Court, for instances in support of applications for transfer under S. 536 (4), *supra*. The solitary provision in the Code for the use of an affidavit in any Court subordinate to the High Court is contained in S. 74, *supra* as to proof of service of summons outside the jurisdiction of the Court issuing it. "The intention of the law is and it cannot be too often repeated, that an affidavit must contain nothing but bare facts known to the person who makes the affidavit, either personally or upon information from a source which he believes to be a correct source and one on which reliance can be placed. Further, as it is possible for human beings to make a mistake in

reciting a fact, the law requires that the contents of affidavits should be carefully read over to the deponents in words understood by them and vouched by them to be correct"—*per Knox, J.*, in 38 A. 13 at 16. A person seeking by an application in revision to get rid of a conviction standing against him, is, incapable of tendering his own affidavit in support of such application and cannot consequently be prosecuted for statements made in such an affidavit; 19 A. 200; 12 M. 481; 28 A. 331, but see 6 Lah. 34; 3 Lah. 46.

539A. (1) *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.

Affidavit in proof of conduct of public servant.

An affidavit to be used before any Court other than a High Court under this section may be sworn or affirmed in the manner prescribed in section 539, or before any Magistrate.

Affidavits under this section 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 grounds to believe to be true, and, in the latter case, the deponent shall clearly state the grounds of such belief.

(2) *The Court may order any scandalous and irrelevant matter in an affidavit to be struck out or amended.*

This section is newly added and provides for an affidavit in proof of conduct of public servant and gives power to Court also to expunge scandalous or irrelevant matter in an affidavit, and also requires the personal attendance of the deponent of the affidavit for cross-examination before the Court. Sub-section (4) of S. 842 says that no oath shall be administered to the accused which means only that an accused person cannot be examined on oath as a witness in the case in which he is an accused person. See 3 Lah. 40.

539B. (1) *Any Judge or Magistrate may, at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection.*

Local inspection.

(2) *Such memorandum shall form part of the record of the case. If the Public Prosecutor, complainant or accused so desires, a copy of the memorandum shall be furnished to him free of cost:*

Provided that, in the case of a trial by jury or with the aid of assessors, the Judge shall not act under this section unless such jury or assessors are also allowed a view under section 293.

SCOPE OF THE SECTION.—Prior to 1928 there was no provision in the Code allowing a Magistrate to visit and inspect the scene of the commission of an offence, yet Magistrates did frequently make such visits and they were permitted to do so by a long series of decisions of the various High Courts laying down the procedure to be followed and the safeguards to be

applied when making such visits. By the new amendment, the Legislature adopted the general effect of these decisions and incorporated it in the statutory law by enacting this section. The Magistrate should make his visit after due notice to the parties and should incorporate his observations in a memorandum to be placed on the record, 4 Rang. 106 at 109. This section gives power to the Court to make local inspection for the purpose of properly appreciating the evidence given before it. This power rested previously on judicial decisions and on the implied power given in S. 556 *infra* but there was no express provision. It is the duty of the Court to make a memorandum of relevant facts observed at such inspection *forthwith* and make such memorandum form part of the record in the case and the parties are entitled to have a copy of the same on application. The amendment is in accordance with the decisions in, 37 C. 340; 14 C.W.N. xclx; 10 C.W.N. 181; 39 C. 476 and other cases. This is mandatory, 25 Cr. L. J. 1375=82 Ind. Cas. 767. The rule which requires a memorandum to be made does not introduce any new principle, 53 C. 46 at 49. It is open to the Magistrate to use the evidence of his own eyes to test the truth of what the witnesses had deposed to, by making a local inspection and embodying the result of his inspection in the examination of witnesses called under S. 540, *infra*, 45 M.L.J. 279=16 L.W. 113. Where in a local inspection a Magistrate merely interrogated a crowd of people without making any memorandum, held the absence of such a memorandum in a local inspection is an illegality vitiating the conviction and not a mere irregularity curable under S. 537, 50 B. 680, *dissenting* from 52 C. 148 and following 53 C. 46.

SUB-SECTION (2).—The provisions of this sub-section are mandatory and a failure to comply with the express direction of law is an illegality and not an irregularity which can be cured and a note made by the trying Magistrate after inspection of the place should form part of the record of the case, 52 C. 148. This decision was distinguished in 53 C. 46, holding that the observations therein are too wide and that unless prejudice is shown the proceedings cannot be set aside as this section introduced no new principle, and there is no universal rule that disobedience of statutory provisions nullifies the proceedings.

540. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

Power to summon material witness, or examine person present.

SCOPE OF THE SECTION.—The first part of this section is an enabling provision whereby a Court in the exercise of its discretion is empowered at any time before it actually pronounces its judgment to take further evidence either for the prosecution or for the defence and for that purpose it may adjourn the hearing to procure the attendance of witnesses. Very often it happens that new light is thrown on the case by examining a defence witness and then it becomes desirable in the interests of the accused himself that fresh evidence should be called for. When such fresh evidence is likely to prove prejudicial to the accused it should proceed with the utmost circumspection and should not exercise its powers under this section merely because the prosecution desires to do so, 1 Rang. 308 at 311. The second part of the section is on the other hand imperative. If the new evidence appears to the Court essential to the just decision of the case and this must depend entirely on the particular circumstances of each case, the Court has no choice but is bound to take evidence, 1 Rang. 308 at 312. The provisions of this section are very wide. The Court may examine witnesses under this section when those witnesses were summoned originally but not examined by the prosecution, 37 C.L.J. 173=24 Cr. L.J. 193=71 Ind. Cas. 657.

This section empowers the Court to summon and examine a witness if the evidence appears to the Court essential to the right decision of the case. This section is not controlled by S. 342, *supra* imposing the duty of questioning the accused generally after the examination of the prosecution witnesses and before the accused is called upon for his defence. Once the accused has been examined as required by S. 342 it is nowhere laid down that the Court must examine the accused over again, if the Court examines a witness under this section, 26 Cr. L.J. 1118—89 Ind. Cas. 812. This section enables the Court or in certain circumstances imposes a duty on the Court to summon and examine any material witness not brought before the Court. This section is a very salutary provision calling pointed attention of the Court as to the existence of a most important duty cast on the presiding Judge in arriving at a correct conclusion. It confers very wide powers upon a Court. But the wider the powers the greater the exercise of discretion required of a Magistrate, and if the Magistrate will, as he ought to read S. 352, *supra* along with this section, he will find that by this section it is not intended that he should exercise this power at the bidding of any person, but that the powers are given to prevent any miscarriage of justice just because some particular witness has not been called, 12 A.L.J. 15; 37 C.L.J. 173; 27 C.W.N. 875—37 C. L.J. 415; 24 C. 167; 19 L.W. 272—46 M.L.J. 328—(1924) M.W.N. 803—25 Cr. L.J. 351—77 Ind. Cas. 290, but this section will not enable a Court to examine the accused as a witness in an appeal which is only the continuation of the original case, 12 M. 431; Magistrates should always be chary of taking upon themselves the duties of deciding on behalf of the parties whether witnesses should be examined, 28 M.L.J. 134.

AT ANY STAGE OF THE INQUIRY.—This section gives power to the Court at any stage of the inquiry or trial to examine any witness it may find it to be necessary, to come to a proper conclusion in the matter under inquiry or trial, 8 M.L.T. 418. Examination of certain persons as Court witnesses after the close of the prosecution and discharging the accused, relying on the evidence of the court witnesses is not illegal, Walr II, 713. The power can be exercised even after the close of the case for the prosecution, 19 L.W. 272. This section will not empower a Judge to call and examine the witnesses summoned for the defence before the prosecution case is closed, 15 A. 242. The Magistrates should exercise their discretion very cautiously. Where a case is fully heard and judgment reserved to be pronounced on a certain date, it is improper to examine prosecution witnesses at that stage, 37 C.L.J. 416—24 Cr. L.J. 193—71 Ind. Cas. 657. A Magistrate is strictly within the rights of this section in taking fresh evidence even when a case is adjourned for judgment, 24 C. 167. For the case was still a pending case when fresh evidence was taken, but the practice of examining witnesses after the defence is closed to bolster up the prosecution, if such evidence was prejudicial to the accused is to be condemned, 15 C.W.N. 414 at 416—12 Cr. L.J. 7—9 Ind. Cas. 46.

SUMMON ANY PERSON AS A WITNESS.—A witness whom the prosecution declines to examine and who is examined by the Court on its own initiative is a witness called by the Court within the meaning of this section, 37 C.L.J. 173—24 Cr. L.J. 193—71 Ind. Cas. 657. Where the accused has already exhausted his right of summoning witnesses for the defence by filing his list in Court and if he requires further witnesses to be examined, the only course open to him is to move the Court to summon his additional witnesses as Court witnesses under this section, 36 A. 13.

EXAMINE ANY PERSON.—There is nothing in law or principle which prevents a person who was charged with an offence but discharged by the Magistrate being examined as a witness under this section, 7 W.R. (Cr.) 44, but not an accused or an appellant. This section merely provides that a Magistrate may summon any witness whose evidence appears to be necessary. It does not specify the manner in which he may acquire his knowledge of the need for the evidence of such a witness. There are in fact many ways in which a Magistrate may come by such knowledge, the most common being through the evidence of other witnesses in the case. There are certainly ways in which the Magistrate may acquire such knowledge without himself going out into the high

ways and by ways and searching for further evidence, and the power to summon witnesses does not by any means imply a power to discover such witness by personal inquiry out of Court. One of the basic principles of British Judicial system is that a cause should be determined on evidence given on oath in Court and in the presence of the parties. If a Magistrate makes personal inquiries out of Court it is practically impossible for him to complete the trial of the case adhering to the above principle. He would necessarily be influenced by what he had seen and heard and in assessing the value of the evidence of the witnesses examined he would be guided by his own recollection and if their evidence should differ from his recollection he would be impelled to reject it not on the intrinsic merits of the evidence but on his own knowledge. 4 Rang. 108 at 109. For the just decision of the case, Courts generally examine medical witnesses when the accused sets up the plea of insanity or where there is no evidence on record as to the nature of the injuries which form the subject-matter of the offence under trial, 6 C.W.N. 98. Where a Magistrate examined certain witnesses under this section and relying on their evidence discredited the prosecution witnesses and discharged the accused, his procedure was held to be legal, Weir II, 714. When a Judge after making a local inspection in the presence of the parties recalled some of the prosecution witnesses and examined them in such a way as to put on record the important points observed by him at the inspection, and the accused were also allowed to cross-examine the witnesses, it was held that the procedure adopted was legal, 45 M.L.J. 279-18 L.W. 113. If the witness is called by the Court under the section and examined both by the prosecutor and the accused have a right to cross-examine him freely, 47 A. 147; 5 C. 614; 24 C. 288. Failure to allow the accused an opportunity to rebut the evidence so adduced and to hear further arguments on such further evidence cannot be cured by S. 537, *supra*, 4 Lab. 376; 28 Cr. L.J. 1035-87 Ind. Cas. 923.

540A. (1) *At any stage of an inquiry or trial under this Code, where two or more accused are before the Court, if the Judge or Magistrate is satisfied, for reasons to be recorded, that any one or more of such accused is or are incapable of remaining before the Court, he may, if such accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.*

PROVISION FOR INQUIRIES AND TRIAL BEING HELD IN THE ABSENCE OF ACCUSED IN CERTAIN CASES.

(2) *If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit, and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.*

This section has been newly added and provides for inquiries and trials being held when one or more of the accused become incapable of remaining at the bar. Where accused is represented by a pleader his personal attendance being dispensed with there is no difficulty. In case where the accused is not represented or whose personal attendance is thought necessary, the Court may adjourn the trial of all the accused or order the trial of the particular accused to be tried separately. The amendment is intended to meet a practical difficulty.

541. (1) *Unless when otherwise provided by any law for the time being in force, the Local Government may direct in what place any person liable to be imprisoned or committed to custody under this Code shall be confined.*

Power to appoint place of imprisonment.

Removal to criminal jail of accused or convicted persons who are in confinement in civil jail, and their return to the civil jail.

(2) If any person liable to be imprisoned or committed to custody under this Code is in confinement in a civil jail, the Court or Magistrate ordering the imprisonment or committal may direct that the person be removed to a criminal jail.

(3) When a person is removed to a criminal jail under subsection (1), he shall, on being released therefrom, be sent back to the civil jail, unless either—

(a) three years have elapsed since he was removed to the criminal jail, in which case he shall be deemed to have been discharged from the civil jail under section 342 of the Code of Civil Procedure; or

(b) the Court which ordered his imprisonment in the civil jail has certified to the officer in charge of the criminal jail that he is entitled to be discharged under section 341 of the Code of Civil Procedure.

See sections 57 and 58 of the Civil Procedure Code, 1908. The term of imprisonment in execution of a decree of a Civil Court is limited to six months, and in some cases to six weeks.

542. (1) Notwithstanding anything contained in the Prisoner's Testimony Act, 1869, any Presidency Magistrate desirous of examining as a witness or an accused person, in any case pending before him, any person confined in any jail, within the local limits of his jurisdiction, may issue an order to the officer in charge of the said jail requiring him to bring such prisoner in proper custody, at a time to be therein named, to the Magistrate for examination.

Power of Presidency Magistrate to order prisoner in jail to be brought up for examination.

(2) The officer so in charge, on receipt of such order, shall act in accordance therewith, and shall provide for the safe custody of the prisoner during his absence from the jail for the purpose aforesaid.

The Prisoner's Testimony Act now in force is Act III of 1900. See in this connection sections 34 to 43 of the Act, provisions for requiring the attendance of prisoners and obtaining their evidence.

543. When the services of an interpreter are required by any Criminal Court for the interpretation of any evidence or statement, he shall be bound to state the true interpretation of such evidence or statement.

Interpreter to be bound to interpret truthfully.

A deposition taken without administering an oath to the interpreter will not make it inadmissible in evidence; the prosecution will have to prove that the interpretation was made accurately, 38 C. 808. See S. 361, *supra* which provides for interpretation of evidence to an accused or his pleader.

544. Subject to any rules made by the Local Government, * * any Criminal Court may, if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding before such Court under this Code.

Expenses of complainants and witnesses.

The words "with the previous sanction of the Governor General in Council" have now been omitted by the Devolution Act XXXVIII of 1920.

IF HE THINKS FIT.—These words were added in the Code 1898. The discretion must be exercised according to sound judicial principles and reason. 9 Bom. L.R. 383-5 Cr. L.J. 329.

545. (1) Whenever under any law in force for the time being a Criminal Court imposes a fine or confirms in appeal, revision or otherwise a sentence of fine, or a sentence of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—

Power of Court to pay expenses or compensation out of fine.

(a) in defraying expenses properly incurred in the prosecution ;
 (b) *in the 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 ;*

(c) *when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.*

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented before the decision of the appeal.

AMENDMENT.—The italicised words in sub-sections (1) (b) and (c) are new. The rulings in 6 M. 286, 6 M.L.T. 241, 24 Bom. L.R. 382, Weir 11, 715 and 717 are no longer law.

SCOPE OF THE SECTION.—This section is applicable where there is a conviction of the accused and fine forms a part of the sentence. A Magistrate cannot without imposing a fine, order payment of compensation to the complainant by the accused, 22 B. 717 ; 3 C.L.R. 404 ; 25 Cr. L.J. 1116-81 Ind. Cas. 940. Where a Court orders that out of the fine, if recovered a certain amount be paid as compensation, it does not mean that the amount should be paid only if the full amount of fine were recovered and nothing was payable till the recovery of the full amount, 6 Cr. L. Rev. 440-2 L.W. 22-16 Cr. L.J. 53-26 Ind. Cas. 650. Where the accused is discharged, and no fine is imposed this section cannot apply, 22 B. 717. Nor can this section apply to a case under S. 107, *supra*, as no fine could be imposed in such a case. An order directing the accused to pay the costs of the complainant in such a case is illegal 25 Cr. L.J. 476-77 Ind. Cas. 828. It deals only with the expenses properly incurred in the

prosecution and for compensation for the injury caused by the offence when substantial compensation is recoverable in a Civil Court; compensation for loss caused to the complainant on account of his inability to attend to his work, his time being fully taken up in the prosecution of the accused cannot be granted, 22 B. 438. The injury must be the direct result of the offence and compensation can be ordered only out of the fine recovered and it is not competent to the Magistrate to award compensation in addition to the fine imposed on the accused, 5 Bom. L.R. 976; 21 M. 305. See also 5 Bom. L.R. 126. An order for compensation to the nearest heirs without specifying who those heirs may be is bad, 20 Ind. Cas. 983. The fine should be calculated according to the nature of the offence and means of the accused and not according to the expenses which the complainant might have incurred. There is no provision of law which empowers a Court to order payment of money as indemnity in a case of theft, 26 Cr. L.J. 1495—90 Ind. Cas. 151.

COURT CONFIRMS IN APPEAL, REVISION OR OTHERWISE, A SENTENCE OF FINE.—There must be an imposition of a sentence of fine by the first Court. An appellate Court or the High Court imposing a sentence of fine in lieu of a term of imprisonment is not competent to award compensation under this section; fine must form part of the sentence originally imposed on the accused when passing judgment or order for offences specified herein and cannot be made after judgment had been pronounced and fine credited to Government, 11 W. R. (Cr.) 53.

IN DEFRAYING EXPENSES PROPERLY INCURRED IN THE PROSECUTION.—Where N was convicted of the offence of accepting an illegal gratification as a public servant and sentenced to imprisonment and a fine and the Magistrate directed that out of the fine if paid Rs. 95, the amount of the bribe paid be given as compensation for the trouble and expenses of the prosecution, it was held that the order was illegal, *Ratimal* 375. All legitimate expenses such as medical officer's fee can be awarded, 21 M. 305; 4 Bom. L.R. 877. Provisions of Civil Procedure Code as to costs cannot be imported ordinarily, 23 Cr. L.J. 458.

FOR INJURY CAUSED BY THE OFFENCE.—Compensation paid for injury caused is different from what is paid to defray the expenses of the prosecution. Compensation can be awarded only to the person actually injured by the offence. It was held that it cannot be given to the heirs of persons who have been killed, 10 W. R. (Cr.) 39 or to the widow of the deceased when death is caused by rash and negligent act, 12 M. 382; 21 M. 74; 7 B.H.C.R. 78. But in 36 C. 302 a different view was taken and it was held that this section provided for compensation in case when it is recoverable under Act XIII of 1855 by the persons therein indicated, viz., wife, husband, parent and child, if any, of the deceased. The new amendment in cl. (1) (b) that compensation may be paid to any person by whom it will be recoverable in a Civil Court adopts the view taken in, 36 C. 302 and the view of *Benson, J.*, the referring Judge, in 21 M. 74 (F.B.). The decisions in 21 M. 74 (F.B.) and 6 Cr. L. Rev. 148 which followed it are no longer law.

SUB SECTION (1) (c) is new and makes provision for the payment of compensation to the innocent purchaser of *stolen property* when the property is restored to the owner. The following decisions are therefore no longer law, 6 M. 268; *Wair II*, 715, 717; 6 M.L.T. 211—10 Cr. L.J. 290—3 Ind. Cas. 437; 25 Bom. L.R. 382; 3 Bom. L.R. 449. Neither this section nor S. 519, *supra* apply to the case of an innocent mortgagee who has advanced money on stolen property, 23 Cr. L.J. 241—65 Ind. Cas. 997.

SUB SECTION (2).—This sub-section is specially enacted as there is no provision in the Code for a refund of the money paid as compensation under this section. The only remedy open to the person who paid the money and who is entitled to a refund of the same was by a civil suit. The Madras High Court in *Wair II*, 717 held that when the order for compensation was reversed in revision and the money having been paid over to the complainant before the result of the revision application, if the complainant refuses to refund the amount, the only remedy open to the person who paid the money was to institute a civil suit to recover the amount; in 19 A. 112, it was held that when the High Court in revision set aside a sentence of fine, compensation paid out of it to the complainant under this section may be recovered.

under S. 547, *infra*. Refund under such circumstances may be considered to be an incidental or consequential order coming under S. 423 (1) (d), *supra*.

NOTICE TO COMPLAINANT.—There is no express provision of law in case of an order under this section or S. 250 *supra* with regard to notice upon the opposite party. When compensation is granted to a complainant under this section it would be the exercise of proper discretion by the appellate Court if notice is given to the complainant of the hearing of the appeal. It is a fundamental principle of law that no order should be passed to the detriment or prejudice of a party without giving him an opportunity of being heard and it is the settled practice of the Calcutta High Court that where compensation has been awarded to the complainant to serve notices upon him as well in issuing a Rule, 27 Cr. L.J. 1088-87 Ind. Cas. 62. The Madras High Court also follows this practice and gives notice to the complainant.

546. At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under section 545.

Payments to be taken into account in subsequent suit.

SHALL TAKE INTO ACCOUNT.—This section enacts a direction to the Civil Court which has to assess damages in the civil suit. The expression means that the Civil Court may take into consideration the compensation awarded by the Magistrate and not that the compensation awarded shall be deducted from the damages to be awarded, 22 W.R. (Civ.) 336.

546A. (1) Whenever any complaint of a non-cognizable offence is made to a Court, the Court, if it convicts the accused, may, in addition to the penalty imposed upon him, order him to pay to the complainant—

Order of payment of certain fees paid by complainant in non-cognizable cases.

(a) the fee (if any) paid on the petition of complaint, or for the examination of the complainant, and

(b) any fees paid by the complainant for serving processes on his witnesses or on the accused,

and may further order that, in default of payment, the accused shall suffer simple imprisonment for a period not exceeding thirty days.

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

SCOPE OF THE SECTION.—This section is new and provides for the payment of certain fees, such as stamp fee on petition of complaint, process fee, etc., paid by the complainant in non-cognizable cases to be recovered from the convicted person in addition to the penalty imposed upon him by the Court. It merely provides for the refund of process-fees, in non-cognizable cases, when paid, but does not authorise their payment. 27 Cr. L.J. 419-83 Ind. Cas. 79. Costs cannot be awarded when the offence is not a non-cognizable one, 25 Cr. L.J. 1161-81 Ind. Cas. 985.

SUB SECTION (2).—This sub-section empowers the High Court in revision to make the necessary order for payment to complainant when by an oversight the first Court failed to pass such order.

547. Any money (other than a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for shall be recovered as if it were a fine.

Money ordered to be paid recoverable as fines.

AMENDMENT.—The words "not otherwise expressly provided for" were added as the Code already contains various provisions for the recovery of, *e.g.* costs, S. 148 (3); compensation, S. 250 (2); maintenance, S. 488 (3), etc., as if they were fines.

There is no express provision in the Code for refund of any money once paid over to any person by a criminal Court. The word payable occurring in this section is construed as also including re-payable, 19 A. 112; 25 A. 318; 28 C. 253. This section is applicable only to money and not to goods, 23 Cr. L.J. 157—65 Ind. Cas. 621.

548. If any person affected by a judgment or order passed by a Criminal Court desires to have a copy of the Judge's charge to the jury or of any order or deposition or other part of the record, he shall, on applying for such copy, be furnished therewith :

Copies of proceedings.

Provided that he pays for the same, unless the Court, for some special reason, thinks fit to furnish it free of cost.

ANY PERSON AFFECTED.—Every one making a complaint of an offence by which he has been injured is affected by the disposal of his complaint whether the case has been sent up by a police-officer or not. Such a person is entitled to ask for a copy of the Magistrate's order of discharge, Ratanlal 308; 8 C. 166. Every prosecutor whose charge has been dismissed is a person affected, 10 C.L.R. 190. A prisoner is entitled to have copies of all documents which he thinks necessary for his defence and the Court is not entitled to refuse such copies, 4 M.H.C.R. (Appx.) 57; 14 W.R. (Cr.) 77.

JUDGES CHARGE TO THE JURY.—See S. 371 *supra* as to heads of charge to the Jury.

OTHER PART OF THE RECORD.—*e. g.* statements under S. 161, *supra*, police charge-sheet under S. 173, *supra*, reports under Ss. 157, 167, 168, and 174, *supra*.

REVISION.—The High Court is entitled to revise the order of a Magistrate refusing to grant copies, 8 C. 166.

549. (1) The Governor General in Council may make rules, consistent with this Code and the Army Act or any similar law for the time being in force, as to the cases in which persons subject to military law shall be tried by a Court to which this Code applies, or by Court-martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable, under the Army Act, section 41, to be tried by a Court-martial, such Magistrate shall have regard to such rules and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the regiment, corps or detachment to which he belongs, or to the commanding officer of the nearest military station, for the purpose of being tried by Court-martial.

Delivery to military authorities of persons liable to be tried by Court-martial.

(2) Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any body of troops stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.

Apprehension of such persons.

SCOPE OF THE SECTION.—This section is based on the old Bengal Regulation XX of 1825, under which the Military authorities would require a Magistrate to handover any prisoner who may be apprehended and brought before him for an offence committed at any place more than 120 miles from the Presidency Town, but the proceedings before the Magistrate, when taken at the request of, and assented to by the Military authorities are not absolutely void, and a commitment so made is not invalid, 22 W.R. (Cr.) 20; 3 C. 121.

ARMY ACT.—See 44 and 45 Vic., Ch. 58.

For rules made under this section, see Government of India, Home Department Notification, dated 30-4-1897, and Gazette of India Notification No. 817 J, dated 23-5-1902.

550. Any police-officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence. Such police-officer, if subordinate to the officer in charge of a police-station, shall forthwith report the seizure to that officer.

Powers to police to seize property suspected to be stolen.

This section expressly empowers police officers to seize properties which they may suspect to have been stolen or which they find under circumstances which create suspicion of the commission of an offence. S. 523, *supra* describes the procedure to be followed with reference to such property when seized. See also Ss. 51 and 54 (1), cl. (iv) *supra*, but without seizing, a police officer cannot issue an order to detain certain logs suspected to be stolen property lying in a truck at the Railway Station yard, to the Station Master, 13 Cr. L.J. 177—22 Ind. Cas. 753. This section gives very wide powers of seizure of property, say cattle, suspected to have been stolen, if it does not extend to the taking away other cattle, simply because they are mixed up with the suspected stolen cattle, See 11 Cr. L.J. 89—3 Ind. Cas. 980.

551. Police-officers superior in rank to an officer in charge of a police-station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station.

Powers of superior officers of police.

Where a superior officer, *viz.*, the District Superintendent of Police, reported at a police station that a police-officer and another constable had prepared false records, wrongfully confined certain persons and caused hurt to them to extort a confession, it was held that although he had power to investigate the case under S. 156, *supra* by virtue of this section, still it was rather startling that the complainant himself should have made the investigation under S. 157, 35 M. L. T. 379; 45 M. L. J. 279. Order for disposal of an unlawful assembly by a Deputy Commissioner of Police is lawful, 7 B. 42.

OFFICER IN CHARGE OF POLICE STATION.—For definition of the expression see S. 4 (p) *supra*.

552. Upon complaint made to a Presidency Magistrate or District Magistrate on oath of the abduction or unlawful detention of a woman, or of a female child under the age of *sixteen** years, for any unlawful purpose, he 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.

Power to compel restoration of abducted females.

* Amended by Act XVIII of 1924.

and may compel compliance with such order, using such force as may be necessary.

SCOPE OF THE SECTION.—This section applies to women and female children only who are alleged on oath to have been abducted or unlawfully detained for any unlawful purpose. The section is not intended for the protection of children only or children generally, but of women and female children only. This combination and exclusion of male children go to show not only that some definite purpose unlawful in itself was contemplated but that the purpose has some reference to the sex of the person against whom it was entertained. Therefore it should not be so construed as to make it include purposes which though not unlawful in themselves might only become so when entertained towards a child in opposition to the wishes of its guardian, say for the purpose of being brought up in a religion which such parent or guardian disapproves, 16 C. 487; 4 Bom. L. R. 609; 9 C. W. N. 1030. The purpose contemplated by this section must in itself be unlawful, 4 Bom. L. R. 609. *e. g.* detention for the purpose of forcing a woman or a girl under sixteen years, even with her consent, the girl's consent being immaterial, for sexual intercourse, would certainly be unlawful. There must be an express finding by the Magistrate that the woman is unlawfully detained before passing an order under the section. If a woman resides with the relations who are aiding her in her endeavour to procure a divorce from her husband such a detention cannot be held to be an unlawful detention. *Weir II, 725.*

MAKE AN ORDER FOR IMMEDIATE RESTORATION.—For making an order for restoration the Magistrate must find that she was unlawfully detained by some one and direct that person to restore her to liberty. When he is unable to find who the person is that is detaining the woman and what his purpose is, the only proper order to issue is to have the woman brought up before the Court and have her examined.

FEMALE CHILD UNDER SIXTEEN YEARS.—A girl of sixteen years has a right to choose her own residence and, living away from her mother with a missionary lady cannot be said to be an unlawful detention by the missionary lady, 16 B. 307.

UNLAWFUL DETENTION.—It is immaterial whether the girl did or did not consent. She was kept against the will of the lawful guardian and such keeping and refusal to give her up, amounted to an unlawful detention, 16 C. 487 at 501. But when a husband complained to a District Magistrate of his wife being unlawfully detained by his father-in-law and refusing to send her to his house without alleging that she has been so detained contrary to her own wish, it was held that the proper remedy for the husband lay in the Civil Court if he had any grievance, 15 Cr. L. J. 712—26 Ind. Cas. 160.

553. (1) Whenever any person causes a police-officer to arrest another person in a presidency-town, if it appears to the Magistrate by whom the case is heard that there was no sufficient ground for causing such arrest, the Magistrate may award such compensation, not exceeding fifty rupees, to be paid by the person so causing the arrest, to the person so arrested, for his loss of time and expenses in the matter, as the Magistrate thinks it.

(2) In such cases, if more persons than one are arrested, the Magistrate may, in like manner, award to each of them such compensation, not exceeding fifty rupees, as such Magistrate thinks fit.

(3) All compensation awarded under this section may be recovered as if it were a fine, and, if it cannot be so recovered, the person by whom it is payable shall be sentenced to simple imprisonment for such term not exceeding thirty days as the Magistrate directs, unless such sum is sooner paid.

See S. 250, *supra* which deals with false and frivolous or vexatious complaints,

THE MAGISTRATE BY WHOM THE CASE IS HEARD:—Obviously the Magistrate herein referred to is a Presidency Magistrate. The section is taken from the Presidency Magistrates Act IV of 1877.

554. (1) With the previous sanction of the Governor General in Council, the High Court at Fort William, and, with the previous sanction of the Local Government, any other High Court established by Royal Charter, may, from time to time, make rules for the inspection of the records of subordinate Courts.

Power of chartered High Courts to make rules for inspection of records of subordinate Courts.

Power of other High Courts to make rules for other purposes.

(2) Every High Court not established by Royal Charter may, from time to time, and with the previous sanction of the Local Government,—

(a) make rules for keeping all books, entries and accounts to be kept in all Criminal Courts subordinate to it, and for the preparation and transmission of any returns or statements to be prepared and submitted by such Courts ;

(b) frame forms for every proceeding in the said Courts for which it thinks that a form should be provided ;

(c) make rules for regulating its own practice and proceedings and the practice and proceedings of all Criminal Courts subordinate to it ; and

(d) make rules for regulating the execution of warrants issued under this Code for the levy of fines :

Provided that the rules and forms made and framed under this section shall not be inconsistent with this Code or any other law in force for the time being.

(3) All rules made under this section shall be published in the local official Gazette.

This section on the authority of which the forms in the schedules are framed expressly states that the forms given in the Schedule to the code are liable to be varied according to the requirements of each particular case. It would certainly be extremely difficult to carry in police administration of the country if every warrant had to be directed by name to a police-officer and upon his transfer it were to become incapable of execution till the name of some other officer had been substituted in his place. [1918] Pat. 262-3 Pat. L.J. 493.

555. Subject to the power conferred by section 554, and by section 107 of the *Government of India Act*, the forms set forth in the fifth schedule, with such variation as the circumstances of each case require, may be used for the respective purposes therein mentioned, and if used shall be sufficient.

MAY BE USED.—This section provides that the forms in the schedule are not obligatory; they may be used with such variations as they may require, and if used with such variations shall be sufficient compliance with law, 22 C W N. 342 at 345. See also 31 C. 897; 26 M. 55; 7 A. 44 (F.B.) as to significance of the words "if used shall be sufficient." Where a search-warrant under S. 100 *supra* was drawn up in a printed form used under S. 98 with necessary alterations, it was held to be a valid warrant, 39 C. 403; 6 Cr. L.J. 127. See 35 C. 905 following 16 C.W.N. 336. This section deals with the form of warrant itself and nothing more and the words of the section are not intended to supersede the provisions of S. 90, *supra*. 81 C. 1. The Madras High Court in its Proceedings No. 1297, dated 29 7-1879, has observed that Sessions Judges should frame the charge in the second person and not in the third person, and if the charge sent up by a Committing Magistrate is defective, it should be corrected by the Sessions Court.

556. No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party, or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself.

Explanation.—A Judge or Magistrate shall not be deemed a party, or personally interested, within the meaning of this section, to or in any case by reason only that he is a Municipal Commissioner or otherwise concerned therein in a public capacity, or by reason only that he has viewed the place in which an offence is alleged to have been committed, or any other place in which any other transaction material to the case is alleged to have occurred, and made an inquiry in connection with the case.

Illustration.

A, as Collector, upon consideration of information furnished to him, directs the prosecution of B for a breach of the Excise Laws, A is disqualified from trying this case as a Magistrate.

OBJECT OF THE SECTION.—The object of this section is to enact the well-known maxim that "no man can be his own judge or give judgment concerning his own rights." It is one of the oldest and plainest rules of justice and common sense that no man shall sit as Judge in a case in which he has a substantial interest. That is the law of this country as much as it is the law of England, 2 C. 23 at 27. The object is to clear everything which might engender suspicion and distrust and to promote the feeling of confidence in the administration of justice which is so essential to social order and security, 20 C. 857. Where a Judge is a sole judge of law and fact in a case tried before himself he cannot give evidence before himself or import matters in his judgment not stated on oath before the Court in the presence of the accused. If he does so he makes himself a witness in the case and renders himself incompetent to try the case. 29 Cr. L.J. 45—48 Ind. Cas. 688 where 19 M. 263 is *referred*. It is highly undesirable, that a Magistrate should act judicially in a case in which

he has himself extra-judicially investigated and has formed conclusions of fact adverse to the party against whom he subsequently initiates criminal proceeding, 10 C.L.J. 484—11 Cr. L.J. 2—5 Ind. Cas. 437 where 5 A.L.J. 357 is referred to 1908 A.W.N. 95. See also 13 Cr. L.J. 238—14 Ind. Cas. 428. Interest creating a real ground for transfer must be distinguished from the disqualifying interest contemplated by this section. The latter comes within the purview of S. 536 and may not come within the scope of this section. Consent of parties to a cause cannot remove the disqualification imposed by this section, 23 Cr. L.J. 448—67 Ind. Cas. 622; 25 Cr. L.J. 88—75 Ind. Cas. 980.

TRY ANY CASE.—These words are wide enough to include any stage of a judicial proceeding in which the guilt or innocence of the accused is finally adjudicated upon. Consequently the provisions of this section apply to proceedings taken under S. 437 *supra* which will have the effect of setting aside an order of discharge. This construction does not force to the words of the section and is in accord with the intention of the Legislature which was to enact the rule that no man could be judge in his own cause, 13 Cr. L.J. 30—13 Ind. Cas. 222 where 27 A. 25 is distinguished. The words "try any case" are comprehensive enough to include the hearing of an appeal, 23 Cr. L.J. 446—67 Ind. Cas. 622; 14 Cr. L.J. 388—20 Ind. Cas. 208. The fact that the Magistrate had issued a search warrant prior to the institution of the case or the fact that the accused may possibly object to the propriety of the issuing of search warrant will not disqualify the Magistrate from trying the case, 24 A.L.J. 388—27 Cr. L.J. 783—95 Ind. Cas. 319. A Sub-divisional Magistrate who did not take cognizance of a complaint or hold a local investigation, but acting as the officer in charge of the division directed the issue of summons holding that the investigating Magistrate had not given satisfactory reasons for recommending a dismissal of the complaint without, however, expressing any clear opinion hostile to the accused is not disqualified under this section to hear an appeal from a conviction especially where no objection whatever was raised to the Magistrate hearing the appeal. Nor can a judge try an offence nor hear an appeal from a conviction where he directs a prosecution, as by doing so he had merely directed further inquiry into the matter, 26 Cr. L.J. 1481—89 Ind. Cas. 1049.

EXCEPT WITH THE PERMISSION OF THE COURT TO WHICH APPEALS LIE.—There is nothing in this section to suggest that the interest which might disqualify a Judge or Magistrate from trying or committing for trial would prevent an appellate Court granting the permission contemplated by this section. 20 A. 181 The expression "permission of the Court" refers to the words "try or commit for trial" and may probably include hearing of an appeal. But it was held in 23 C. 44 at 47, that the words "try any case" are words comprehensive enough to include even an appeal. The prohibition in the case of an appellate Court hearing an appeal from its own judgment is absolute. No such permission can ever be granted. The word "trial" may not apply to proceedings under Ss. 437 and 438, *supra*. "I have grave doubt whether the word 'try' used in S. 556 can in any case be applied to proceedings taken under S. 435 or any other section of the Code in which he is not empowered to pass any orders, but merely to report the case for the orders of this Court. It seems to me doing violence to the word 'try' that it should cover any such proceedings"—*per Knox, J.*, in 27 A. 25 at 27. Consent of the accused cannot confer jurisdiction upon a Magistrate who is disqualified from trying the case. 7 A.L.J. 719.

PERSONALLY INTERESTED.—The word "interest" in this section does not merely imply intellectual interest, but something of the nature of an expectation of an advantage to be gained or for a loss or of some disadvantage to be avoided by the person who is said to be interested in the case, 8 Bom. L.R. 947—15 Cr. L.J. 649—25 Ind. Cas. 877. The words "personally interested" cannot mean that a public officer, whose duty it is to see that the law is obeyed, is merely by reason of that duty, a person personally interested in the prosecution. They cannot refer to any very remote interest in the matter and must refer to some particular and immediate personal interest in the case and its result, 15 A. 192 (F.B.); 23 A. 310; 27 A. 23 see also 20 C. 287; 23 C. 328; 7 C.W.N. 708, 24 M. 238; 1 Lah. 35. The words do not exclude *pecuniary* interest as distinguished from *personal* interest, 20 B. 432. Where the accused was a

servant of the Magistrate who tried him and was charged with rash and negligent driving of a carriage driven by the Magistrate's wife it was held that the Magistrate was personally interested, and the conviction was set aside, 14 B. 572; 9 B. 172. But the objection, that because the trying Judge was, once while at the bar holding briefs for a certain company, and therefore could not decide a case of the company impartially, was, overruled, holding that a man is quite capable of disassociating himself from such influence while acting in a judicial position, 4 C.W.N. cxxliii. The explanation was added to meet the objections raised in, 22 C. 323; 27 C. 340; 19 M. 263 and follows the view expressed in, 10 C. 194 and 19 A. 303. "A gentleman who without remuneration is merely discharging a public and honorary office and who has no personal interest in the proceedings of the municipality may well be supposed to be free from the bias which the jealousy of the law presumes in other persons immediately interested. Such immediate and disqualifying interest does, we think, exist in the case of a gentleman whose time and services are in consideration of a salary given to carry on the work of a Municipal Corporation. The jealousy of law must presume that such a person, however upright and honourable his character, is disqualified from taking part in judicial proceedings in which the municipality is *ipso facto* the prosecutor"—*per Field, J.*, in 10 C. 194 at 195. As a general rule it is undurable that a Magistrate, who, by local investigation while en tour, having himself discovered the existence of a crime, and collected or ascertained evidence in support of it, thereafter directs, recommends or invites the institution of judicial proceedings should try the supposed criminal, 18 Cr. L.J. 233; 1 Lab. 35; 23 Cr. L.J. 445; 24 Cr. L.J. 128. But it was held in 3 Bom. L.R. 542, that a Magistrate who held a departmental inquiry and sent the records to the Collector with his opinion that the evidence justified a prosecution was not disqualified. Where there is a disqualification under this section the judicial officer before whom the case is, is not a Court of competent jurisdiction and S. 537, *infra* would not apply. A case so tried must be regarded as one tried by a Court without jurisdiction, 23 C. 325.

EXPLANATION.—The explanation does not apply to any case in which a Magistrate may have been personally concerned as a Municipal Commissioner in the matter which forms the subject of a trial before him. It was rather intended to prevent an objection being raised that from the mere fact that the Magistrate happened to be a Municipal Commissioner, he was necessarily disqualified from holding a trial in which some municipal matter was involved. A Magistrate who merely authorises a prosecution as President of a Town Committee is not disqualified under this section from trying the case. But it is extremely undesirable that a Magistrate who has given formal sanction for a prosecution in his official capacity should try the case himself when other Magistrates are available, 25 Cr. L.J. 273—76 Ind. Cas. 855. It is a very different matter when the Magistrate is practically one of the prosecutors and the Judge, 10 C. 1030 at 1031 or otherwise concerned therein in a public capacity. A Magistrate holding a preliminary inquiry under S. 201, *supra* is not disqualified from trying the case himself, 4 C.W.N. 604; 24 C. 167. A Magistrate is not debarred from trying the case under the *Opium Act* by reason only of his being in charge of the opium and excise administration of the District, 15 A. 192 (F.B.); 11 A.L.J. 852—16 Cr. L.J. 17—22 Ind. Cas. 181. But where a District Magistrate took an active part in the investigation of a case, he was held to be disqualified, 24 M. 238; 6 C.W.N. 854. In *Weir II*, 728; a Municipal Commissioner reported to the Council an offence against conservancy provision which came to his notice, the Council of which he was a member directed the prosecution and the Commissioner also sat on the same Bench of Magistrates who convicted him, it was held that the proceedings were not illegal. Again a Municipal Commissioner who brought to the notice of the Executive Officer of the Committee of an infringement of a bye-law by the accused and on the strength of which the health officer instituted a prosecution of the accused before a Bench of Honorary Magistrates of which the said Municipal Commissioner was a member, and the accused was tried and convicted, it was held, that the conviction was not bad on the ground that the Municipal Commissioner was personally interested in the prosecution or was a party to the prosecution in the sense that he caused it to be instituted, 24 Cr. L.J. 135—72 Ind. Cas. 259. The Illustration to the section makes it clear that the interest need not be pecuniary, 14 Cr. L.J. 385—20 Ind. Cas. 209.

VIEWED THE PLACE IN WHICH AN OFFENCE IS ALLEGED TO HAVE BEEN COMMITTED. Local inspection is not a necessary disqualification. See also, 24 Cr. L.J. 135-71 Ind. Cas. 359.—See 16 C.W.N. 326; 12 C.W.N. 748; 9 C. 363; 37 C. 330; 39 C. 375; Weir II, 728, and a conviction had, will not be set aside if the local inspection is used to confirm the evidence on record. 25 Cr. L.J. 705-81 Ind. Cas. 193. S. 539B which has been newly added regulates local inspection. See 52 C. 148 and 53 C. 46 in this connection.

OR MAKING AN INQUIRY INTO THE CASE.—Where a District Magistrate took an active part in the investigation of a case he was held not to be competent to have it tried by himself, 24 M. 238; 5 C.W.N. 864; 1 Lah. 38. But a Magistrate holding a preliminary inquiry under S. 202, *supra* is not disqualified from trying the case himself. A District Magistrate who directed the accused to be prosecuted before a Magistrate subordinate to him will be disqualified from hearing an appeal preferred to him against the conviction. But a Magistrate who is the head of the police in the District is not debarred by this section from trying a person accused under the Police Act for any breach of any order, 22 A. 350. Where a Magistrate merely laid information before the police, and directed the police to make an inquiry, and the police after investigation instituted proceedings, held that the Magistrate was not disqualified from trying the case, 1908 A.W.N. 95; 32 A. 635, where 27 A. 25, is distinguished. A Sessions Judge is not prohibited in law from hearing an appeal from a conviction by a Magistrate in which he as an Insolvency Judge allowed the prosecution to proceed, 21 A.L.J. 90-24 Cr. L.J. 144-71 Ind. Cas. 388.

Practising pleader not to sit as Magistrate in certain Courts.

557. No pleader who practises in the Court of any Magistrate in a presidency-town or district shall sit as a Magistrate in such Court, or in any Court within the jurisdiction of such Court.

PLEADER.—For definition see S. 4 (1) (v), *supra*. The section does not deal with appointments. All it says is that no pleader who practises in the Court of any Magistrate shall sit as Magistrate in such Court or as a Presidency Magistrate. A pleader when appointed to act as a Magistrate ceases to practise in that Court and this section cannot apply to him. The appointment of a pleader as a Magistrate is not forbidden by any section of the Code, 23 B. 490. This section only provides that pleaders shall not sit as Presidency Magistrates while in actual practice in that Court. A pleader appointed as a Magistrate in any Court cannot under this section be prohibited from practising in that Court. But he cannot sit as a Magistrate in the Court if he continues to practise therein, 25 Cr. L.J. 311-75 Ind. Cas. 1031.

558. The Local Government may determine what, for the purposes of this Code, shall be deemed to be the language of each Court within the territories administered by such Government, other than the High Courts established by Royal Charter.

Power to decide language of Courts.

Provision for powers of Judges and Magistrates being exercised by their successors in office.

559. (1) Subject to the other provisions of this Code, the powers and duties of a Judge or Magistrate may be exercised or performed by his successor in office.

(2) When there is any doubt as to who is the successor in office of any Magistrate, the Chief Presidency Magistrate in a presidency-town, and the District Magistrate outside such towns, shall determine by order in writing the

Magistrate who shall, for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor in office of such Magistrate.

(3) *When there is any doubt as to who is the successor in office of any Additional or Assistant Sessions Judge, the Sessions Judge shall determine by order in writing the Judge who shall, for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor in office of such Additional or Assistant Sessions Judge.*

This section is new and enables powers of Judges and Magistrates to be exercised by their successors and when a doubt arises as to who is the successor, the District Magistrate, Chief Presidency Magistrate in the case of Magistrates and the Sessions Judge in the case of Additional and Assistant Sessions Judges to decide the question.

Officers concerned in sales not to purchase or bid for property.

560. A public servant having any duty to perform in connection with the sale of any property under this Code shall not purchase or bid for the property.

Compare S. 169, I.P.O. which prohibits a public servant from purchasing or bidding for property which he is legally bound not to purchase.

Special provisions with respect to offence of rape by a husband.

561. (1) Notwithstanding anything in this Code, no Magistrate except a Chief Presidency Magistrate or District Magistrate shall—

(a) take cognizance of the offence of rape where the sexual intercourse was by a man with his wife, or

(b) commit the man for trial for the offence.

(2) And, notwithstanding anything in this Code, if a Chief Presidency Magistrate or District Magistrate deems it necessary to direct an investigation by a police-officer, with respect to such an offence as is referred to in sub-section (1), no police-officer of a rank below that of police-inspector shall be employed either to make or to take part in the investigation.

When the offence of rape has been taken cognizance of by a District Magistrate as required by law, the fact that the investigation into the offence was made by an officer below the rank of police Inspector was held not to be such a material irregularity as would vitiate the subsequent proceedings. 1895 A.W.N. 9.

561A. *Nothing in this Code shall be deemed to limit or affect the inherent power 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.*

SCOPE OF THE SECTION.—In 1933 the Legislature has introduced a section in the Code the necessity of which really follows as a corollary from the proposition that the Code is not exhaustive. It is S. 561A which saves the inherent power of the High Court, which after all is the custodian of the rights of the subjects. Under this provision nothing in the Code of Criminal Procedure shall be deemed to limit

or affect the inherent power 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. This power was always supposed to exist and it was never denied that the arms of the High Court were not long enough to reach any kind of wrong but still in the absence of any express provision of law recognising the existence of this power the exercise of it could not be relied upon as an effective remedy for all cases of failure of justice. The Legislature very properly has put in this section in 1973 and it may be called the saving section of the Code, a counter to the curing section. S. 537. 30 C.W.N. cl. This section is new and it recognises the inherent powers of the High Court. It confers no new powers on the High Court; since the Court cannot by invoking its inherent powers extend to powers given to it by statute, 43 M.L.J. 593 following 48 M. 262 F.B.); 45 M. 913 (F.B.). Criminal Courts no less than Civil Courts exist for the administration of justice and Courts of both descriptions have inherent power to mould the procedure subject to the statutory provisions applicable to the matter in hand to enable them to discharge their functions as Courts of justice, 15 C.L.J. 517.

INHERENT POWER TO SECURE ENDS OF JUSTICE :—The terms of the section are from their nature very wide; "Inherent power" "to prevent abuse of process," "to secure ends of justice" are terms incapable of definition or enumeration and capable at the most of test, according to well established principles of criminal jurisprudence. The results of such tests might in certain cases be doubtful or indecisive... What then are the "ends of justice"? To the particular result in any particular case, justice is indifferent. The ends of justice is no more conviction than acquittal. It is justice by the ascertainment of truth as to the facts on a balance of evidence on each side. If so, do the ends of justice require, or do they not that the accused person from the moment of his arrest, should have reasonable access to his legal advisers; or does it suffice that this access should commence under the Prisons Act IX of 1894, from the time exclusive police custody has ceased. If the end of justice is justice and the spirit of justice is fairness, then each side should have equal opportunity to prepare its own case and to lay its evidence fully, freely and fairly before the Court. This necessarily involves preparation, which is more effective from the point of view of justice, if it is made with the aid of skilled legal advice. Ss. 497 and 498, *supra* give ample authority to release the prisoner on bail from exclusive police custody. If access to legal advisers is refused under this section the High Court has ample powers to see that such access is not prevented, where the ends of justice so require, 80 B. 741-at 749 750. Unlike S. 151 of the Civil Procedure Code which saves the inherent powers of all Courts, this section recognises the inherent powers of the High Court alone and is not as wide as S. 151, C.P.C., which empowers the Court to make any order as may be necessary for the ends of justice. See 32 C.L.J. 270 (S.B.) where *Mookerjee, J.*, has discussed at great length the inherent power of the Court and comes to the conclusion that there was no doubt whatever that the doctrine of inherent power as enunciated in, 44 C. 816 and 15 C.L.J. 517 is well established in principle and cannot be successfully questioned. This section recognises the inherent power of the High Court to make such orders as may be necessary to prevent abuse of the process of any Court, or otherwise to secure the ends of justice. But the power to expunge a portion of a judgment delivered by a competent Court is intended for cases of exceptional circumstances and should be exercised very sparingly. It is true there have been a few instances in which remarks calculated to expose a witness or an accused person to a criminal prosecution have been deleted. It is not desirable that a subordinate Magistrate should apply to the High Court to expunge remarks made by the lower appellate Court with regard to the conduct of judicial proceedings had before the subordinate Magistrate. A subordinate Magistrate should not be too sensitive and any attempt on his part to criticise a judgment of the lower appellate Court must be deprecated. The High Court burdened as it is with a large volume of judicial work cannot afford to waste time on applications made by subordinate Magistrates against their official superiors and there is not precedent for entertaining such an application. 27 Cr. L.J. 510-93 Ind. Cas. 974; 27 Cr. L.J. 1114-97 Ind. Cas. 426. The High Court has power under this section to order the expunging of passages in the order of a Sessions Judge granting bail, if such passages are likely to pre-

judge the Magistrate in the impartial trial of the case. 25 Cr. L.J. 1333—82 Ind. Cas. 755. See 23 Cr. L.J. 349 and 271. But the High Court has no power under this section to order restoration of property attached under S. 88, *supra* when no such application was made under S. 89, *supra* within two years as prescribed by that section, as such an order by the High Court will conflict with the express provisions of S. 89, *supra*. The proper remedy in such a case is to make an application to Government. 26 Bom. L.R. 719—25 Cr. L.J. 1293—82 Ind. Cas. 365. As observed by the learned Chief Justice in 45 M. 913, the Court cannot by invoking its inherent powers extend the powers given to it by statute. 38 M. 262 (F.B.); 27 Cr. L.J. 126—91 Ind. Cas. 703. Under this section the High Court can interfere where a charge has been framed by a Magistrate where none should have been framed on the evidence on record. 23 A.L.J. 21—26 Cr. L.J. 748—86 Ind. Cas 284.

First Offenders.

562. (1) *When any person not under twenty-one years of age is convicted*

Power of Court to release certain convicted offenders, on probation of good conduct instead of sentencing to punishment.

of an offence punishable with imprisonment for not more than seven years, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or transportation for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted,

regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (*not exceeding three years*) as the Court may direct, and in the meantime to keep the peace and be of good behaviour ;

Provided that, where any first offender is convicted by a Magistrate of the third class, or a Magistrate of the second class not specially empowered by the Local Government in this behalf, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class or Sub-divisional Magistrate, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in manner provided by section 380.

(1A) *In any case in which a person is convicted of theft, theft in a build-*

Conviction and release with admonition.

ing, dishonest misappropriation, cheating or any offence under the Indian Penal Code punishable with not more than two years' imprisonment and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

(2) *An order under this section may be made by any Appellate Court or by the High Court when exercising its power of revision.*

(3) *When an order has been made under this section in respect of any offender, the High Court may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law:*

Provided that the High Court shall not under this sub-section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(4) *The provisions of sections 122, 126A and 406A shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.*

AMENDMENT.—In sub-section (1) three years has been altered to seven years and 1 Lah. 612 is no longer law. See also 5 Pat.L.J. 257; the words "any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or transportation for life" have been added now. S. 380 (theft in a building), S. 381 (theft by clerk or servant), S. 490 (cheating and dishonestly inducing delivery of property) and S. 411 (receiving stolen property) come within this section. It is also expressly enacted that an appellate Court or the High Court may make an order under this section. The High Court when hearing an appeal in respect of any offender or when no appeal lies, in revision, is now empowered to set aside an order made under this section and in lieu thereof pass sentence on him according to law. Sub-section (1A) has been newly added by Act XXXVII of 1923. In sub-section (4) Ss. 126A, 406A have been added along with S. 122, and *supra*.

SCOPE OF THE SECTION.—The scope of the section has been greatly enlarged now. The principle embodied in this section applies not only to persons who are convicted of an offence punishable under the I.P.C. but also to those who are found guilty of an offence punishable under a Special or Local law but its provisions should not ordinarily apply to a person convicted under the Excise Act, 7 Lah. 32; 27 Cr. L.J. 478-93 Ind. Cas. 702. This section is not intended for the benefit of juvenile offenders only for which in fact the Reformatory Schools Act makes ample provision. Before applying this section to any particular case the Court must consider whether the case is a fit one for applying the provisions of this section or not and must guard against danger to the public and danger to the accused himself by applying the section. Where the offender has shown a criminal propensity rather than mere thoughtlessness and a general character of craft and deceit, the provisions of the section should not be applied, 25 Cr. L.J. 1224-82 Ind. Cas. 152. Where in a case of cheating the accused is literate well able to appreciate his action and its consequences and the crime appears to have been carefully planned, the use of the provisions of this section is not appropriate, 27 Cr. L.J. 838-95 Ind. Cas. 756. Powers are conferred upon the Magistrates not for the purpose of showing favour to any particular class of persons, the sole intention of the section is the convict should be given a chance of reformation which he would lose by being incarcerated in prison. The exercise of this discretion does need a considerable sense of responsibility in the Magistrate. Should he make a bad use of this discretion, far from a reforming an offender, he will be a cause of corruption of many; punishment is not awarded to a criminal, only for vindictive purposes. It is awarded so that the fate of the convict punished, may be a deterrent to others. If the Magistrate, by misuse of this section, causes to spring up in the minds of young people, an impression that they could with impunity commit serious offences, because they can get off with no punishment, then it is obvious that this misuse of beneficial power is a means on the contrary, of increasing crime. It may well be that many a young man who would have lived a virtuous life, had he been certain that his first offence, if serious, would meet with due punishment, may be led by the expectation that he will, even if detected, escape with no punishment, into a criminal course of life. He has

already the chance, that his first efforts may be undetected. It is therefore at least necessary in dealing with the first offender to see that the crime he has committed does not indicate that he is rather a fortunate habitual than a real first offender. Magistrates should be very careful to consider the wording of the section and should not allow themselves to be misled into the use of the section by misplaced leniency and sympathy, 27 Cr. L.J. 309-32 Ind. Cas. 693. The first essential for the application of this section is that the offender is to be a first offender and if he is one, the extenuating considerations which entitle him to indulgence are his age, character and antecedents, 2 Bom. L.R. 817. See also 27 Cr. L.J. 409-93 Ind. Cas. 73, where the accused, a widow of 45 years old, and a mere puppet in the hands of the other accused in the case who was convicted for an offence under S. 82 of the Registration Act was held entitled to the benefit of this section and was released on her entering into a bond with one surety for rupees one hundred. The section is headed "first offenders" and is intended primarily for first offenders but the words of the section "and no previous conviction is proved against him" seem to include the idea an inquiry into the past of the accused. Where as a matter of fact an accused person had a conviction 20 years ago which was not proved at the trial, the order passed under this section cannot be said to be unwarranted, 26 Cr. L.J. 1278-88 Ind. Cas. 1054; if the person is not under 21 years, the conviction is to be for an offence punishable with imprisonment for not more than seven years and if the person is under 21 years or a woman the conviction is to be for an offence not punishable with death or transportation for life. On a proper construction of this section a first offender, provided with other provisions of the section to apply, is entitled to the benefit of the section even when without such provision the Magistrate would be obliged to pass a sentence of imprisonment. Any other construction would entirely nullify in a great number of cases the provisions of this section, 27 Bom. L.R. 111-26 Cr. L.J. 694-88 Ind. Cas. 70. An order under this section directing release upon probation of good conduct cannot be said to be a punishment coming within S. 53, I.P.C., which specifies different kinds of punishments known to law. What is done in such a case is that the sentence of punishment is postponed and something which is not a punishment is substituted for it, i.e., the convicted person is required to enter into a recognizance with or without sureties and in the meanwhile to keep the peace and be of good behaviour, 24 Cr. L.J. 733-74 Ind. Cas. 66. Before passing an order under this section the Magistrate must satisfy himself that the accused is in a position to furnish security having regard to the provisions of S. 564, *infra*. S. 123, *supra*, applies to Ss. 106 and 118 and not to this section, 2 Rang. 360. The sending of first youthful offenders whose antecedents are not shown to be had, to ordinary jails has the effects of making them hardened criminals after they are discharged from such jails. Their association with all classes of offenders has a very unhealthy influence on them. The scope of the section has recently been widened. The provisions of this section and that of the Reformatory Schools Act should be resorted to by Magistrates when sentencing first youthful offenders, 27 Cr. L.J. 934-88 Ind. Cas. 390. This section cannot apply to a case falling under S. 411, I.P.C., even when the accused was 19 years old and the offence was his first offence, 1923 Patna 237; 26 Cr. L.J. 419-88 Ind. Cas. 85. This section will not apply when an accused person has not only been convicted, but also been sentenced by the Court, 17 A.L.J. 426-10 Cr. L.J. 392-50 Ind. Cas. 1000.

OFFENCE PUNISHABLE WITH IMPRISONMENT.—The Legislature in using these words must be taken to contemplate an offence primarily punishable with imprisonment. Had it been intended, that an offence punishable with fine only should also be within the scope of this sub-section, they would have added some such words as "or of an offence punishable with fine only," which is an expression constantly used (see for instance S. 67, I.P.C.). Further the use of the word "released" in this sub-section points to the object of the section being to prevent an offenders' committal to jail, in the circumstances mentioned in the sub-section, and that it was not intended to cover cases where the offender is merely ordered to pay a fine. Therefore in the absence of words which clearly show that an offence punishable with fine only, even though there is imprisonment in default of payment of fine, comes within this sub-section, the order is illegal, 27 Cr. L.J. 1183-97 Ind. Cas. 742.

COURT BEFORE WHICH HE IS CONVICTED.—The intention of the Legislature in using these words is not to limit the power of making orders under this section to the Court of first instance. The proviso to the section appears to be inconsistent with the view that this was the intention of the Legislature. The appellate Court therefore when disposing of an appeal has jurisdiction to pass an order under this section. 29 M. 567 following 24 A. 305. A formal conviction must be recorded by the Court before invoking the provisions of this section. See 1 Bom. L.R. 857.

TO APPEAR AND RECEIVE SENTENCE WHEN CALLED UPON.—It is not necessary or proper to fix a date under this section on which the accused should come up for receiving sentence. He is merely required to appear and receive sentence when called upon. S. 563, *infra*, explains how and when he is eventually to be brought up before the Court for receiving sentence. It is only when an accused person who has been ordered to keep the peace and be of good behaviour for a specified period, does not observe the conditions of his recognizance within the period, that the provisions of S. 563, *infra*, will have to be followed calling upon the accused to appear before the Court for receiving sentence, 2 Bom. L.R. 702.

RELEASE ON HIS ENTERING INTO A BOND WITH OR WITHOUT SURETIES.—The third proviso to S. 118, *supra*, which enacts that a minor's bond for keeping the peace or good behaviour shall be executed only by his sureties, is not applicable to bonds taken under this section enacted for the benefit of youthful offenders. To introduce proviso (3) of S. 118, *supra*, into this section is to give a forced and unnatural construction to the words of the section. Under this section a minor may himself execute a bond, as the language used is "on his entering into a bond with or without sureties, 6 Cr. L.J. 123.

WHEN CALLED UPON.—All that a Magistrate is authorised to do under this section is to require the accused to appear before him and receive the sentence when called upon to do so on the happening of the event contemplated by the next section, *vis.*, when the offender fails to observe any of the conditions of his recognizance.

PROVISO TO SUB-SECTION (1).—The procedure to be followed in cases submitted to superior Magistrates by Magistrates not empowered to act under this section is laid down in S. 380, *supra*; see commentaries under S. 380 at page 517. The superior Magistrate is empowered to pass such sentence or make such order as he might have passed or made if the case had originally been heard by him and he is also empowered to direct further inquiry or to direct additional evidence being taken or he may himself make such further inquiry or take such additional evidence if he thinks fit. The words "make such order as he might have made if the case had originally been heard by him" clearly suggest that the Magistrate is entitled to acquit an accused who having been convicted by a Magistrate not empowered to take action under this section submits the case for orders to a superior Magistrate, 16 Cr. L.J. 528—29 Ind. Cas. 863. See the similar provision in S. 349, *supra*, where it was held that a Magistrate cannot return the records to the inferior Magistrate, but must himself pass such judgment, order or sentence as he thinks fit according to law. The superior Magistrate may also have power when sentencing an accused to demand security to keep the peace under S. 106, *supra*. But there are no decided cases on these points. It is incompetent for a second class Magistrate to pass an order under this section himself. He should submit the case to a Magistrate of the first class or a Sub-Divisional Magistrate for orders with his report that he is of opinion that the case is a fit one for the exercise of powers under this section. 5 Lah. 36. The term of the sub-section are wide and the Court is to take into account the character and antecedents of the accused, 25 Cr. L.J. 1278—88 Ind. Cas. 1055.

SUB-SECTION (1A).—This was newly added by Act XXXVII of 1929 in accordance with the recommendations of the Indian Jails Committee and permits a first offender to be released after due admonition, a provision which did not exist before. This sub-section only applies to certain limited class of cases such as theft, etc., under the Indian Penal Code. Consequently it does not apply to offences under a totally different act such as the Motor Vehicles Act. The words of the sub-section are plain and effect must be given to them. Whether the sub-section should not be extended so as to cover less serious offences than those

mentioned in the sub-section is a matter for the Legislature. If a Magistrate wishes to pass a nominal sentence there are other means of doing so than the one adopted, *viz.*, release after due admonition. The High Court in the exercise of revisional powers set aside the order passed under this sub-section and sentenced each of the taxi-drivers found guilty under the Motor Vehicles Act to a fine of rupees five. 29 Bom. L.R. 297—27 Cr. L.J. 528—83 Ind. Cas. 992. Admonition is a judicial reprimand, a censure of the Judge and a warning that in case of repetition he will be punished severely in accordance with law. It is unfortunate that when this sub-section was added to the section by the new amendment the Legislature did not place it before the proviso. Ordinarily speaking when a proviso governs the whole of the provisions of the section it ought to come in the end. The proviso says that where any first offender is convicted by any Magistrate of the third or second class not specially empowered by the Local Government, the Magistrate shall record his opinion that the power conferred by this section should be exercised and submit his proceedings to a superior Magistrate forwarding the accused or taking bail for his appearance before such Magistrate who shall dispose of the case as provided by S. 380. Before this sub-section was enacted there was no power to release the offender after due admonition. That power undoubtedly is one under this section and although the proviso comes now in the middle of the section that fact does not affect the competency of third class Magistrates to exercise the powers granted under this sub-section. A third class Magistrate when he finds an accused guilty and discharges the accused after giving admonition under this sub-section, on account of his tender age acts without jurisdiction and must submit the proceedings to the superior Magistrate and the High Court is competent to review a third class Magistrate's order discharging the accused on admonition. 27 Bom. L.R. 1019—26 Cr. L.J. 1481—89 Ind. Cas. 1029, but see 47 A. 258, where it is held that the power under sub-section (1A) is exercisable by a second class Magistrate.

SUB-SECTION (2).—This sub-section is new and is in accordance with the decisions in 24 A. 306 followed in 29 M. 567. The effect of the order of the High Court when releasing an offender on probation of good conduct is to set aside the sentence passed on the accused and when the accused fails to furnish the security as directed by the Court, the Code is silent as to what the consequence is. The proper view to take in such a case is to consider the accused to be convicted by the Magistrate but not sentenced to punishment and produced before the Court for suitable punishment, 21 L.W. 40—26 Cr. L.J. 683—86 Ind. Cas. 89.

SUB-SECTION (3).—This sub-section empowers the High Court when exercising its powers as an appellate or revisional Court to set aside an order made under this section and in lieu thereof pass sentence of imprisonment on such offender according to law, 24 A.L.J. 228—27 Cr. L.J. 303—82 Ind. Cas. 591. But unlike its powers under S. 499, the High Court cannot inflict a greater punishment than might have been inflicted by the original Court. The decision in 37 A. 31 to the contrary is no longer law.

APPEAL AND REVISION.—An appeal lies against an order under this section in a summary trial notwithstanding the provisions of S. 414, *supra*. The order passed is not sentence within S. 414, 46 A. 828, see also 4 Cr. L. Rev. 480; 62 C. 463 followed in 27 Cr. L.J. 873—95 Ind. Cas. 121. The High Court is not bound to interfere in revision even where the order passed is illegal, 27 Cr. L.J. 624—94 Ind. Cas. 368 where 11 Cr. L.J. 339—5 Ind. Cas. 139 and 4 Cr. L.J. 75 is followed.

563. (1) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

Provision in case of offender failing to observe conditions of his recognizance.

(2) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard, or admit him to bail with a sufficient surety conditioned on his appearing for sentence. Such Court may, after hearing the case, pass sentence.

Power to issue a warrant of arrest for the apprehension of a first offender under this section is not given to Magistrates generally but is confined to the Court which convicted the offender or to the Court which could have dealt with the offender in respect of his original offence.

564. (1) The Court, before directing the release of an offender under section 562, shall be satisfied that the offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts, or in which the offender is likely to live during the period named for the observance of the conditions.

(2) Nothing in this section or in sections 562 and 563 shall affect the provisions of section 31 of the Reformatory Schools Act, 1897.

An order under sub-section (1) passed by a Sub-divisional Magistrate under the provisions of S. 380, *supra*, would be clearly appealable under S. 407, *supra*. S. 408, *supra*, gives a right of appeal to a person convicted on a trial by an Assistant Sessions Judge, a District Magistrate, a Magistrate of the first class and from a sentence passed under S. 349, by a Magistrate of the first class or an order (which is not a sentence) passed by a Magistrate of the first class under S. 380, *supra*. Such an order may exclude an order under this sub-section. Section 408, *supra*, is controlled by two sub-sections (b) and (c), sub-section (a) having now been deleted. These two sub-sections contained in the proviso do not curtail the right on appeal given by the section itself, but makes exceptions as to the *venue* of appeal which ordinarily lies to the Court of Session in cases specifically mentioned in provisos (b) and (c). The rights conferred by sections 407 and 408 are only restricted by Ss. 412, 413 and 414 and subject to the provisions of S. 415 which is a proviso to Ss. 413 and 414. This interpretation may lead to certain anomalies but a contrary view leads to absurdities of not less serious nature. A person against whom an order under S. 562 (1) has been passed will have one appeal in the first instance and possibly a second one when an order is passed sentencing him under S. 563 (2). The general tendency of the amending Act of 1923 has been to enlarge rather than to curtail the right of appeal in favour of the accused person. Several orders not appealable before have been made so now. An appeal lies on behalf of convicted persons against whom an order under this section was made, 26 Cr. L.J. 465-85 Ind. Cas. 135 where 37 A. 31; 18 Cr. L.J. 401-38 Ind. Cas. 861; 1 Cr. L.J. 543 and 1038 are referred to.

Section 31 of the Reformatory Schools Act refers to the power of Court to deal with youthful offenders including girls by discharging them after due admonition or deliver them to their parent or guardian or near relative taking a bond to be responsible for the good behaviour of the offenders.

Previously Convicted Offenders.

Order for notifying address of previously convicted offender.

565. (1) When any person having been convicted—

(a) by a Court in British India of an offence punishable under section 215, section 489A, section 489B, section 489C, or section 489D of the Indian Penal

Code, or of any offence punishable under Chapter XII or Chapter XVII of that Code, with imprisonment of either description for a term of three years or upwards, or

(b) by a Court or Tribunal in the territories of any Prince or State in India acting under the general or special authority of the Governor General in Council, or of any Local Government, of any offence which would, if committed in British India, have been punishable under any of the aforesaid sections or Chapters of the Indian Penal Code with like imprisonment for a like term, is again convicted of any offence punishable under any of those sections or Chapters with imprisonment for a term of three years or upwards by a High Court, Court of Session, Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate, of the first class, such Court or Magistrate may, if it or he thinks fit, at the time of passing sentence of transportation or 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 sentence.

(2) If such conviction is set aside on appeal or otherwise, such order shall become void.

(3) The Local Government may make rules to carry out the provisions of this section relating to the notification of residence or change or absence from residence by released convicts,

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

(5) Any person against whom an order has been made under this section and who refuses or neglects to comply with any rule so made shall be deemed within the meaning of section 176 of the Indian Penal Code to have omitted to give a notice required for the purpose of preventing the commission of an offence.

(6) Any person charged with a breach of any such rule may be tried by a Magistrate of competent jurisdiction in the district in which the place last notified by him as his place of residence is situated.

AMENDMENT.—This section has been redrafted. In sub-section (1), Ss. 215 and Ss. 489A to 489D have been added. Sub-section (4) empowers the appellate Court and the High Court in revision to pass orders under this section. By the addition in sub-section (5) failure to notify will be deemed to be omission to give information for the prevention of the commission of an offence. Sub-section (6) provides the place of trial for breach of rules.

OBJECT OF THE SECTION.—This section imposes a duty on a habitual offender when released from jail to give notice of his residence to the police in order that they may know his movements with certainty. This section must be construed strictly and it must be taken that the Court's power is limited to cases specifically described therein and does not specifically extend to cases where the Court instead of passing sentence of transportation or imprisonment passes a sentence of whipping, Ss B. 137. The object is that the person may be kept

under police surveillance with a view to preventing him from committing further offences, 31 M. 548 at 550. This section presupposes the previous convictions of the accused, 8 M.L.T. 352—(1910) M.W.N. 567—11 Cr. L.J. 636—8 Ind. Cas. 300, but not to a conviction for attempt. The law apparently assumes that a person convicted twice is likely to commit further crimes. The notice to the police is therefore introduced as a deterrent and in the majority of cases it undoubtedly acts as such. The residence of such men are frequently visited by the police and if he happens to have been away from home at the time of the occurrence of the crime in the locality they stand a fair chance of being suspected of being concerned in the crime. The conviction need not be for an offence of the same kind as before, because the expression "of the same kind" has been omitted. The sentence must be one of transportation or imprisonment and cannot be one of whipping, 35 B. 137.

SUB-SECTION (1).—The order must be passed at the time of passing the sentence. The previous conviction must be by a Court in British India or by a Court in the territories of any Prince or State in India acting under the authority of Government which if committed in British India would be punishable under the Penal Code.

SUB-SECTION (2).—For rules relating to notifications of residence by released convicts.

For Madras see G. O. No. 940, dated 15—6—1904 Fort. St. George Gazette, 1904, Part I, P. 576.

Bombay.—Bombay Gov. Gazette, 1900, Part I, P. 374, Notn. No. 1040. :

Bengal.—Bengal. Gov. Notn. No. 313, J. dated 14—1—1902.

Assam.—Assam Gazette, 1900, Part II, P. 540.

Punjab.—Punjab Gazette, 1901, Part I, P. 182.

Burma.—Burma Gazette, 1902, Part I, P. 63.

SUB-SECTION (3).—This sub-section is new. The appellate Court or a Court of revision is now empowered to pass an order under this section.

SUB-SECTION (5).—It was held in 31 M. 548 that non-compliance was punishable under first part of S. 176, I.P.C. See also 2 Cr. L.J. 735 but by the new amendment, cases under this sub-section fall under the second part of S. 176 I.P.C., viz., omission to give notice required for the purpose of preventing the commission of an offence which is a more serious offence. It was held before, that information required to be given under sub-section (4) of this section cannot be said to be required for the purpose of preventing the commission of any particular offence, though it may be required for the purpose of preventing the commission of offences generally and allowed to be dealt with under the first part of S. 176, I.P.C., 31 M. 548 where 15 C. 388 is referred to, but this is no longer law. A person is bound under this section merely to notify his residence or change of residence after his release. As long as he retains his residence in the same place, his temporary absence from his home for a day or two does not require notification. Whether he retains his residence or not must always be a question of fact. But provided a man leaves his family and household effects in the house in which he was residing he would ordinarily be considered to retain his residence. From an absence for a single night it cannot be said that he changed his residence and made himself liable to be dealt with under S. 176, I.P.C., 40 M. 789 at 790.

SCHEDULE I.
ENACTMENTS REPEALED.
[Repealed by Act X of 1914.]

SCHEDULE II.
TABULAR STATEMENT OF OFFENCES.

EXPLANATORY NOTE.—The entries in the second and seventh columns of this schedule, headed respectively "Offence" and "Punishment under the Indian Penal Code," are not intended as definitions of the offences and punishments described in the several corresponding sections of the Indian Penal Code, or even as abstracts of those sections, but merely as references to the subject of the section, the number of which is given in the first column.

The third column of this schedule applies also to the police in the towns of Calcutta and Bombay.

CHAPTER V.—ABETMENT.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant of a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
109	Abetment of any offence, if the act abetted is committed in consequence, and where no express provision is made for its punishment.	May arrest without warrant if arrest for the offence abetted may be made without warrant, but not otherwise.	According as a warrant or summons may issue for the offences abetted.	According as the offence abetted is bailable or not.	According as the offence abetted is compoundable or not.	The same punishment as for the offence abetted.	The Court by which the offence abetted is triable.
110	Abetment of any offence, if the person abetted does the act with a different intention from that of the abettor.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
111	Abetment of any offence, when one act is abetted and a different act is done; subject to the proviso.	Ditto	Ditto	Ditto	Ditto	The same punishment as for the offence intended to be abetted.	Ditto
113	Abetment of any offence, when an effect is caused by the act abetted different from that intended by the abettor.	Ditto	Ditto	Ditto	Ditto	The same punishment as for the offence committed.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
114	Abetment of any offence, if abettor is present when offence is committed.	May arrest without warrant if arrest for the offence abetted may be made without warrant, but not otherwise.	According as a warrant or summons may issue for the offence abetted.	According as the offence abetted is bailable or not.	According as the offence abetted is compoundable or not.	The same punishment as for the offence committed.	The Court by which the offence abetted is triable.
115	Abetment of an offence, punishable with death or transportation for life, if the offence be not committed in consequence of the abetments.	Ditto	Ditto	Not bailable.	Ditto	Imprisonment of either description for 7 years and fine.	Ditto
	If an act which causes harm be done in consequence of the abetment.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 14 years and fine.	Ditto
116	Abetment of an offence, punishable with imprisonment, if the offence be not committed in consequence of the abetment.	Ditto	Ditto	According as the offence abetted is bailable or not.	Ditto	Imprisonment extending to a quarter part of the longest term, and of any description, provided for the offence, or fine, or both.	Ditto
	If the abettor or the person abetted be a public servant whose duty it is to prevent the offence.	Ditto	Ditto	Ditto	Ditto	Imprisonment extending to half of the longest term, and of any description, provided for the offence, or fine, or both.	Ditto
117	Abetting the commission of an offence by the public, or by more than ten persons.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
318	<p>Concealing a design to commit an offence punishable with death or transportation for life if the offence be committed.</p> <p>If the offence be not committed.</p>	<p>May arrest without warrant if arrest for the offence abetted may be made without warrant, but not otherwise.</p> <p>Ditto</p>	<p>According as a warrant or summons may issue for the offence abetted.</p> <p>Ditto</p>	<p>Not bailable.</p> <p>Bailable.</p>	<p>According as the offence abetted is compoundable or not.</p> <p>Ditto</p>	<p>Imprisonment of either description for 7 years and fine.</p> <p>Imprisonment of either description for 8 years and fine.</p>	<p>The Court by which the offence abetted is triable.</p> <p>Ditto</p>
319	<p>A public servant concealing a design to commit an offence which it is his duty to prevent, if the offence be committed.</p> <p>If the offence be punishable with death or transportation for life.</p> <p>If the offence be not committed.</p>	<p>Ditto</p> <p>Ditto</p> <p>Ditto</p>	<p>Ditto</p> <p>Ditto</p> <p>Ditto</p>	<p>According as the offence abetted is bailable or not.</p> <p>Not bailable.</p> <p>Bailable.</p>	<p>Ditto</p> <p>Ditto</p> <p>Ditto</p>	<p>Imprisonment extending to half of the longest term and of any description, provided for the offence, or fine, or both.</p> <p>Imprisonment of either description for 10 years.</p> <p>Imprisonment extending to a quarter part of the longest term, and of any description, provided for the offence, or fine, or both.</p>	<p>Ditto</p> <p>Ditto</p> <p>Ditto</p>
320	<p>Concealing a design to commit an offence punishable with imprisonment, if the offence be committed.</p>	<p>Ditto</p>	<p>Ditto</p>	<p>According as the offence concealed is bailable or not.</p>	<p>Ditto</p>	<p>Ditto</p>	<p>Ditto</p>

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
120	If the offence be not committed.	May arrest without warrant if arrest for the offence abetted may be made without warrant, but not other wise.	According as a warrant or summons may issue for the offence abetted.	Bailable.	According as the offence abetted is compoundable or not.	Imprisonment extending to one-eighth part of the longest term, and of the description, provided for the offence, or fine, or both.	The Court by which the offence abetted is triable.

CHAPTER V A.—CRIMINAL CONSPIRACY.

120 B	Criminal conspiracy to commit an offence punishable with death, transportation or rigorous imprisonment for a term of two years or upwards.	May arrest without warrant if arrest for the offence which is the object of the conspiracy may be made without warrant, but not otherwise.	According as a warrant or summons may issue for the offence which is the object of the conspiracy.	According as the offence which is the object of the conspiracy is bailable or not.	Not compoundable.	The same punishment as that provided for the abetment of the offence which is the object of the conspiracy.	Court of Session when the offence which is the object of the conspiracy is triable exclusively by such Court; in the case of all other offences Court of Session, Presidency Magistrate or Magistrate of the first class.
	Any other criminal conspiracy.	Shall not arrest without warrant.	Summons.	Bailable.	Ditto	Imprisonment of either description for six months and fine, or both.	Presidency Magistrate or Magistrate of the first class.

CHAPTER VI.—OFFENCES AGAINST THE STATE.

121	Waging or attempting to wage war, or abetting the waging of war, against the Queen.	Shall not arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Death, or transportation for life and fine.	Court of Session.
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1	2	3	4	5	6	7	
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
131 A	Conspiring to commit certain offences against the State.	Shall not arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Transportation for life or any shorter term, or imprisonment of either description for 10 years and fine.	Court of Session.
132	Collecting arms, etc., with the intention of waging war against the Queen.	Ditto	Ditto	Ditto	Ditto	Transportation for life or imprisonment of either description for 10 years and fine.	Ditto
133	Concealing, with intent to facilitate a design to wage war.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto
134	Assaulting Governor General, Governor, etc., with intent to compel or restrain the exercise of any lawful power.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Ditto
134 A	Bedition.	Ditto	Ditto	Ditto	Ditto	Transportation for life or for any term and fine, or imprisonment of either description for 8 years and fine, or fine.	Court of Session, Chief Presidency Magistrate or District Magistrate or Magistrate of the first class specially empowered by Local Government in that behalf.
135	Waging war against any Asiatic Power in alliance or at peace with the Queen, or abetting the waging of such war.	Ditto	Ditto	Ditto	Ditto	Transportation for life and fine, or imprisonment of either description for 7 years and fine, or fine.	Court of Session.
136	Committing depredation on the territories of any Power in alliance or at peace with the Queen.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine, and forfeiture of certain property.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
127	Receiving property taken by war or depredation, mentioned in sections 125 and 126.	Shall not arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 7 years and fine, and forfeiture of certain property.	Court of Session.
128	Public servant voluntarily allowing prisoner of State or war in his custody to escape.	Ditto	Ditto	Ditto	Ditto	Transportation for life or imprisonment of either description for 10 years, and fine.	Ditto
129	Public servant negligently suffering prisoner of State or war in his custody to escape.	Ditto	Ditto	Bailable.	Ditto	Simple imprisonment for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
130	Aiding escape of, rescuing or harbouring, such prisoner, or offering any resistance to the re-capture of such prisoner.	Ditto	Ditto	Not bailable.	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session.

CHAPTER VII.—OFFENCES RELATING TO THE ARMY AND NAVY.

131	Abetting mutiny, or attempting to seduce an officer, soldier or sailor from his allegiance or duty.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session.
132	Abetment of mutiny, if mutiny is committed in consequence thereof.	Ditto	Ditto	Ditto	Ditto	Death or transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto
133	Abetment of an assault by an officer, soldier or sailor on his superior officer, when in the execution of his office.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
134	Abetment of such assault, if the assault is committed.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Court of Session.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
148	Rioting, armed with a deadly weapon.	May arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
149	If an offence be committed by any member of an unlawful assembly, every other member of such assembly shall be guilty of the offence.	According as arrest may be made without warrant for the offence or not.	According as a warrant or summons may issue for the offence.	According as the offence is bailable or not.	Ditto	The same as for the offence.	The Court by which the offence is triable.
150	Hiring, engaging or employing persons to take part in an unlawful assembly.	May arrest without warrant.	According to the offence committed by the person hired, engaged or employed.	Ditto	Ditto	The same as for a member of such assembly, and for any offence committed by any member of such assembly.	Ditto
151	Knowingly joining or continuing in any assembly of five or more persons after it has been commanded to disperse.	Ditto	Summons.	Bailable.	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Any Magistrate.
152	Assaulting or obstructing public servant when suppressing riot, etc.	Ditto	Warrant.	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
153	Wantonly giving provocation with intent to cause riot, if rioting be committed.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Any Magistrate.
	If not committed.	Ditto	Summons.	Ditto	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
153 A	Promoting enmity between classes.	Shall not arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
154	Owner or occupier of land not giving information of riot, etc.	Ditto	Summons.	Bailable.	Ditto	Fine of 1,000 rupees.	Presidency Magistrate or Magistrate of the first or second class.
155	Person for whose benefit or on whose behalf a riot takes place not using all lawful means to prevent it.	Ditto	Ditto	Ditto	Ditto	Fine ...	Ditto
156	Agent of owner or occupier for whose benefit a riot is committed not using all lawful means to prevent it.	Ditto	Ditto.	Ditto	Ditto	Ditto	Ditto
157	Harbouring persons hired for an unlawful assembly.	May arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months; or fine, or both.	Ditto
158	Being hired to take part in an unlawful assembly or riot.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
159	Or to go armed.	Ditto	Warrant.	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto
160	Committing affray.	Shall not arrest without warrant.	Summons.	Ditto	Ditto	Imprisonment of either description for 1 month, or fine of 100 rupees, or both.	Any Magistrate.

CHAPTER IX.—OFFENCES BY, OR RELATING TO, PUBLIC SERVANTS.

161	Being or expecting to be a public servant, and taking a gratification other than legal remuneration in respect of an official act.	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
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1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
162	Taking a gratification, in order by corrupt or illegal means to influence a public servant.	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
163	Taking a gratification for the exercise of personal influence with a public servant.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
164	Abetment by public servant of the offences defined in the last two preceding clauses with reference to himself.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
165	Public servant obtaining any valuable thing, without consideration, from a person concerned in any proceeding or business transacted by such public servant.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
166	Public servant disobeying a direction of the law with intent to cause injury to any person.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 year, or fine, or both.	Ditto
167	Public servant framing an incorrect document with intent to cause injury.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
168	Public servant unlawfully engaging in trade.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
169	Public servant unlawfully buying or bidding for property.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 2 years, or fine, or both, and confiscation of property, if purchased.	Ditto
170	Personating a public servant.	May arrest without warrant.	Warrant	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Any Magistrate.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether com- poundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
171	Wearing garb or carrying token used by public servant with fraudulent intent.	May arrest without warrant.	Sum- mons.	Bailable.	Not com- pound- able.	Imprisonment of either descrip- tion for 3 months, or fine of 300 rupees, or both.	Any Magistrate.

CHAPTER IX-A.—OFFENCES RELATING TO ELECTIONS.*

171 E	Bribery ...	Shall not arrest without warrant.	Sum- mons.	Bailable.	Not com- pound- able.	Imprisonment of either descrip- tion for 1 year, or fine, or both or if treating only, fine only.	Presidency Ma- gistrate or Magis- trate of the first class.
171 F	Undue influence and personation at an election.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either descrip- tion for 1 year, or fine, or both.	Ditto
171 G	False statement in connection with an election.	Ditto	Ditto	Ditto	Ditto	Fine ...	Ditto
171 H	Illegal payments in connection with elections.	Ditto	Ditto	Ditto	Ditto	Fine of 500 rupees.	Ditto
171 I	Failure to keep election accounts.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

CHAPTER X.—CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.

172	Abconding to avoid service of summons or other proceedings from a public servant.	Shall not arrest without warrant.	Sum- mons.	Bailable.	Not com- pound- able.	Simple impri- sonment for 1 month, or fine of 500 rupees, or both.	Any Magistrate.
	If summons or notice require atten- dance in person, etc., in a Court of Justice.	Ditto	Ditto	Ditto	Ditto	Simple impri- sonment for 6 months, or fine of 1,000 rupees, or both.	Ditto
173	Preventing the service or the affix- ing of any summons or notice, or the removal of it when it has been affixed, or preventing a pro- clamations.	Ditto	Ditto	Ditto	Ditto	Simple impri- sonment for 1 month, or fine of 500 rupees, or both.	Presidency Ma- gistrate or Magis- trate of the first or second class.
	If summons, etc., require attendance in person, etc., in a Court of Justice.	Ditto	Ditto	Ditto	Ditto	Simple impri- sonment for 6 months, or fine of 1,000 rupees, or both.	Ditto

* Added by Act XXXIX of 1920, S. 3.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
174	Not obeying a legal order to attend at a certain place in person or by agent, or departing therefrom without authority. If the order require personal attendance, etc., in a Court of Justice.	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Any Magistrate.
		Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto
175	Intentionally omitting to produce a document to a public servant by a person legally bound to produce or deliver such documents.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	The Court in which the offence is committed, subject to the provisions of Ch. XXXV; or, if not committed in a Court, a Presidency Magistrate or Magistrate of the first or second class.
	If the document is required to be produced in or delivered to a Court of Justice.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto
176	Intentionally omitting to give notice or information to a public servant by a person legally bound to give such notice or information.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
	If the notice or information required respects the commission of an offence, etc.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto
177	Knowingly furnishing false information to a public servant.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
	If the information required respects the commission of an offence, etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether com-poundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
178	Refusing oath when duly required to take oath by a public servant.	Shall not arrest without warrant.	Summons.	Bailable.	Not-com-poundable.	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	The Court in which the offence is committed, subject to the provisions of Ch. XXXV; or if not committed in a Court, a Presidency Magistrate or Magistrate of the first or second class.
179	Being legally bound to state truth, and refusing to answer questions.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
180	Refusing to sign a statement made to a public servant when legally required to do so.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 8 months, or fine of 500 rupees, or both.	Ditto
181	Knowingly stating to a public servant on oath as true that which is false.	Ditto	Warrant.	Ditto	Ditto	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
182	Giving false information to a public servant in order to cause him to use his lawful power to the injury or annoyance of any person.	Ditto	Summons.	Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
183	Resistance to the taking of property by the lawful authority of a public servant.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
184	Obstructing sale of property offered for sale by authority of a public servant.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 month, or fine of 500 rupees, or both.	Ditto
185	Bidding, by a person under a legal incapacity to purchase it, for property at a lawfully authorised sale, or bidding without intending to perform the obligations incurred thereby.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 month, or fine of 300 rupees, or both.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
186	Obstructing public servant in discharge of his public functions.	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Imprisonment of either description for 3 months, or fine of 500 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
187	Omission to assist public servant when bound by law to give such assistance.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 month, or fine of 200 rupees, or both.	Ditto
	Willfully neglecting to aid a public servant who demands aid in the execution of process, the prevention of offences, etc.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine of 500 rupees, or both.	Ditto
188	Disobedience to an order lawfully promulgated by a public servant, if such disobedience causes obstruction, annoyance or injury to persons lawfully employed.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 month, or fine of 200 rupees, or both.	Ditto
	If such disobedience causes danger to human life, health or safety, etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Ditto
189	Threatening a public servant with injury to him, or one in whom he is interested, to induce him to do or forbear to do any official act.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto
190	Threatening any person to induce him to refrain from making a legal application for protection from injury.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Ditto

CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.

193	Giving or fabricating false evidence in a judicial proceeding.	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
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1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
199	False statement made in any declaration which is by law receivable as evidence.	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	The same as for giving false evidence.	Court of Session, Presidency Magistrate or Magistrate of the first class.
200	Using as true any such declaration known to be false.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
201	Causing disappearance of evidence of an offence committed, or giving false information touching it to screen the offender, if a capital offence.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Court of Session.
	If punishable with transportation for life or imprisonment for 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If punishable with less than 10 years' imprisonment.	Ditto	Ditto	Ditto	Ditto	Imprisonment for a quarter of the longest term, and of the description provided for the offence, or fine, or both.	Presidency Magistrate or Magistrate of the first class, or Court by which the offence is triable.
202	Intentional omission to give information of an offence by a person legally bound to inform.	Ditto	Summons.	Ditto	Ditto	Imprisonment of either description for 6 months or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
203	Giving false information respecting an offence committed.	Ditto	Warrant.	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto
204	Secreting or destroying any document to prevent its production as evidence.	Ditto	Ditto	Ditto	Ditto	Ditto	Presidency Magistrate or Magistrate of the first class.
205	False personation for the purpose of any act or proceeding in a suit or criminal prosecution, or for becoming bail or security.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
306	Fraudulent removal or concealment, etc., of property to prevent its seizure as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree.	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
307	Claiming property without right, or practising deception touching any right to it, to prevent its being taken as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
308	Fraudulently suffering a decree to pass for a sum not due, or suffering decree to be executed after it has been satisfied.	Ditto	Ditto	Ditto	Ditto	Ditto	Presidency Magistrate or Magistrate of the first class.
309	False claim in a Court of Justice.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, and fine.	Ditto
310	Fraudulently obtaining a decree for a sum not due, or causing a decree to be executed after it has been satisfied.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto
311	False charge of offence made with intent to injure.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
	If offence charged be punishable with imprisonment for 7 years or upwards.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If offence charged be capital, or punishable with transportation for life.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session.
312	Harbouring an offender, if the offence be capital.	May arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 5 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
	If punishable with transportation for life or with imprisonment for 10 years.	May arrest without warrant.	Warrant	Bailable.	Not compoundable.	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If punishable with imprisonment for 1 year and not for 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment for a quarter of the longest term, and of the description, provided for the offence, or fine, or both.	Presidency Magistrate or Magistrate of the first class, or Court by which the offence is triable.
213	Taking gift, etc., to screen an offender from punishment, if the offence be capital.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Court of Session.
	If punishable with transportation for life, or with imprisonment for 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If with imprisonment for less than 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment for a quarter of the longest term, and of the description, provided for the offence, or fine, or both.	Presidency Magistrate or Magistrate of the first class, or Court by which the offence is triable.
214	Offering gift or restoration of property in consideration of screening offender, if the offence be capital.	Shall not arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Court of Session.
	If punishable with transportation for life, or with imprisonment for 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If with imprisonment for less than 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment for a quarter of the longest term and of the description, provided for the offence, or fine, or both.	Presidency Magistrate or Magistrate of the first class or Court by which the offence is triable.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
215	Taking gift to help to recover moveable property of which a person has been deprived by an offence, without causing apprehension of offender.	May arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
216	Harbouring an offender who has escaped from custody, or whose apprehension has been ordered, if the offence be capital.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If punishable with transportation for life or with imprisonment for 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 8 years, with or without fine.	Ditto
	If with imprisonment for 1 year, and not for 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment for a quarter of the longest term, and of the description provided for the offence or fine, or both.	Presidency Magistrate or Magistrate of the first class or Court by which the offence is triable.
216 A	Harbouring robbers or dacoits.	Ditto	Ditto	Ditto	Ditto	Rigorous imprisonment for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
217	Public servant disobeying a direction of law with intent to save person from punishment, or property from forfeiture.	Shall not arrest without warrant.	Summons.	Ditto	Ditto	Imprisonment of either description for 2 years or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
218	Public servant framing an incorrect record or writing with intent to save person from punishment, or property from forfeiture.	Ditto	Warrant.	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
219	Public servant in a judicial proceeding corruptly making and pronouncing an order, report, verdict or decision which he knows to be contrary to law.	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 7 years, or fine, or both.	Court of Session.
220	Commitment for trial or confinement by a person having authority, who knows that he is acting contrary to law.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
221	Intentional omission to apprehend on the part of a public servant bound by law to apprehend an offender, if the offence be capital.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, with or without fine.	Ditto
	If punishable with transportation for life, or imprisonment for 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, with or without fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If with imprisonment for less than 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years with or without fine.	Presidency Magistrate or Magistrate of the first or second class.
222	Intentional omission to apprehend on the part of a public servant bound by law to apprehend person under sentence of a Court of Justice if under sentence of death.	Ditto	Ditto	Not bailable.	Ditto	Transportation for life, or imprisonment of either description for 14 years, with or without fine.	Court of Session.
	If under sentence of transportation or penal servitude for life, or transportation, imprisonment or penal servitude for 10 years or upwards.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, with or without fine.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
	If under sentence of imprisonment for less than 10 years or lawfully committed to custody.	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 3 years, or fine or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
223	Escape from confinement negligently suffered by a public servant.	Ditto	Summons.	Ditto	Ditto	Simple imprisonment for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
224	Resistance or obstruction by a person to his lawful apprehension.	May arrest without warrant.	Warrant.	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto
225	Resistance or obstruction to the lawful apprehension of another person, or rescuing him from lawful custody.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
	If charged with an offence punishable with transportation for life or imprisonment for 10 years.	Ditto	Ditto	Not bailable.	Ditto	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If charged with a capital offence.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Court of Session.
	If the person is sentenced to transportation for life, or to transportation, penal servitude or imprisonment for 10 years or upwards.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
	If under sentence of death.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto
225 A	Omission to apprehend, or sufferance of escape on part of public servant, in cases not otherwise provided for— (a) in case of intentional omission or sufferance ;	Shall not arrest without warrant.	Ditto	Bailable.	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
	(b) in case of negligent omission or sufferance.	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Simple imprisonment for 2 years, or fine or both.	Presidency Magistrate or Magistrate of the first or second class.
325 B	Resistance or obstruction to lawful apprehension, or escape or rescue in cases not otherwise provided for.	May arrest without warrant.	Warrant.	Ditto	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Ditto
326	Unlawful return from transportation.	Ditto	Ditto	Not bailable.	Ditto	Transportation for life, and fine, and rigorous imprisonment for 3 years before transportation.	Court of Session.
327	Violation of condition of remission of punishment.	Shall not arrest without warrant.	Summons.	Ditto	Ditto	Punishment of original sentence, or, if part of the punishment has been undergone, the residue.	The Court by which the original offence was triable.
328	Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding.	Ditto	Ditto	Bailable.	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	The Court in which the offence is committed, subject to the provisions of Chapter XXXV.
329	Personation of a juror or assessor.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first class.

CHAPTER XII.—OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS.

331	Counterfeiting, or performing any part of the process of counterfeiting, coin.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session
332	Counterfeiting, or performing any part of the process of counterfeiting, the Queen's coin.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
233	Making, buying or selling instrument for the purpose of counterfeiting coin.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
234	Making, buying or selling instrument for the purpose of counterfeiting the Queen's coin.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Court of Session.
235	Possession of instrument or material for the purpose of using the same for counterfeiting coin.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If Queen's coin.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Court of Session.
236	Abetting in British India the counterfeiting out of British India of coin.	Ditto	Ditto	Ditto	Ditto	The punishment provided for abetting the counterfeiting of such coin within British India.	Ditto
237	Import or export of counterfeit coin, knowing the same to be counterfeit.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
238	Import or export of counterfeits of the Queen's coin knowing the same to be counterfeit.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years and fine.	Court of Session.
239	Having any counterfeit coin known to be such when it came into possession, and delivering, etc., the same to any person.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 5 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
240	The same with respect to the Queen's coin.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant of a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
241	Knowingly delivering to another any counterfeit coin as genuine which, when first possessed, the deliverer did not know to be counterfeit.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine of ten times the value of the coin counterfeited, or both.	Presidency Magistrate or Magistrate of the first or second class.
242	Possession of counterfeit coin by a person who knew it to be counterfeit when he became possessed thereof.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
243	Possession of Queen's coin by a person who knew it to be counterfeit when he became possessed thereof.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto
244	Person employed in a Mint causing coin to be of a different weight or composition from that fixed by law.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session.
245	Unlawfully taking from a Mint any coining instrument.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
246	Fraudulently diminishing the weight or altering the composition of any coin.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
247	Fraudulently diminishing the weight or altering the composition of Queen's coin.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto
248	Altering appearance of any coin with intent that it shall pass as a coin of a different description.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Ditto
249	Altering appearance of the Queen's coin with intent that it shall pass as a coin of a different description.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
250	Delivery to another of coin possessed with the knowledge that it is altered.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 5 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
251	Delivery of Queen's coin possessed with the knowledge that it is altered.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine.	Ditto
252	Possession of altered coin by a person who knew it to be altered when he became possessed thereof.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Ditto
253	Possession of Queen's coin by a person who knew it to be altered when he became possessed thereof.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 5 years and fine.	Ditto
254	Delivery to another of coin as genuine which, when first possessed, the deliverer did not know to be altered.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine of ten times the value of the coin.	Presidency Magistrate or Magistrate of the first or second class.
255	Counterfeiting a Government stamp.	Ditto	Ditto	Bailable.	Ditto	Transportation for life or imprisonment of either description for 10 years and fine.	Court of Session.
256	Having possession of an instrument or material for the purpose of counterfeiting a Government stamp.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto
257	Making, buying or selling instrument for the purpose of counterfeiting a Government stamp.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
258	Sale of counterfeit Government stamp.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

CHAPTER XIV.—OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY,
CONVENIENCE, DECENCY AND MORALS.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether com- poundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
269	Negligently doing any act known to be likely to spread infection of any disease dangerous to life.	May arrest without warrant.	Sum- mons.	Bailable.	Not com- pound- able.	Imprisonment of either descrip- tion for 6 months, or fine, or both.	Presidency Ma- gistrata or Magis- trate of the first or second class.
270	Malignantly doing any act known to be likely to spread infection of any disease dangerous to life.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either descrip- tion for 2 years, or fine, or both.	Ditto
271	Knowingly dis- obeying any quaran- tine rules.	Shall not arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either descrip- tion for 6 months, or fine, or both.	Ditto
272	Adulterating food or drink intended for sale, so as to make the same noxious.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either descrip- tion for 6 months, or fine of 1,000 rupees, or both.	Ditto
273	Selling any food or drink as food and drink, knowing the same to be noxious.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
274	Adulterating any drug or medical pre- paration intended for sale so as to lessen its efficacy, or to change its opera- tion, or to make it noxious.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
275	Offering for sale or issuing from a dis- pensary any drug or medical preparation known to have been adulterated.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
276	Knowingly sell- ing or issuing from a dispensary any drug or medical pre- paration as a differ- ent drug or medi- cal preparation,	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
294	Obscene songs.	May arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 3 months, or fine, or both.	<i>Any Magistrate.</i>
294 A	Keeping a lottery office.	Shall not arrest without warrant.	Summons.	Ditto	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Ditto
	Publishing proposals relating to lotteries.	Ditto	Ditto	Ditto	Ditto	Fine of 1,000 rupees.	Ditto

CHAPTER XV.—OFFENCES RELATING TO RELIGION.

295	Destroying, damaging or defiling a place of worship or sacred object with intent to insult the religion of any class of persons.	May arrest without warrant.	Summons.	Bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
296	Causing a disturbance to an assembly engaged in religious worship.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Ditto
297	Trespassing in place of worship or sepulture, disturbing funeral, with intention to wound the feelings or to insult the religion of any person, or offering indignity to a human corpse.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Ditto
298	Uttering any word or making any sound in the hearing, or making any gesture, or placing any object in the sight of any person, with intention to wound his religious feeling.	Shall not arrest without warrant.	Ditto	Ditto	Compoundable.	Ditto	Ditto

CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY.

Of Offences Affecting Life.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether com- poundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
302	Murder	May arrest without warrant.	Warrant.	Not bailable.	Not com- poundable.	Death or trans- portation for life and fine.	Court of Session.
303	Murder by a per- son under sentence of transportation for life.	Ditto	Ditto	Ditto	Ditto	Death.	Ditto
304	Culpable homicide not amounting to murder, if act by which the death is caused is done with intention of causing death, etc.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or impris- onment of either description for 10 years, and fine.	Ditto
	If act is done with knowledge that it is likely to cause death, but without any intention to cause death, &c.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, or fine, or both.	Ditto
304 A	Causing death by rash or negligent act.	Ditto	Ditto	Bailable.	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Court of Session, Presidency Magis- trate or Magistrate of the first class.
305	A betment of suicide committed by a child, or insane, or delirious person, or an idiot, or a person intoxicated.	Ditto	Ditto	Not bailable.	Ditto	Death, or trans- portation for life, or imprisonment for 10 years and fine.	Court of Session.
306	Abetting the com- mission of suicide.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine.	Ditto
307	Attempt to murder.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
	If such act cause hurt to any person.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or as above.	Ditto
	Attempt by life- convict to murder, if hurt is caused.	Ditto	Ditto	Ditto	Ditto	Death or as above.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
308	Attempt to commit culpable homicide.	May arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session.
	If such act cause hurt to any person.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, or fine, or both.	Ditto
309	Attempt to commit suicide.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
311	Being a thug.	Ditto	Ditto	Not bailable.	Ditto	Transportation for life, and fine.	Court of Session.

Of the Causing of Miscarriage ; of Injuries to Unborn Children ; of the Exposure of Infants ; and of the Concealment of Births.

312	Causing miscarriage.	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session.
	If the woman be quick with child.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto
313	Causing miscarriage without woman's consent.	Ditto	Ditto	Not bailable.	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto
314	Death caused by an act done with intent to cause miscarriage.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto
	If act done without woman's consent.	Ditto	Ditto	Ditto	Ditto	Transportation for life or as above.	Ditto
315	Act done with intent to prevent a child being born alive, or to cause it to die after its birth.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, or fine, or both.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
316	Causing death of a quick unborn child by an act amounting to culpable homicide.	Shall not arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 10 years, and fine.	Court of Session.
317	Exposure of a child under 12 years of age by parent or person having care of it with intention of wholly abandoning it.	May arrest without warrant.	Ditto	Bailable.	Ditto	Imprisonment of either description for 7 years or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
318	Concealment of birth by secret disposal of dead body.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto

Of Hurt.

323	Voluntarily causing hurt.	Shall not arrest without warrant.	Summons.	Bailable.	Compoundable.	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both.	Any Magistrate.
324	Voluntarily causing hurt by dangerous weapons or means.	May arrest without warrant.	Ditto	Ditto	Compoundable when permission is given by the Court before which a prosecution is pending.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
325	Voluntarily causing grievous hurt.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
326	Voluntarily causing grievous hurt by dangerous weapons or means.	May arrest without warrant.	Summons.	Not bailable.	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
327	Voluntarily causing hurt to extort property or a valuable security, or to constrain to do anything which is illegal or which may facilitate the commission of an offence.	Ditto	Warrant.	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto
328	Administering stupefying drug with intent to cause hurt, etc.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session.
329	Voluntarily causing grievous hurt to extort property or a valuable security, or to constrain to do anything which is illegal, or which may facilitate the commission of an offence.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto
330	Voluntarily causing hurt to extort confession or information, or to compel restoration of property, etc.	Ditto	Ditto	Bailable.	Ditto	Imprisonment of either description for 7 years, and fine.	Ditto
331	Voluntarily causing grievous hurt to extort confession or information, or to compel restoration of property, etc.	Ditto	Ditto	Not bailable.	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto
332	Voluntarily causing hurt to deter public servant from his duty.	Ditto	Ditto	Bailable.	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
333	Voluntarily causing grievous hurt to deter public servant from his duty.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 10 years, and fine.	Court of Session.
334	Voluntarily causing hurt on grave and sudden provocation, not intending to hurt any other than the person who gave the provocation.	Shall not arrest without warrant.	Summons.	Bailable.	Compoundable.	Imprisonment for 1 month, or fine of 500 rupees, or both.	Any Magistrate.
335	Causing grievous hurt on grave and sudden provocation, not intending to hurt any other than the persons who gave the provocation,	May arrest without warrant.	Ditto	Ditto	Compoundable when permission is given by the Court before which a prosecution is pending.	Imprisonment of either description for 4 years, or fine of 2,000 rupees, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
336	Doing any act which endangers human life or the personal safety of others.	Ditto	Ditto	Ditto	Not compoundable.	Imprisonment of either description for 3 months, or fine of 250 rupees, or both.	Any Magistrate.
337	Causing hurt by an act which endangers human life, etc.	Ditto	Ditto	Ditto	Compoundable when permission is given by the Court before which a prosecution is pending.	Imprisonment of either description for 6 months, or fine of 500 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
338	Causing grievous hurt by an act which endangers human life, etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine of 1,000 rupees, or both.	Ditto

Of Wrongful Restraint and Wrongful Confinement.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
341	Wrongfully restraining any person.	May arrest without warrant.	Summons.	Bailable.	Compoundable.	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Any Magistrate.
342	Wrongfully confining any person.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for one year, or fine of 1,000 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
343	Wrongfully confining for three or more days.	Ditto	Ditto	Ditto	Compoundable when permission is given by the Court before which the prosecution is pending.	Imprisonment of either description for 2 years, or fine, or both.	Ditto
344	Wrongfully confining for ten or more days.	Ditto	Ditto	Ditto	Not compoundable.	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
345	Keeping any person in wrongful confinement, knowing that a writ has been issued for his liberation.	Shall not arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years in addition to imprisonment under any other section.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
365	Assault or criminal force with intent to dishonour a person, otherwise than on grave and sudden provocation.	Shall not arrest without warrant.	Summons.	Bailable.	Compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
366	Assault or criminal force in attempt to commit theft of property worn or carried by a person.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Ditto	Any Magistrate.
367	Assault or use of criminal force in attempt wrongfully to confine a person.	Ditto	Ditto	Bailable.	Compoundable when permission is given by the Court before which the prosecution is pending.	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both.	Ditto
368	Assault or use of criminal force on grave and sudden provocation.	Shall not arrest without warrant.	Summons.	Ditto	Compoundable.	Simple imprisonment for 1 month, or fine of 200 rupees, or both.	Ditto

Of Kidnapping, Abduction, Slavery and Forced Labour.

369	Kidnapping ...	May arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
364	Kidnapping or abducting in order to murder.	Ditto	Ditto	Not bailable.	Ditto	Transportation for life, or rigorous imprisonment for 14 years and fine.	Court of Session.
365	Kidnapping or abducting with intent secretly and wrongfully to confine a person.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant of a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether com-poundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
366	Kidnapping or abducting a woman to compel her marriage or to cause her defilement, etc.	May arrest without warrant.	Warrant.	Not bailable.	Not com-poundable.	Imprisonment of either description for 10 years, and fine.	Court of Session.
366 A.*	Procuration of minor girl.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
366 B.*	Importation of girl from foreign country.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
367	Kidnapping or abducting in order to subject a person to grievous hurt, slavery, etc.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
368	Concealing or keeping in confinement a kidnapped person.	Ditto	Ditto	Ditto	Ditto	Punishment for kidnapping or abduction.	Court of Session, Presidency Magistrate or Magistrate of the first class.
369	Kidnapping or abducting a child with intent to take property from the person of such child.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Ditto
370	Buying or disposing of any person as a slave.	Shall not arrest without warrant.	Ditto	Bailable.	Ditto	Ditto	Court of Session.
371	Habitual dealing in slaves.	May arrest without warrant.	Ditto	Not bailable.	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto
372	Selling or letting to hire a minor for purposes of prostitution, etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
373	Buying or obtaining possession of a minor for the same purposes.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

* Added by Act XX of 1923, S. 4.

1	2	3	4	5	6	7	8
Section.	Offences.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
374	Unlawful compulsory labour.	Shall not arrest without warrant.	Warrant.	Bailable.	Compoundable.	Imprisonment of either description for 1 year, or fine, or both.	Any Magistrate.

Of Raps.

376	<i>Raps— If the sexual intercourse was by a man with his own wife not being under 12 years of age.*</i>	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Court of Session, Chief Presidency Magistrate or District Magistrate.
	<i>If the sexual intercourse was by a man with his own wife being under 12 years of age.*</i>	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session.
	<i>In any other case.</i>	May arrest without warrant.	Warrant.	Not Bailable.	Ditto	Ditto	Ditto

Of Unnatural Offences.

377	Unnatural offences.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
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CHAPTER XVII.—OFFENCES AGAINST PROPERTY.

Of Theft.

379	Theft.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Any Magistrate.
380	Theft in a building, tent or vessel.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Ditto
381	Theft by clerk or servant of property in possession of master or employer.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first or second class.

* Added by Act XXIX of 1925.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
382	Theft, preparation having been made for causing death, or hurt, or restraint, or fear of death, or of hurt, or of restraint, in order to the committing of such theft, or to retiring after committing it, or to retaining property taken by it.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Rigorous imprisonment for 10 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

Of Extortion.

384	Extortion	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
385	Putting or attempting to put in fear of injury, in order to commit extortion.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto
386	Extortion by putting a person in fear of death or grievous hurt.	Ditto	Ditto	Not bailable.	Ditto	Imprisonment of either description for 10 years, and fine.	Court of Session.
387	Putting or attempting to put a person in fear of death or grievous hurt, in order to commit extortion.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Ditto
388	Extortion by threat of accusation of an offence punishable with death, transportation for life, or imprisonment for 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto
	If the offence threatened be an unnatural offence.	Ditto	Ditto	Ditto	Ditto	Transportation for life.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
399	Making preparation to commit dacoity.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Rigorous imprisonment for 10 years, and fine.	Court of Session.
400	Belonging to a gang of persons associated for the purpose of habitually committing dacoity.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or rigorous imprisonment for 10 years, and fine.	Ditto
401	Belonging to a wandering gang of persons associated for the purpose of habitually committing thefts.	Ditto	Ditto	Ditto	Ditto	Rigorous imprisonment for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
402	Being one of five or more persons assembled for the purpose of committing dacoity.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session.
<i>Of Criminal Misappropriation of Property.</i>							
403	Dishonest misappropriation of moveable property, or converting it to one's own use.	Shall not arrest without warrant.	Warrant.	Bailable.	Compoundable when permission is given by the Court before which the prosecution is pending.	Imprisonment of either description for 2 years, or fine, or both.	Any Magistrate.
404	Dishonest misappropriation of property, knowing that it was in possession of a deceased person at his death, and that it has not since been in the possession of any person legally entitled to it.	Ditto	Ditto	Ditto	Not compoundable.	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether com-poundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
404	If by clerk or person employed by deceased.	Shall not arrest without warrant.	Warrant.	Bailable.	Not com-poundable.	Imprisonment of either description for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.

Of Criminal Breach of Trust.

406	Criminal breach of trust.	May arrest without warrant.	Warrant.	Not bailable.	Not com-poundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
407	Criminal breach of trust by a carrier, wharfinger, etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
408	Criminal breach of trust by clerk or servant.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
409	Criminal breach of trust by public servant or by banker, merchant, agent, etc.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

Of the Receiving of Stolen Property.

411	Dishonestly receiving stolen property, knowing it to be stolen.	May arrest without warrant.	Warrant.	Not bailable.	Not com-poundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
412	Dishonestly receiving stolen property knowing that it was obtained by dacoity.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or rigorous imprisonment for 10 years, and fine.	Court of Session.
413	Habitually dealing in stolen property.	Ditto	Ditto	Ditto	Ditto	Transportation for life or imprisonment of either description for 10 years, and fine.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
414	Assisting in concealment or disposal of stolen property, knowing it to be stolen,	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.

Of Cheating.

417	Cheating.	Shall not arrest without warrant.	Warrant.	Bailable.	Compoundable when permission is given by the Court before which the prosecution is pending.	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
418	Cheating a person whose interest the offender was bound, either by law or by legal contract, to protect.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
419	Cheating by personation.	May arrest without warrant.	Ditto	Ditto	Ditto	Ditto	Ditto
420	Cheating and thereby dishonestly inducing delivery of property or the making, alteration or destruction of a valuable security.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

Of Fraudulent Deeds and Disposition of Property.

421	Fraudulent removal or concealment of property, etc., to prevent distribution among creditors.	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
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1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
432	Fraudulently preventing from being made available for his creditors a debt or demand due to the offender.	May arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
438	Fraudulent execution of deed of transfer containing a false statement of consideration.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
434	Fraudulent removal or concealment of property, of himself, or any other person, assisting in the doing thereof, or dishonestly releasing any demand or claim to which he is entitled.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

Of Mischief

436	Mischief.	Shall not arrest without warrant.	Summons.	Bailable.	Compoundable when the only loss or damage caused is loss or damage to a private person.	Imprisonment of either description for 3 months, or fine, or both.	Any Magistrate.
427	Mischief, and thereby causing damage to the amount of 50 rupees or upwards.	Ditto	Warrant.	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
428	Mischief by killing, poisoning, maiming or rendering useless any animal of the value of 10 rupees or upwards.	May arrest without warrant.	Ditto	Ditto	Not compoundable.	Ditto	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
429	Mischief by killing, poisoning, maiming or rendering useless any elephant, camel, horse, etc., whatever may be its value, or any other animal of the value of 50 rupees or upwards.	May arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 5 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
430	Mischief by causing diminution of supply of water for agricultural purposes, etc.	Ditto	Ditto	Ditto	Compoundable when permission is given by the Court before which the prosecution is pending.	Ditto	Ditto
431	Mischief by injury to public road, bridge, navigable river or navigable channel and rendering it impassable or less safe for travelling or conveying property.	Ditto	Ditto	Ditto	Not compoundable.	Ditto	Ditto
432	Mischief by causing inundation or obstruction to public drainage, attended with damage.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
433	Mischief by destroying or moving or rendering less useful a light-house or sea-mark, or by exhibiting false lights.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, or fine, or both.	Court of Session.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
434	Mischief by destroying or moving, etc., a land mark fixed by public authority.	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
435	Mischief by fire or explosive substance with intent to cause damage to amount of 100 rupees or upwards, or in case of agricultural produce, 10 rupees or upwards.	May arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
436	Mischief by fire or explosive substance with intent to destroy a house, etc.	Ditto	Ditto	Not bailable.	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session.
437	Mischief with intent to destroy or make unsafe a decked vessel or a vessel of 20 tons burden.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto
438	The mischief described in the last section when committed by fire or any explosive substance.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto
439	Running vessels ashore with intent to commit theft, etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto
440	Mischief committed after preparation made for causing death, or hurt, etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 5 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
<i>Of Criminal Trespass.</i>							
447	Criminal trespass.	May arrest without warrant.	Summons.	Bailable.	Compoundable.	Imprisonment of either description for 3 months, or fine of 500 rupees, or both.	Any Magistrate.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant of a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
448	House-trespass.	May arrest without warrant.	Warrant.	Bailable.	Compoundable.	Imprisonment of either description for 1 year, or fine of 1,000 rupees, or both.	Any Magistrate.
449	House-trespass in order to the commission of an offence punishable with death.	Ditto	Ditto	Not bailable.	Not compoundable.	Transportation for life, or rigorous imprisonment for 10 years, and fine.	Court of Session.
450	House-trespass in order to the commission of an offence punishable with transportation for life.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto
451	House-trespass in order to the commission of an offence punishable with imprisonment.	Ditto	Ditto	Bailable.	Compoundable when permission is given by Court before which prosecution is pending.	Imprisonment of either description for 2 years, and fine.	Any Magistrate.
	If the offence is theft.	Ditto	Ditto	Not bailable.	Not compoundable.	Imprisonment of either description for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
452	House-trespass, having made preparation for causing hurt, assault, etc.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
453	Lurking house-trespass or house-breaking.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, and fine.	Presidency Magistrate or Magistrate of the first or second class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
454.	Lurking house-trespass or house-breaking in order to the commission of an offence punishable with imprisonment. If the offence is theft.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 3 years, and fine. Imprisonment of either description for 10 years, and fine.	Court of Sessions Presidency Magistrate or Magistrate of the first or second class. Ditto
455	Lurking house-trespass or house-breaking after preparation made for causing hurt, assault, etc.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first class.
456	Lurking house-trespass or house-breaking by night.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
457	Lurking house-trespass or house-breaking by night in order to the commission of an offence punishable with imprisonment. If the offence is theft.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 5 years, and fine. Imprisonment of either description for 14 years, and fine.	Ditto Ditto
458	Lurking house-trespass or house-breaking by night, after preparation made for causing hurt, etc.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first class.
459	Grievous hurt caused whilst committing lurking house-trespass or house-breaking.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
460	Death or grievous hurt caused by one of several persons jointly concerned in house-breaking by night, etc.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session.
461	Dishonestly breaking open or unfastening any closed receptacle containing or supposed to contain property.	Ditto	Ditto	Bailable.	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
462	Being entrusted with any closed receptacle containing or supposed to contain any property, and fraudulently opening the same.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.

CHAPTER XVIII.—OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY MARKS.

465	Forgery	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 9 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
466	Forgery of a record of a Court of Justice or of a Register of Births, etc., kept by a public servant.	Ditto	Ditto	Not bailable.	Ditto	Imprisonment of either description for 7 years, and fine.	Court of Session.
467	Forgery of a valuable security, will or authority to make or transfer any valuable security, or to receive any money, etc.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto
	When the valuable security is a promissory note of the Government of India.	May arrest without warrant.	Ditto	Ditto	Ditto	Ditto	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
468	Forgery for the purpose of cheating.	Shall not arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
469	Forgery for the purpose of harming the reputation of any person, or knowing that it is likely to be used for that purpose.	Ditto	Ditto	Bailable.	Ditto	Imprisonment of either description for 3 years, and fine.	Ditto
471	Using as genuine a forged document which is known to be forged.	Ditto	Ditto	Ditto	Ditto	Punishment for forgery of such document.	Same Court as that by which the forgery is triable.
	When the forged document is a promissory note of the Government of India.	May arrest without warrant.	Ditto	Ditto	Ditto	Ditto	Court of Session.
473	Making or counterfeiting a seal, plate, etc., with intent to commit a forgery punishable under section 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc., knowing the same to be counterfeit.	Shall not arrest without warrant.	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 7 years, and fine.	Ditto
478	Making or counterfeiting a seal, plate, etc., with intent to commit a forgery punishable otherwise than under section 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc., knowing the same to be counterfeit.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
474	Having possession of a document, knowing it to be forged with intent to use it as genuine; if the document is one of the description mentioned in section 466 of the Indian Penal Code. If the document is one of the description mentioned in section 467 of the Indian Penal Code.	Shall not arrest without warrant. Ditto	Warrant. Ditto	Bailable. Ditto	Not compoundable. Ditto	Imprisonment of either description for 7 years, and fine. Transportation for life, or imprisonment of either description for 7 years, and fine.	Court of Session. Ditto
475	Counterfeiting a device or mark used for authenticating documents described in section 467 of the Indian Penal Code, or possessing counterfeit marked material.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
476	Counterfeiting a device or mark used for authenticating documents other than those described in section 467 of the Indian Penal Code, or possessing counterfeit marked material.	Ditto	Ditto	Not bailable.	Ditto	Imprisonment of either description for 7 years, and fine.	Ditto
477	Fraudulently destroying or defacing, or attempting to destroy or deface, or secreting a will, etc.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 7 years, and fine.	Ditto
477 A	Falsification of accounts.	Ditto	Ditto	Bailable.	Ditto	Imprisonment of either description for 7 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.

Of Trade and Property Marks.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
482	Using a false trade or property-mark with intent to deceive or injure any person.	Shall not arrest without warrant.	Warrant.	Bailable.	Compoundable when permission is given by the Court before which the prosecution is pending.	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
483	Counterfeiting a trade or property-mark used by another, with intent to cause damage or injury.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto
484	Counterfeiting a property-mark used by a public servant, or any mark used by him to denote the manufacture, quality, etc., of any property.	Ditto	Summons.	Ditto	Not compoundable.	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
485	Fraudulently making or having possession of any die, plate or other instrument for counterfeiting any public or private property or trade-mark.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Ditto
486	Knowingly selling goods marked with a counterfeit property or trade-mark.	Ditto	Ditto	Ditto	Compoundable with permission of the Court before which the prosecution is pending.	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
487	Fraudulently making a false mark upon any package or receptacle containing goods, with intent to cause it to be believed that it contains goods which it does not contain, etc.	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable	Imprisonment of either description for 2 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
488	Making use of any such false mark.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
489	Removing, destroying or defacing any property-mark with intent to cause injury.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.

Of Currency Notes and Bank Notes.

A	Counterfeiting currency notes or bank notes.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session.
489 B	Using as genuine forged or counterfeit currency notes or bank notes.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
489 C	Possession of forged or counterfeit currency notes or bank notes.	Ditto	Ditto	Bailable.	Ditto	Imprisonment of either description for 7 years, and fine, or both.	Ditto
489 D	Making or possessing instruments or materials for forging or counterfeiting currency notes or bank notes.	Ditto	Ditto	Not bailable.	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto

CHAPTER XIX.—CRIMINAL BREACH OF CONTRACTS OF SERVICE.

490	Being bound by contract to render personal services during a voyage or journey or to convey or guard any property or person and voluntarily omitting to do so.	Shall not arrest without warrant.	Summons.	Bailable.	Compoundable.	Imprisonment of either description for 1 month, or fine of 100 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
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1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
491	Being bound to attend on or supply the wants of a person who is helpless from youth, unsoundness of mind or disease, and voluntarily omitting to do so.	Shall not arrest without warrant.	Summons.	Bailable.	Compoundable.	Imprisonment of either description for 3 months, or fine of 200 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
492	Being bound by contract to render personal service for a certain period at a distant place to which the employee is conveyed at the expense of the employer, and voluntarily deserting the service or refusing to perform the duty.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 month, or fine of double the expense incurred, or both.	Ditto

CHAPTER XX.—OFFENCES RELATING TO MARRIAGE.

493	A man by deceit causing a woman not lawfully married to him to believe that she is lawfully married to him and to co-habit with him in that belief.	Shall not arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 10 years, and fine.	Court of Session.
494	Marrying again during the lifetime of a husband or wife.	Ditto	Ditto	Bailable.	Compoundable with permission of the Court before which the prosecution is pending.	Imprisonment of either description for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

CHAPTER XXII.—CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
504	Insult intended to provoke a breach of the peace.	Shall not arrest without warrant.	Warrant.	Bailable.	Compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Any Magistrate.
505	False statement, rumour, etc., circulated with intent to cause mutiny or offence against the public peace.	Ditto	Ditto	Not bailable.	Not compoundable.	Ditto	Presidency Magistrate or Magistrate of the first class.
506	Criminal intimidation.	Ditto	Ditto	Bailable.	Compoundable.	Ditto	Presidency Magistrate or Magistrate of the first or second class.
	If threat be to cause death or grievous hurt, etc.	Ditto	Ditto	Ditto	Not Compoundable.	Imprisonment of either description for 7 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
507	Criminal intimidation by anonymous communication or having taken precaution to conceal whence the threat comes.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, in addition to the punishment under above section.	Ditto
508	Act caused by inducing a person to believe that he will be rendered an object of Divine displeasure.	Ditto	Ditto	Ditto	Compoundable.	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
509	Uttering any word or making any gesture intended to insult the modesty of a woman, etc.	Ditto	Ditto	Ditto	Compoundable when permission is given by the Court before which the prosecution is pending.	Simple imprisonment for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
510	Appearing in a public place, etc., in a state of intoxication and causing annoyance to any person.	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Simple imprisonment for 24 hours, or fine of 10 rupees, or both.	Any Magistrate.

CHAPTER XXIII.—ATTEMPTS TO COMMIT OFFENCES.

511	Attempting to commit offences punishable with transportation or imprisonment, and in such attempt doing any act towards the commission of the offence.	According as the offence is one in respect of which the police may arrest without warrant or not.	According as the offence is one in respect of which a summons or warrant shall ordinarily issue.	According as the offence contemplated by the offender is bailable or not.	Compoundable when the offence attempted is compoundable.	Transportation or imprisonment not exceeding half of the longest term, and of any description, provided for the offence, or fine, or both.	The Court by which the offence attempted is triable.
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OFFENCES AGAINST OTHER LAWS.

If punishable with death, transportation or imprisonment for 7 years or upwards.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	(Court of Session.
If punishable with imprisonment for 3 years and upwards, but less than 7.	Ditto	Ditto	Not bailable, except in cases under the Indian Arms Act, 1878, section 19, which shall be bailable.	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first class.
If punishable with imprisonment for one year and upwards, but less than 3 years.	Shall not arrest without warrant.	Summons.	Bailable.	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
If punishable with imprisonment for less than one year, or with fine only.	Ditto	Ditto	Ditto	Ditto	Any Magistrate.

SCHEDULE III.

(See section 36.)

ORDINARY POWERS OF PROVINCIAL MAGISTRATES.

I.—Ordinary Powers of a Magistrate of the Third Class.

- (1) Power to arrest, or direct the arrest of, and to commit to custody, a person committing an offence in his presence, section 64.
- (2) Power to arrest, or direct the arrest in his presence of, an offender, section 65.
- (3) Power to endorse a warrant, or to order the removal of an accused person arrested under a warrant, sections 83, 84 and 86.
- (4) Power to issue proclamations in cases judicially before him, section 87.
- (5) Power to attach and sell property and to dispose of claims to attached property in cases judicially before him, section 88.
- (6) Power to restore attached property, section 89.
- (7) Power to require search to be made for letters and telegrams, section 95.
- (8) Power to issue search-warrant, section 96.
- (9) Power to endorse a search-warrant and order-delivery of thing found, section 99.
- (10) Power to command unlawful assembly to disperse, section 127.
- (11) Power to use civil force to disperse unlawful assembly, section 128.
- (12) Power to require military force to be used to disperse unlawful assembly, section 130.
- (13)
- (14) Power to authorise detention *not being detention in the custody of the police of a person during a police investigation*, section 167.
- (14a) *Power to postpone the issue of process and inquire into the case himself*, section 202.
- (15) Power to detain an offender found in Court, section 351.
- (16) Power to take cognizance of offence, although committed by European British subject, and issue process returnable before a Magistrate having jurisdiction, section 445.
- (17) Power to apply to District Magistrate to issue commission for examination of witness, section 506 (2).
- (18) Power to recover forfeited bond for appearance before Magistrate's Court, section 514, and require fresh security, section 514A.
- (18a) *Power to make order as to custody and disposal of property pending inquiry or trial*, section 516A.
- (19) Power to make order as to disposal of property, section 517.
- (20) Power to sell property of a suspected character, section 525.
- (21) *Power to require affidavit in support of application*, section 539A.
- (22) *Power to make local inspection*, section 539B.

II.—Ordinary Powers of a Magistrate of the Second Class.

- (1) The ordinary powers of a Magistrate of the third class.
- (2) Power to order the police to investigate an offence in cases in which the Magistrate has jurisdiction to try or commit for trial, section 155.
- (3) Power to postpone and issue of process and to inquire into a case or direct investigation, section 202.
- (4)

III.—Ordinary Powers of a Magistrate of the first Class.

- (1) The ordinary powers of a Magistrate of the second class.
- (2) Power to issue search-warrant otherwise than in course of an inquiry, section 98.
- (3) Power to issue search-warrant for discovery of persons wrongfully confined, section 100.
- (4) Power to require security to keep the peace, section 107.
- (5) Power to require security for good behaviour, section 109.
- (6) Power to discharge sureties, section 126A.
- (6a) *Power to make orders as to local nuisances*, section 133.
- (7) Power to make orders, etc., in possession cases, sections 145, 145 and 147.
- (7a) *Power to record statements and confessions during a police investigation*, section 164.

- (7a) Power to authorise detention of a person in the custody of the police during a police investigation, section 167.
- (7b) Power to hold inquests, section 174.
- (8) Power to commit for trial, section 206.
- (9) Power to stop proceedings when no complaint, section 249.
- (9a) Power to tender pardon to accomplices during inquiry into case by himself, section 337.
- (10) Power to make orders of maintenance, sections 488 and 489.
- (11) Power to take evidence on commission, section 503.
- (12) Power to recover penalty on forfeited bond, section 514.
- (12a) Power to require fresh security, section 514A.
- (12b) Power to recall case made over by him to another Magistrate, section 528 (4).
- (13) Power to make order as to first offenders, section 567.
- (14) Power to order released convicts to notify residence, section 565.

IV.—Ordinary Powers of a Sub-divisional Magistrate appointed under section 13.

- (1) The ordinary powers of a Magistrate of the first class.
- (2) Power to direct warrants to landholders, section 78.
- (3) Power to require security for good behaviour, section 110.
- (4)
- (5) Power to make orders prohibiting repetitions of nuisances, section 143.
- (6) Power to make orders under section 144.
- (7) Power to depute subordinate Magistrate to make local inquiry, section 148.
- (8) Power to order police investigation into cognizable case, section 156.
- (9) Power to receive report of police-officer and pass order, section 173.
- (10)
- (11) Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction, section 186.
- (12) Power to entertain complaints, section 190.
- (13) Power to receive police reports, section 190.
- (14) Power to entertain cases without complaint, section 190.
- (15) Power to transfer cases to a subordinate Magistrate, section 192.
- (16) Power to pass sentence on proceedings recorded by a subordinate Magistrate, section 349.
- (17) Power to forward record of inferior Court to District Magistrate, section 435 (2).
- (18) Power to sell property alleged or suspected to have been stolen, etc., section 524.
- (19) Power to withdraw cases other than appeals, and to try or refer them for trial, section 528.
- (20)

V.—Ordinary Powers of a District Magistrate.

- (1) The ordinary powers of a Sub-divisional Magistrate.
- (1a) Power to try juvenile offenders, section 29A.
- (2) Power to require delivery of letters, telegrams, etc., section 95.
- (3) Power to issue search-warrants for documents in custody of postal or telegraph authorities, section 96.
- (4) Power to require security for good behaviour in case of sedition, section 108.
- (5) Power to discharge persons bound to keep the peace or to be of good behaviour, section 124.
- (6) Power to cancel bond for keeping the peace, section 126.
- (6a) Power to order preliminary investigation by police-officer not below the rank of Inspector in certain cases, section 196B.
- (7) Power to try summarily, section 260.
- (7a) Power to tender pardon to accomplices at any stage of a case, section 337.
- (8) Power to quash convictions in certain cases, section 360.
- (9) Power to hear appeals from orders requiring security for keeping the peace or good behaviour, section 406.
- (9a) Power to hear appeals from orders of Magistrates refusing to accept or rejecting sureties, section 406A.

- (10) Power to hear or refer appeals from convictions by Magistrates of the second and third classes, section 407.
- (11) Power to call for records, section 435.
- (12) Power to order inquiry into complaint dismissed or case of accused discharged: section 436.
- (13) Power to order commitment, section 437.
- (14) Power to report case to High Court, section 438.
- (15) Power to try European British subjects, section 443.
- (16) Power to sentence European British subjects to more than three months imprisonment or one thousand rupees, fine, or both, section 446.
- (17) Power to appoint person to be Public Prosecutor in particular case, section 492 (2).
- (18) Power to issue commission for examination of witness, sections 503 and 506.
- (19) Power to hear appeals from or revise orders passed under sections 514, 515.
- (20) Power to compel restoration of abducted female, section 552.

SCHEDULE IV.

(See sections 37 and 38.)

ADDITIONAL POWERS WITH WHICH PROVINCIAL MAGISTRATES MAY BE INVESTED.

POWERS WITH WHICH
A MAGISTRATE OF
THE FIRST CLASS
MAY BE INVESTED.

BY THE
LOCAL
GOVERNMENT.

- (1) Power to require security for good behaviour in case of sedition, section 108 :
- (2) Power to require security for good behaviour, section 110 :
- (3)
- (4) Power to make orders prohibiting repetitions of nuisances, section 143 :
- (5) Power to make orders under section 144 :
- (6)
- (7) Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction, section 186 :
- (8) Power to take cognizance of offences upon complaint, section 190 :
- (9) Power to take cognizance of offences upon police reports, section 190 :
- (10) Power to take cognizance of offences without complaint, section 190 :
- (11) Power to try summarily, section 260 :
- (12) Power to hear appeals from convictions by Magistrates of the second and third classes, section 407 :
- (13) Power to sell property alleged or suspected to have been stolen, etc., section 524 :
- (14)
- (15) Power to try cases under section 124-A of the Indian Penal Code.

BY THE
DISTRICT
MAGISTRATE.

- (1) Power to make orders prohibiting repetitions of nuisances, section 143 :
- (2) Power to make orders under section 144 :
- (3)
- (4) Power to take cognizance of offences upon complaint, section 190 :
- (5) Power to take cognizance of offences upon police reports, section 190 :
- (6) Power to transfer cases, section 192 :

POWERS WITH WHICH
A MAGISTRATE OF
THE SECOND CLASS
MAY BE INVESTED.

BY THE
LOCAL
GOVERNMENT.

- (1)
- (2) Power to make orders prohibiting repetitions of nuisances, section 143 :
- (3) Power to make orders under section 144 :
- (3a) Power to record statements and confessions during a police investigation, section 164 :
- (3b) Power to authorise detention of a person in the custody of the police during a police investigation, section 167 :
- (4) Power to hold inquests, section 174 :
- (5) Power to take cognizance of offences upon complaint, section 190 :
- (6) Power to take cognizance of offences upon police reports, section 190 :
- (7) Power to take cognizance of offences without complaint, section 190 :
- (8) Power to commit for trial, section 206 :
- (9) Power to make order as to first offenders, section 562.

BY THE
DISTRICT
MAGISTRATE.

- (1) Power to make orders prohibiting repetitions of nuisances, section 143 :
- (2) Power to make orders under section 144 :
- (3) Power to hold inquests, section 174 :
- (4) Power to take cognizance of offences upon complaint, section 190 :
- (5) Power to take cognizance of offences upon police reports, section 190.

POWERS WITH WHICH
A MAGISTRATE OF
THE THIRD CLASS
MAY BE INVESTED.

BY THE
LOCAL
GOVERNMENT.

- (1) Power to make orders prohibiting repetitions of nuisances, section 143 :
- (2)
- (3) Power to hold inquests, section 174 :
- (4) Power to take cognizance of offences upon complaint, section 190 :
- (5) Power to take cognizance of offences upon police reports, section 190.
- (6)

BY THE
DISTRICT
MAGISTRATE.

- (1) Power to make orders prohibiting repetitions of nuisances, section 143 :
- (2)
- (3) Power to hold inquests, section 174 :
- (4) Power to take cognizance of offences upon complaint, section 190 :
- (5) Power to take cognizance of offences upon police reports, section 190.

POWERS WITH WHICH
A SUB-DIVISIONAL
MAGISTRATE MAY BE
INVESTED.

BY THE
LOCAL
GOVERNMENT.

- Power to call for records, section 435.

**SCHEDULE V.
FORMS.**

(See section 555).

I.—SUMMONS TO AN ACCUSED PERSON.

(See section 68.)

To _____ of _____
 WHEREAS your attendance is necessary to answer to a charge of (*state shortly the offence charged*); you are hereby required to appear in person (or by pleader, as the case may be) before the (*Magistrate*) _____ of _____, on the _____ day of _____ . Herein fail not.
 Dated this _____ day of _____ 19 _____ .
 (*Seal*), _____ (Signature).

II.—WARRANT OF ARREST.

(See section 75.)

To (*name and designation of the person or persons who is or are to execute the warrant*):
 WHEREAS _____ of _____ stands charged with the offence of (*state the offence*), you are hereby directed to arrest the said _____, and to produce him before me, Herein fail not.
 Dated this _____ day of _____ 19 _____ .
 (*Seal*), _____ (Signature).

(See section 76.)

This warrant may be endorsed as follows:—

If the said _____ shall give bail himself in the sum of _____ with one surety in the sum of _____ (or two sureties each in the sum of) _____ to attend before me on the _____ day of _____ and to continue so to attend until otherwise directed by me, he may be released.
 Dated this _____ day of _____ 19 _____ ; _____ (Signature).

III.—BOND AND BAIL-BOND AFTER ARREST UNDER A WARRANT.

(See section 86.)

I (*name*) of _____ being brought before the District Magistrate of _____ (*or as the case may be*) under a warrant issued to compel my appearance to answer to the charge of _____ do hereby bind myself to attend in the Court of _____ on the _____ day of _____ next, to answer to the said charge, and to continue so to attend until otherwise directed by Court; and, in case of my making default herein, I bind myself to forfeit, to His Majesty the King, Emperor of India, the sum of rupees _____ .
 Dated this _____ day of _____ 19 _____ . (Signature).

I do hereby declare myself surety for the abovenamed _____ of _____ that he shall attend before _____ in the Court of _____ on the _____ day of _____ next, to answer to the charge on which he has been arrested, and shall continue so to attend until otherwise directed by the Court; and, in case of his making default therein, I bind myself to forfeit to His Majesty the King, Emperor of India, the sum of rupees _____ .
 Dated this _____ day _____ 19 _____ . (Signature).

IV.—PROCLAMATION REQUIRING THE APPEARANCE OF A PERSON ACCUSED.

(See section 87.)

WHEREAS complaint has been made before me that (*name, description and address*) _____ has committed (or is suspected to have committed) the offence of _____, punishable under section _____ of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (*name*) cannot be found, and whereas it has been shown to my satisfaction

that the said (name) has absconded (or is concealing himself to avoid the service of the said warrant) :

Proclamation is hereby made that the said _____ of _____ is required to appear at (place) before this Court (or before me) to answer the said complaint on the day of _____).

Dated this _____ day of _____ 19 _____.

(Seal).

(Signature).

V.—PROCLAMATION REQUIRING THE ATTENDANCE OF A WITNESS.

(See section 87.)

WHEREAS complaint has been made before me that (name, description and address) has committed (or is suspected to have committed) the offence of (mention the offence concisely) and a warrant has been issued to compel the attendance of (name, description and address of the witness) before this Court to be examined touching the matter of the said complaint ; and whereas it has been returned to the said warrant that the said (name of witness) cannot be served, and it has been shown to my satisfaction that he has absconded (or is concealing himself to avoid the service of the said warrant) :

Proclamation is hereby made that the said (name) is required to appear at (place) before the Court of _____ on the _____ day of _____ next at _____ o'clock, to be examined touching _____ the offence complained of,

Dated this _____ day of _____ 19 _____.

(Seal).

(Signature).

VI.—ORDER OF ATTACHMENT TO COMPEL THE ATTENDANCE OF A WITNESS.

(See section 88.)

To the police-officer in charge of the police-station at _____

WHEREAS a warrant has been duly issued to compel the attendance of (name, description and address) to testify concerning a complaint pending before this Court and it has been returned to the said warrant that it cannot be served ; and whereas it has been shown to my satisfaction that he has absconded (or is concealing himself to avoid the service of the said warrant) ; and thereupon a Proclamation has been or is being duly issued and published requiring the said _____ to appear and give evidence at the time and place mentioned therein. . . .

This is to authorise and require you to attach by seizure the moveable property belonging to the said _____ to the value of rupees _____ which you may find within the district of _____ and to hold the said property under attachment pending the further order of this Court, and to return this warrant with an endorsement certifying the manner of its execution,

Dated this _____ day of _____ 19 _____ ;

(Seal).

(Signature).

ORDER OF ATTACHMENT TO COMPEL THE APPEARANCE OF A PERSON ACCUSED.

(See section 89.)

To (name and designation of the person or persons who is or are to execute the warrant).

WHEREAS complaint has been made before me that (name, description and address) has committed (or is suspected to have committed) the offence of _____ punishable under section _____ of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (name) cannot be found ; and whereas it has been shown to my satisfaction that the said (name) has absconded (or is concealing himself to avoid the service

of the said warrant); and thereupon a *Proclamation has been or is being duly issued* and published requiring the said to appear to answer the said charge within days; and whereas the said is possessed of the following property other than land paying revenue to Government in the village (or town) of in the district of , viz., , and an order has been made for the attachment thereof;

You are hereby required to attach the said property by seizure, and to hold the same under attachment pending the further order of this Court, and to return this warrant with an endorsement certifying the manner of its execution.

Dated this day of 19 ,
(Seal).

(Signature).

ORDER AUTHORISING AN ATTACHMENT BY THE DEPUTY COMMISSIONER AS COLLECTOR.
(See section 88.)

To the Deputy Commissioner of the District of

WHEREAS complaint has been made before me that (name, description and address) has committed (or is suspected to have committed) the offence of , punishable under section of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (name) cannot be found; and whereas it has been shown to my satisfaction that the said (name) has absconded (or is concealing himself to avoid the service of the said warrant); and thereupon a *Proclamation has been or is being duly issued* and published requiring the said to appear to answer the said charge within days; and whereas the said is possessed of certain land paying revenue to Government in the village (or town) of in the district of ;

You are hereby authorised and requested to cause the said land to be attached, and to be held under attachment pending the further order of this Court and to certify without delay what you may have done in pursuance of this order.

Dated this day of 19 .
(Seal).

(Signature).

VII.—WARRANT IN THE FIRST INSTANCE TO BRING UP A WITNESS.
(See section 90.)

To (name and designation of the police-officer or other person or persons who is or are to execute the warrant.)

WHEREAS complaint has been made before me that of has (or is suspected to have) committed the offence of (mention the offence concisely), and it appears likely that (name, and description of witness) can give evidence concerning the said complaint; and whereas I have good and sufficient reason to believe that he will not attend as a witness on the hearing of the said complaint unless compelled to do so;

This is to authorise and require you to arrest the said (name) and on the day of to bring him before this Court, to be examined touching the offence complained of.

Given under my hand and the seal of the Court this day of 19 .
(Seal).

(Signature).

VIII.—WARRANT TO SEARCH AFTER INFORMATION OF A PARTICULAR OFFENCE.
(See section 96.)

To (name and designation of the police-officer or other person or persons who is or are to execute the warrant.)

WHEREAS information has been laid (or complaint has been made) before me of the commission (or suspected commission) of the offence of (mention the offence concisely) and it

has been made to appear to me that the production of (*specify the thing clearly*) is essential to the inquiry now being made (or about to be made) into the said offence (or suspected offence) :

This is to authorise and require you to search for the said (*the thing specified*) in the (*describe the house or place or part thereof to which the search is to be confined*), and, if found, to produce the same forthwith before this Court, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

Given under my hand and the seal of the Court, this _____ day of _____ 19 _____ ;
(Seal). (Signature).

IX.—WARRANT TO SEARCH SUSPECTED PLACE OF DEPOSIT.

(See section 98.)

To (*name and designation of a police-officer above the rank of a constable*).

WHEREAS information has been laid before me, and on due inquiry thereupon had, I have been led to believe that the (*describe the house or other place*) is used as a place for the deposit (or sale) of stolen property (or if for either of the other purposes expressed in the section state the purpose in the words of the section) ;

This is to authorise and require you to enter the said house (or other place) with such assistance as shall be required, and to use, if necessary, reasonable force for that purpose and to search every part of the said house (or other place, or if the search is to be confined to a part, specify the part clearly), and to seize and take possession of any property (or documents, or stamps, or seals, or coins, as the case may be)—Add (*when the case requires it*) and also of any instruments and materials which you may reasonably believe to be kept for the manufacture of forged documents, or counterfeit stamps, or false seals, or counterfeit coin (as the case may be), and forthwith to bring before this Court such of the said things as may be taken possession of, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

Given under my hand and the seal of the Court this _____ day of _____ 19 _____ ;
(Seal). (Signature).

X.—BOND TO KEEP THE PEACE.

(See section 107.)

WHEREAS I (*name*), inhabitant of (*place*), have been called upon to enter into a bond to keep the peace for the term of or until the completion of the inquiry in the matter of _____ now pending in the Court of _____,

I hereby bind myself not to commit a breach of the peace or do any act that may probably occasion a breach of the peace, during the said term, or until the completion of the said inquiry and in case of my making default therein, I hereby bind myself to forfeit to His Majesty the King-Emperor of India, the sum of rupees _____.

Dated this _____ day of _____ 19 _____ ; (Signature).

XI.—BOND FOR GOOD BEHAVIOUR.

(See sections 108, 109 and 110.)

WHEREAS I (*name*), inhabitant of (*place*), have been called upon to enter into a bond to be of good behaviour to His Majesty the King, Emperor of India, and to all His subjects for the term of (*state the period*), or until the completion of the inquiry in the matter of _____ now pending in the Court of _____,

I hereby bind myself to be of good behaviour to His Majesty and to all His subjects during the said term or until the completion of the said inquiry ; and, in case of my making default therein, I bind myself to forfeit to His Majesty the sum of rupees _____.

Dated this _____ day of _____ 19 _____ ; (Signature).

(Where a bond with sureties is to be executed, add).—We do hereby declare ourselves sureties for the abovenamed that he will be of good behaviour to His Majesty the King, Emperor of India, and to all His subjects during the said term or until the completion of the inquiry; and, in case of his making default therein, we bind ourselves, jointly and severally, to forfeit to His Majesty the sum of rupees

Dated this day of , 19

(Signature).

XII.—SUMMONS ON INFORMATION OF A PROBABLE BREACH OF THE PEACE;

(See section 114.)

To of

WHEREAS it has been made to appear to me by credible information that (*state the substance of the information*), and that you are likely to commit a breach of the peace (or by which not a breach of the peace will probably be occasioned), you are hereby required to attend in person (or by a duly authorised agent), at the Office of the Magistrate of on the day of 19 , at ten o'clock in the forenoon, to show cause why you should not be required to enter into a bond for rupees [when sureties are required, add, and also to give security by the bond of one (or two, as the case may be) surety (or sureties) in the sum of rupees (each if more than one)] that you will keep the peace for the term of

Given under my hand and the seal of the Court, this day of 19 .

(Seal).

(Signature).

XIII.—WARRANT OF COMMITMENT ON FAILURE TO FIND SECURITY TO KEEP THE PEACE.

(See section 123.)

To the Superintendent (or Keeper) of the jail at

WHEREAS (*name and address*) appeared before me in person (or by his authorised agent) on the day of in obedience to a summons calling upon him to show cause why he should not enter into a bond for rupees with one surety (or a bond with two sureties each in rupees), that he, the said (*name*), would keep the peace for the period of months; and whereas an order was then made requiring the said (*name*) to enter into and find such security (*state the security ordered when it differs from that mentioned in the summons*), and he has failed to comply with the said order;

This is to authorise and require you, the said Superintendent (or Keeper), to receive the said (*name*) into your custody, together with this warrant, and him safely to keep in the said jail for the said period of (*term of imprisonment*) unless he shall in the meantime be lawfully ordered to be released and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this day of 19 .

(Seal).

(Signature).

XIV.—WARRANT OF COMMITMENT ON FAILURE TO FIND SECURITY FOR GOOD BEHAVIOUR.

(See section 123.)

To the Superintendent (or Keeper) of the jail at

WHEREAS it has been made to appear to me that (*name and description*) has been and is lurking within the district of having no ostensible means of subsistence (or, and that he is unable to give any satisfactory account of himself);

or

WHEREAS, etc., etc., (as the case may be) ;

I do hereby direct and require you within (state the time allowed) to (state what is required to be done to abate the nuisance), or to appear at _____ in the _____ Court of _____ on the _____ day of _____ next, and to show cause why this order should not be enforced ;

or

I do hereby direct and require you within (state the time allowed) to cease carrying on the said trade or occupation at the said place, and not again to carry on the same, or to remove the said trade from the place where it is now carried on, or to appear, etc.;

or

I do hereby direct and require you within (state the time allowed) to put up a sufficient fence (state the kind of fence and the part to be fenced); or to appear, etc. ;

or

I do hereby direct and require you, etc. (as the case may be).

Given under my hand and the seal of the Court, this _____ day of _____ 19 _____ ;
(Seal). (Signature).

XVII.—MAGISTRATE'S ORDER CONSTITUTING JURY.

(See section 138.)

WHEREAS on the _____ day of _____ 19 _____ an order was issued to (name) requiring him (state the effect of the order), and whereas the said (name) has applied to me, by a petition bearing date the _____ day of _____ for an order appointing a jury to try whether the said recited order is reasonable and proper ; I do hereby appoint (the names, etc., of the five or more jurors) to be the jury to try and decide the said question, and do require the said jury to report their decision within _____ days from the date of this order at my office at _____

Given under my hand and the seal of the Court, this _____ day of _____ 19 _____ ;
(Seal). (Signature).

XVIII.—MAGISTRATE'S NOTICE AND PEREMPTORY ORDER AFTER

THE FINDING BY A JURY.

(See section 140.)

To (name, description and address).

I HEREBY give you notice that the jury duly appointed on the petition presented by you on the _____ day of _____ have found that the order issued on the _____ day of _____ requiring you (state substantially the requisition in the order) is reasonable and proper. Such order has been made absolute, and I hereby direct and require you to obey the said order within (state the time allowed), on peril of the penalty provided by the Indian Penal Code for disobedience thereto.

Given under my hand and the seal of the Court, this _____ day of _____ 19 _____ ;
(Seal). (Signature).

XIX.—INJUNCTION TO PROVIDE AGAINST IMMINENT DANGER PENDING

INQUIRY BY JURY.

(See section 142.)

To (name, description and address).

WHEREAS the inquiry by a jury appointed to try whether my order issued on the _____ day of _____ 19 _____ is reasonable and proper is still pending, and it has been made to appear to me that the nuisance mentioned in the said order is attended with so imminent serious danger to the public as to render necessary immediate measures to prevent such danger, I do hereby, under the provisions of section 142 of the Code of Criminal Procedure, direct and enjoin you forthwith to (state plainly what is required to be done as a temporary safe-guard), pending the result of the local inquiry by the jury.

Given under my hand and the seal of the Court, this _____ day of _____ 19 _____ ;
(Seal). (Signature).

XXIII.—WARRANT OF ATTACHMENT IN THE CASE OF A DISPUTE AS TO THE POSSESSION OF LAND, ETC.,

(See section 146.)

To the police-officer in charge of the police-station at _____ [or, To the Collector of _____]

WHEREAS it has been made to appear to me that a dispute likely to induce a breach of the peace existed between (*describes the parties concerned by name and residence, or residence only if the dispute be between bodies of villagers*) concerning certain (*state concisely the subject of dispute*), situate within the limits of my jurisdiction and the said parties were thereupon duly called upon to state in writing their respective claims as to the fact of actual possession of the said (*the subject of dispute*), and whereas, upon due inquiry into the said claims, I have decided that neither of the said parties was in possession of the said (*the subject of dispute*) [*for I am unable to satisfy myself as to which of the said parties was in possession as aforesaid*];

This is to authorise and require you to attach the said (*the subject of dispute*) by taking and keeping possession thereof, and to hold the same under attachment until the decree or order of a competent Court determining the rights of the parties, or the claim to possession, shall have been obtained, and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this _____ day of _____ 19 _____ .
(Seal). (Signature).

XXIV.—MAGISTRATE'S ORDER PROHIBITING THE DOING OF ANYTHING ON LAND OR WATER,

(See section 147.)

A dispute having arisen concerning the right of use of (*state concisely the subject of dispute*) situate within the limits of my jurisdiction, the possession of which land (*or water*) is claimed exclusively by (*describes the person or persons*), and it appearing to me on due inquiry into the same, that the said land (*or water*) has been open to the enjoyment for such use by the public (*or is*) by an individual or a class of persons, (*describes him or them*), and (*if the use can be enjoyed throughout the year*) that the said use has been enjoyed within three months of the institution of the said inquiry (*or, if the use is enjoyable only at particular seasons, say "during the last of the seasons at which the same is capable of being enjoyed"*);

I do order that the said (*the claimant or claimants of possession*), or any one in their interest, shall not take (*or retain*) possession of the said land (*or water*) to the exclusion of the enjoyment of the right of use aforesaid, until he (*or they*) shall obtain the decree or order of a competent Court adjudging him (*or them*) to be entitled to exclusive possession.

Given under my hand and the seal of the Court, this _____ day of _____ 19 _____ .
(Seal). (Signature).

XXV.—BOND AND BAIL-BOND ON A PRELIMINARY INQUIRY BEFORE A POLICE-OFFICER,

(See section 169.)

I (*name*), of _____, being charged with the offence of _____, and after inquiry required to appear before the Magistrate of _____

or

and after inquiry called upon to enter into my own recognizance to appear when required, do hereby bind myself to appear at _____, in the court of _____, on the _____ day of _____ next (*or on such day as I may hereafter be required to attend*) to answer further to the said charge, and, in case of my making default herein, I bind myself to forfeit to His Majesty the King, Emperor of India, the sum of rupees _____

Dated this _____ day of _____ 19 _____ .
(Signature).

I hereby declare myself (or we jointly and severally declare ourselves and each of us) surety (or sureties) for the abovesaid that he shall attend at in the Court of , on the day of next (or on such day as he may hereafter be required to attend), further to answer to the charge pending against him, and, in case of his making default therein, I hereby bind myself (or we hereby bind ourselves) to forfeit to His Majesty the King, Emperor of India, the sum of rupees .

Dated this day of 19 .

(Signature).

XXVI.—BOND TO PROSECUTE OR GIVE EVIDENCE.

(See section 170.)

I (name), of (place), do hereby bind myself to attend at in the Court of , at o'clock on the day of next, and then and there to prosecute (or to prosecute and give evidence) (or to give evidence) in the matter of a charge of against one A.B., and, in case of making default herein, I bind myself to forfeit to His Majesty the King, Emperor of India, the sum of rupees .

Dated this day of 19 ;

(Signature).

XXVII.—NOTICE OF COMMITMENT BY MAGISTRATE TO GOVERNMENT PLEADER.

(See section 218.)

THE Magistrate of hereby gives notice that he has committed one for trial at the next Sessions; and the Magistrate hereby instructs the Government Pleader to conduct the prosecution of the said case.

The charge against the accused is that, etc. (state the offence as in the charge).

Dated this day of 19 .

(Signature).

XXVIII.—CHARGES.

(See sections 221, 222 and 223.)

(I)—CHARGES WITH ONE HEAD.

(a) I [name and office of Magistrate, etc., hereby charge you [name of accused person] as follows:—

(b) That you, on or about the day of at waged war against His Majesty the King, Emperor of India, and On Penal Code, S. 121. thereby committed an offence punishable under section 121 of the Indian Penal Code, and within the cognizance of the Court of Session [when the charge is framed by a Presidency Magistrate, for Court of Session substitute High Court].

(c) And I hereby direct that you be tried by the said Court on the said charge.

[Signature and seal of the Magistrate.]

[To be substituted for (b)]:—

(2) That you, on or about the day of , at , with the intention of inducing the Hon'ble A.B., Member of the Council of the Governor-General of India, to refrain from exercising a lawful power as such Member, assaulted such Member, and thereby committed an offence punishable under section 124 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(8) That you, being a public servant in the _____ Department, directly accepted from _____ [state the name], for another party [state the name], a gratification, other than legal remuneration, as a motive for bearing to do an official act, and thereby committed an offence punishable under section 161 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(4) That you, on or about the _____ day of _____, at _____, did [or omitted to do, as the case may be] such conduct being contrary to the provisions of Act _____, section _____, and known by you to be prejudicial to _____ and thereby committed an offence punishable under section 166 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(5) That you, on or about the _____ day of _____, at _____, in the course of the trial of _____, before _____, stated in evidence that " _____ " which statement you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under section 193 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(6) That you, on or about the _____ day of _____, at _____, committed culpable homicide not amounting to murder, causing the death of _____, and thereby committed an offence punishable under section 304 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(7) That you, on or about the _____ day of _____, at _____, abetted the commission of suicide by A.B., a person in a state of intoxication, and thereby committed an offence punishable under section 306 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(8) That you, on or about the _____ day of _____, at _____, voluntarily caused grievous hurt to _____, and thereby committed an offence punishable under section 325 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(9) That you, on or about the _____ day of _____, at _____, robbed _____ [state the name], and thereby committed an offence punishable under section 392 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(10) That you, on or about the _____ day of _____, at _____, committed dacoity, an offence punishable under section 395 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

[In cases tried by Magistrates substitute "within my cognizance" for "within the cognizance of the Court of Session," and in (c) omit "by the said Court."]

(II)—CHARGES WITH TWO OR MORE HEADS.

(a) I [name and office of Magistrates, etc.] hereby charge you [name of accused person] as follows :—

(b) First.—That you, on or about the _____ day of _____, at _____, knowing a coin to be counterfeit, delivered the same to another person by name A. B., as genuine, and thereby committed an offence punishable under section 241 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Secondly.—That you, on or about the _____ day of _____, at _____, knowing a coin to be counterfeit, attempted to induce another person, by name *A. B.*, to receive it as genuine, and thereby committed an offence punishable under section 241 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(c) And I hereby direct that you be tried by the said Court on the said charge.

[Signature and seal of the Magistrate].

[To be substituted for (b)]:—

(2) **First.**—That you, on or about the _____ day of _____, at _____, committed murder by causing the death of _____, and On sections 302 and 304. thereby committed an offence punishable under section 302 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Secondly.—That you, on or about the _____ day of _____, at _____, by causing the death of _____, committed culpable homicide not amounting to murder, and thereby committed an offence punishable under section 304 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(3) **First.**—That you, on or about the _____ day of _____, at _____, committed theft, and thereby committed an offence punishable under section 379 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court]. On sections 379 and 382.

Secondly.—That you, on or about the _____ day of _____, at _____, committed theft, having made preparation for causing death to a person in order to the committing of such theft, and thereby committed an offence punishable under section 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Thirdly.—That you, on or about the _____ day of _____, at _____, committed theft, having made preparation for causing restraint to a person in order to the effecting of your escape after the committing of such theft, and thereby committed an offence punishable under section 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Fourthly.—That you, on or about the _____ day of _____, at _____, committed theft, having made preparation for causing fear of hurt to a person in order to the retaining of property taken by such theft, and thereby committed an offence punishable under section 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(4) That you, on or about the _____ day of _____, at _____, in the course of the inquiry into _____, before _____, stated in evidence Alternative charges on section 193. that " _____, " and that you, on or about the _____ day of _____, at _____, in the course of the trial, of _____ before _____, stated in evidence that " _____ ", one of which statements you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under section 193 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

[In cases tried by Magistrates substitute " within my cognizance " for " within the cognizance of the Court of Session " and in (c) omit " by the said Court "].

(III)—CHARGE FOR THEFT AFTER PREVIOUS CONVICTION.

I (name and office of Magistrate, etc.) hereby charge you (name of the accused person) as follows:—

That you, on or about the _____ day of _____, at _____, committed theft, and thereby committed an offence punishable under section 379 of the Indian Penal Code, and

within the cognizance of the Court of Session [or {^{High Court}
Magistrate} as the case may be].

And you, the said (*name of the accused*), stand further charged that you, before the committing of the said offence, that is to say on the day of had been convicted by the (*state Court by which conviction was had*) at of an offence punishable under Chapter XVII of the Indian Penal Code with imprisonment for a term of three years, that is to say, the offence of house-breaking by night (*describe the offence in the words used in the section under which the accused was convicted*), which conviction is still in full force and effect and that you are thereby liable to enhanced punishment under section 75 of the Indian Penal Code.

And I hereby direct that you be tried, etc.

XXIX.—WARRANT OF COMMITMENT ON A SENTENCE OF IMPRISONMENT OR FINE IF PASSED BY A MAGISTRATE.

(See sections 245 and 258.)

To the Superintendent (or Keeper) of the Jail at

WHEREAS on the day of 19 (*name of prisoner*), the (1st, 2nd, 3rd, as the case may be) prisoner in case No. of the Calendar for 19, was convicted before me (*name and official designation*) of the offence (*mention the offence or offences concisely*) under section (or sections) of the Indian Penal Code (or of Act), and was sentenced to (*state the punishment fully and distinctly*);

This is to authorise and require you, the said Superintendent (or Keeper), to receive the said (*prisoner's name*) into your custody in the said jail, together with this warrant, and there carry the aforesaid sentence into execution according to law.

Given under my hand and the seal of the Court, this day of 19 .
(Seal). (Signature).

XXX.—WARRANT OF IMPRISONMENT ON FAILURE TO RECOVER AMENDS BY ATTACHMENT AND SALE.

(See section 250.)

To the Superintendent (or Keeper) of the Jail at

WHEREAS (*name and description*) has brought against (*name and description of the accused person*) the complaint that (*mention it concisely*), and the same has been dismissed as false and frivolous (or vexatious), and the order of dismissal awards payment by the said (*name of the complainant*) of the sum of rupees as amends; and whereas the said sum has not been paid and an order has been made for his simple imprisonment in jail for the period of days, unless the aforesaid sum be sooner paid;

This is to authorise and require you, the said Superintendent (or Keeper), to receive the said (*name*) into your custody, together with this warrant, and him safely to keep in the said jail for the said period of (*term of imprisonment*), subject to the provisions of section 69 of the Indian Penal Code, unless the said sum be sooner paid and on the receipt thereof forthwith to set him at liberty, returning this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this day of 19 .
(Seal). (Signature).

XXXI.—SUMMONS TO WITNESS.

(See sections 68 and 252.)

To

of

WHEREAS complaint has been made before me that of has (or is suspected to have) committed the offence of (*state the offence concisely with time and place*), and it appears to me that you are likely to give material evidence for the prosecution;

You are hereby summoned to appear before this Court on the _____ day of _____ next at 10 o'clock in the forenoon, to testify what you know concerning the matter of the said complaint, and not to depart thence without leave of the Court; and you are hereby warned that, if you shall without just excuse neglect or refuse to appear on the said date, a warrant will be issued to compel your attendance.

Given under my hand and the seal of the Court, this _____ day of _____ 19 .
 (Seal). (Signature).

XXXII.—PRECEPT TO DISTRICT MAGISTRATE TO SUMMON JURORS AND ASSESSORS.
 (See section 326.)

To the District Magistrate of _____

WHEREAS a Criminal Session is appointed to be held in the Court-house at _____ on the _____ day of _____ next, and the names of the persons herein stated have been duly drawn by lot from among those named in the revised list of jurors and assessors furnished to this Court; you are hereby required to summon the said persons to attend at the said Court of Session at 10 A.M., on the said date, and, within such date, to certify that you have done so in pursuance of this precept.

(Here enter the names of Jurors and Assessors).

Given under my hand and the seal of the Court, this _____ day of _____ 19 .
 (Seal). (Signature).

XXXIII.—SUMMONS TO ASSESSOR OR JUROR.
 (See section 328.)

To (name) of (place).

PURSUANT to a precept directed to me by the Court of Session of _____ requiring your attendance as an Assessor (or a Juror) at the next Criminal Session, you are hereby summoned to attend at the said Court of Session at (place) at 10 o'clock in the forenoon on the _____ day of _____ next.

Given under my hand and the seal of office, this _____ day of _____ 19 .
 (Seal). (Signature).

XXXIV.—WARRANT OF COMMITMENT UNDER SENTENCE OF DEATH.
 (See section 374.)

To the Superintendent (or Keeper) of the Jail at _____

WHEREAS at the Session held before me on the _____ day of _____ 19 . (name of prisoner), the (1st, 2nd, 3rd, as the case may be) prisoner in case No. _____ of the Calendar at the said Session, was duly convicted of the offence of culpable homicide amounting to murder under section _____ of the Indian Penal Code, and sentenced to suffer death, subject to the confirmation of the said sentence by the _____ Court of _____;

This is to authorise and require you, the said Superintendent (or Keeper), to receive the said (prisoner's name) into your custody in the said jail, together with this warrant, and him there safely to keep until you shall receive the further warrant or order of this Court, carrying into effect the order of the said _____ Court.

Given under my hand and the seal of the Court, this _____ day of _____ 19 .
 (Seal). (Signature).

XXXV.—WARRANT OF EXECUTION ON A SENTENCE OF DEATH.

(See section 361.)

To the Superintendent (or Keeper) of the Jail at

WHEREAS (name of prisoner), the (1st, 2nd, 3rd, as the case may be) prisoner in Case No. _____ of the Calendar at the Session held before me on the _____ day of _____, 19____, has been by a warrant of this Court, dated the _____ day of _____, committed to your custody under sentence of death; and whereas the order of the Court of _____ confirming the said sentence has been received by this Court;

This is to authorise and require you, the said Superintendent (or Keeper), to carry the said sentence into execution by causing the said _____ to be hanged by the neck until he be dead; at (time and place of execution), and to return this warrant to the Court with an endorsement certifying that the sentence has been executed.

Given under my hand and the seal of the Court, this _____ day of _____, 19____.

(Seal).

(Signature).

XXXVI.—WARRANT AFTER A COMMUTATION OF A SENTENCE.

(See sections 381 and 382.)

To the Superintendent (or Keeper) of the Jail at

WHEREAS at Session held on the _____ day of _____, 19____, (name of prisoner) the (1st, 2nd, 3rd, as the case may be) prisoner in Case No. _____ of the Calendar at the said Session, was convicted of the offence of _____, punishable under section _____ of the Indian Penal Code, and sentenced to _____ and was thereupon committed to your custody; and whereas by the order of the _____ Court of _____ (a duplicate of which is hereto annexed) the punishment adjudged by the said sentence has been commuted to the punishment of transportation for life (or as the case may be);

This is to authorise and require you, the said Superintendent (or Keeper), safely to keep the said (prisoner's name) in your custody in the said jail, as by law is required, until he shall be delivered over by you to the proper authority and custody for the purpose of his undergoing the punishment of transportation under the said order,

or

if the mitigated sentence is one of imprisonment, say, after the words "custody in the said jail" and there to carry into execution the punishment of imprisonment under the said order according to law."

Given under my hand and the seal of the Court, this _____ day of _____, 19____.

(Seal).

(Signature).

XXXVII.—WARRANT TO LEVY A FINE BY ATTACHMENT AND SALE.

(See section 386 (i) (a).)

To (name and designation of the police-officer or other person or persons who is or are to execute the warrant),

WHEREAS (name and description of the offender) was on the _____ day of _____, 19____, convicted before me of the offence of (mention the offence concisely) and sentenced to pay a fine of rupees _____, and whereas the said (name), although required to pay the said fine, has not paid the same or any part thereof;

This is to authorise and require you to attach any moveable property belonging to the said (name) which may be found within the district of _____; and, if within (state the number of days or hours allowed, next after such attachment) the said sum shall not be paid (or forthwith), to sell the moveable property attached or so much thereof as shall

be sufficient to satisfy the said fine, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

Given under my hand and the seal of the Court, this _____ day of _____ 19 .
 (Seal). (Signature).

**XXXVII A.—BOND FOR APPEARANCE OF OFFENDER RELEASED
 PENDING REALIZATION OF FINE.**

(See section 388.)

WHEREAS I (*name*), inhabitant of (*place*), have been sentenced to pay a fine of _____ rupees and in default of payment thereof to undergo imprisonment for _____; and whereas the Court has been pleased to order my release on condition of my executing a bond for my appearance on the following date (*or dates*) namely:—

I hereby bind myself to appear before the Court of _____ at _____ o'clock on the said _____ day of _____ next, and in case of making default herein, I bind myself to forfeit to His Majesty the King, Emperor of India, the sum of rupees _____.

Dated this _____ day of _____ 19 .
 (Signature).

Where a bond with sureties is to be executed, add

We do hereby declare ourselves sureties for the abovenamed _____ that he will appear before the Court of _____ on the _____ following date (*or dates*) namely _____ and in case of his making default therein, we bind ourselves jointly and severally to forfeit to His Majesty the King, Emperor of India, the sum of rupees _____.

(Signature).

**XXXVIII.—WARRANT OF COMMITMENT IN CERTAIN CASES OF
 CONTEMPT WHEN A FINE IS IMPOSED.**

(See section 430.)

To the Superintendent (*or Keeper*) of the Jail at _____

WHEREAS at a Court holden before me on this day (*name and description of the offender*) in the presence (*or view*) of the Court committed wilful contempt;

And whereas for such contempt the said (*name of offender*) has been adjudged by the Court to pay a fine of rupees _____, or in default to suffer simple imprisonment for the space of (*state the number of months or days*);

This is to authorise and require you, the Superintendent (*or Keeper*) of the said jail, to receive the said (*name of offender*) into your custody, together with this warrant, and him safely to keep in the said jail for the said period of (*term of imprisonment*), unless the said fine be sooner paid; and on the receipt thereof, forthwith to set him at liberty, returning this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this _____ day of _____ 19 .
 (Seal). (Signature).

**XXXIX.—MAGISTRATE'S OR JUDGE'S WARRANT OF COMMITMENT
 OF WITNESS REFUSING TO ANSWER.**

(See section 435.)

To (*name and description of officer of Court*).

WHEREAS (*name and description*), being summoned (*or brought before this Court*) as a witness and this day required to give evidence on an inquiry into an alleged offence, refused certain question (*or certain questions*) put to him touching the said alleged offence, and duly recorded, without alleging any just excuse for such refusal, and for his contempt has been adjudged detention in custody for (*term of detention adjudged*);

This is to authorise and require you to take the said (name) into custody, and him-
safely to keep in your custody for the space of _____ days unless in the meantime he
shall consent to be examined and to answer the questions asked of him, and on the last of the
said days, or forthwith on such consent being known, to bring him before this Court to be
dealt with according to law, returning this warrant with an endorsement certifying the
manner of its execution.

Given under my hand and the seal of the Court, this _____ day of _____ 19 .
(Seal). (Signature).

XL.—WARRANT OF IMPRISONMENT ON FAILURE TO PAY MAINTENANCE.

(See section 488.)

To the Superintendent (or Keeper) of the Jail at _____

WHEREAS (name, description and address) has been proved before me to be possessed of
sufficient means to maintain his wife (name), [or his child (name), who is by reason of (state
the reason) unable to maintain herself (or himself)] and to have neglected (or refused) to do
so, and an order has been duly made requiring the said (name) to allow to his said wife (or
child) for maintenance the monthly sum of rupees _____; and whereas it has been further
proved that the said (name) in wilful discharge of the said order has failed to pay rupees
_____, being the amount of the allowance for the month (or months) of _____

And thereupon an order was made adjudging him to undergo simple (or
rigorous imprisonment) in the said jail for the period of _____;

This is to authorise and require you, the said Superintendent (or Keeper), to receive
the said (name) into your custody in the said jail, together with this warrant, and there carry
the said order into execution according to law, returning this warrant with an endorsement
certifying the manner of its execution.

Given under my hand and the seal of the Court, this _____ day of _____ 19 .
(Seal). (Signature).

**XLI.—WARRANT TO ENFORCE THE PAYMENT OF MAINTENANCE
BY ATTACHMENT AND SALE.**

(See section 488.)

To (name and designation of the police-officer or other person to execute the warrant).

WHEREAS an order has been duly made requiring (name) to allow to his said wife
(or child) for maintenance the monthly sum of rupees _____, and whereas the said (name)
in wilful disregard of the said order has failed to pay rupees _____, being the amount of
the allowance for the month (or months) of _____;

This is to authorise and require you to attach any moveable property belonging to
the said (name) which may be found within the district of _____, and if within (state the
number of days or hours allowed) next after such attachment the said sum shall not be
paid (or forthwith) to sell the moveable property attached, or so much thereof as
shall be sufficient to satisfy the said sum, returning this warrant, with an endorsement
certifying what you have done under it, immediately upon its execution.

Given under my hand and the seal of the Court, this _____ day of _____ 19 .
(Seal). (Signature).

**XLII.—BOND AND BAIL-BOND ON A PRELIMINARY INQUIRY
BEFORE A MAGISTRATE.**

(See sections 496 and 499.)

I (name), of (place), being brought before the Magistrate of (as the case may be) charged
with the offence of _____, and required to give security for my attendance in his Cour

and at the Court of Session, if required, do bind myself to attend at the Court of the said Magistrate on every day of the preliminary inquiry into the said charge and, should the case be sent for trial by the Court of Session, to be, and appear before the said Court when called upon to answer the charge against me; and, in case of my making default herein, I bind myself to forfeit to His Majesty the King, Emperor of India, the sum of rupees .

Dated this day of 19 . (Signature).

I hereby declare myself (or we jointly and severally declare ourselves and each of us) surety (or sureties) for the said (name) that he shall attend at the Court of on every day of the preliminary inquiry into the offence charged against him, and should the case be sent for trial by the Court of Session, that he shall be, and appear, before the said Court to answer the charge against him, and in case of his making default therein, I bind myself (or we bind ourselves) to forfeit to His Majesty the King, Emperor of India, the sum of rupees .

Dated this day of 19 . (Signature).

**XLIII.—WARRANT TO DISCHARGE A PERSON IMPRISONED
ON FAILURE TO GIVE SECURITY.**

(See section 500.)

To the Superintendent (or Keeper) of the Jail at or other officer
in whose custody the person is.

WHEREAS (name and description of prisoner) was committed to your custody under warrant of this Court, dated the day of and has since with his surety (or sureties) duly executed a bond under section 499 of the Code of Criminal Procedure;

This is to authorise and require you forthwith to discharge the said (name) from your custody, unless he is liable to be detained for some other matter.

Given under my hand and the seal of the Court, this day of 19 .
(Seal). (Signature).

XLIV.—WARRANT OF ATTACHMENT TO ENFORCE A BOND.

(See section 514.)

To the police-officer in charge of the police-station at

WHEREAS (name, description and address of person) has failed to appear on (mention the occasion) pursuant to his recognizance, and has by such default forfeited to His Majesty the King, Emperor of India, the sum of rupees (the penalty in the bond); and whereas the said (name of person) has, on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him;

This is to authorise and require you to attach any moveable property of the said (name) that you may find within the district of by seizure and detention, if the said amount be not paid within three days, to sell the property so attached or so much of it as may be sufficient to realise the amount aforesaid, and to make return of what you have done under this warrant immediately upon its execution.

Given under my hand and the seal of the Court, this day of 19 .
(Seal). (Signature).

XLV.—NOTICE TO SURETY ON BREACH OF BOND.

(See section 514.)

To of

WHEREAS on the day of , 19 , you became surety for (name) of (place), that he should appear before this Court on the day of , and bound yourself

in default thereof to forfeit the sum of rupees _____ to His Majesty the King, Emperor of India ; and whereas the said (*name*) has failed to appear before this Court, and by reason of such default you have forfeited the aforesaid sum of rupees _____ ;

You are hereby required to pay the said penalty or show cause, within _____ days from this date, why payment of the said sum should not be enforced against you.

Given under my hand and the seal of the Court, this _____ day of _____ 19 .

(Seal) ;

(Signature).

XLVI.—NOTICE TO SURETY OF FORFEITURE OF BOND FOR GOOD BEHAVIOUR.

(See section 514.)

To _____ of _____

WHEREAS on the _____ day of _____, 19 _____, you became surety by a bond for (*name*) of (*place*) that he would be of good behaviour for the period of _____ and bound yourself in default thereof to forfeit the sum of rupees _____ to His Majesty the King, Emperor of India ; and whereas the said (*name*) has been convicted of the offences of (*mention the offences concisely*) committed since you became such surety, whereby your security-bond has become forfeited :

You are hereby required to pay the said penalty of rupees _____, or to show cause within _____ days why it should not be paid.

Given under my hand and the seal of the Court, this _____ day of _____ 19 .

(Seal).

(Signature).

XLVII.—WARRANT OF ATTACHMENT AGAINST A SURETY,

(See section 514.)

To _____ of _____

WHEREAS (*name, description and address*) has bound himself as surety for the appearance of (*mention the condition of the bond*) and the said (*name*) has made default, and thereby forfeited to His Majesty the King, Emperor of India, the sum of rupees _____ (*the penalty in the bond*)

This is to authorise and require you to attach any moveable property of the said (*name*) which you may find within the district of _____, by seizure and detention, and, if the said amount be not paid within three days, to sell the property so attached, or so much of it as may be sufficient to realize the amount aforesaid, and make return of what you have done under this warrant, immediately upon its execution.

Given under my hand and the seal of the Court, this _____ day of _____ 19 .

(Seal).

(Signature).

XLVIII.—WARRANT OF COMMITMENT OF THE SURETY OF AN ACCUSED PERSON ADMITTED TO BAIL.

(See section 514.)

To the Superintendent (or Keeper) of the Civil Jail at _____

WHEREAS (*name and description of surety*) has bound himself as a surety for the appearance of (*state the condition of the bond*) and the said (*name*) has therein made default whereby the penalty mentioned in the said bond has been forfeited to His Majesty the King, Emperor of India ; and whereas the said (*name of surety*) has, on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him, and the same cannot be recovered by attachment and sale of moveable property of his, and an order has been made for his imprisonment in the Civil Jail for (*specify the period*) ;

This is to authorise and require you, the said Superintendent (or Keeper), to receive the said (name) into your custody with this warrant and him safely to keep in the said jail for the said (term of imprisonment), and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this day of 19 .

(Seal);

(Signature).

XLIX.—NOTICE TO THE PRINCIPAL OF FORFEITURE OF A BOND TO KEEP THE PEACE.

(See section 514.)

To (name, description and address);

WHEREAS on the day of , 19 , you entered into a bond not to commit, etc. (as in the bond), and proof of the forfeiture of the same has been given before me and duly recorded ;

You are hereby called upon to pay the said penalty of rupees or to show cause before me within days why payment of the same should not be enforced against you.

Dated this day of 19 .

(Seal).

(Signature).

L.—WARRANT TO ATTACH THE PROPERTY OF THE PRINCIPAL ON BREACH OF A BOND TO KEEP THE PEACE,

(See section 514.)

To (name and designation of police officer), at the police-station of

WHEREAS (name and description) did, on the day of 19 , enter into a bond for the sum of rupees , binding himself not to commit a breach of the peace, etc. (as in the bond), and proof of the forfeiture of the said bond has been given before me and duly recorded; and whereas notice has been given to the said (name) calling upon him to show cause why the said sum should not be paid, and he has failed to do so or to pay the said sum ;

This is to authorise and require you to attach by seizure moveable property belonging to the said (name) to the value of rupees which you may find within the district of and, if the said sum be not paid within , to sell the property so attached, or so much of it as may be sufficient to realise the same ; and to make return of what you have done under this warrant immediately upon its execution.

Given under my hand and the seal of the Court, this day of 19 .

(Seal).

(Signature).

LI.—WARRANT OF IMPRISONMENT ON BREACH OF A BOND TO KEEP THE PEACE.

(See section 514.)

To the Superintendent (or Keeper) of the Civil Jail at

WHEREAS proof has been given before me and duly recorded that (name and description) has committed a breach of the bond entered into by him to keep the peace, whereby he has forfeited to His Majesty the King, Emperor of India, the sum of rupees and whereas the said (name) has failed to pay the said sum or to show cause why the said sum should not be paid, although duly called upon to do so, and payment thereof cannot be enforced by attachment of its moveable property, and an order has been made for the imprisonment of the said (name) in the Civil Jail for the period of (term of imprisonment) ;

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