LECTURE X.

ABETMENT—ATTEMPTS—PUNISHMENT, &c.

Abetment.

HAVING brought to a close our brief notice of the classes or kinds of offences declared punishable by the Penal Code, it remains to be noticed that there are many cases in which an offence is not merely committed by several persons all of whom are concerned in the transaction as principals, but the offender has been incited to do the act, or has been aided in doing it, by someone else. Whoever *aids* in the commission of an offence, may, under certain circumstances, find that the law treats him *as if* he were himself committing the offence; but generally speaking, "abetment" or participation is an offence which is different from the offence abetted.

In English law, abetment is spoken of in a somewhat different way. The "aider and abettor" is said to be an "accessory"; and he may be an "accessory before the fact" or "after the fact." This distinction is founded on the natural division of acts done in aid of an offence; that is to say, some acts are preparatory to the offence, such as buying poison, procuring implements, arranging and planning details of a scheme of operation; others are subsequent, and tend to prevent its discovery, such as concealing property, harbouring the offender, causing disappearance of marks, &c. In the Indian Penal Code no formal distinction of this kind is made, but the term "abetment" (in general) is defined, and if an act comes under the definition, it is punishable, whether before or after the deed. As a matter of fact, however, it will be found that the majority of cases (which would in England come under the head of "accessory after the fact"), such as concealing a birth, harbouring the offender, not giving information, making away with property, or with marks of an offence, are constituted

distinct offences, in appropriate sections. It will then be understood that in this Code—

(I.) A number of acts of abetment are, for special reasons, treated as specific offences, and as such are described and the penalty is provided (*e.g.*, abetment of mutiny, abetment of suicide, &c.) (see p. 109).

(II.) Other acts of abetment are included under one general head; any act which comes within the definition, and is not made the subject of a special provision, is punishable as an abetment under the general section.

(III.) There are certain special provisions (and this is the only element of difficulty or complication in the subject) relating to those cases in which (*a*) the knowledge or intention of the abettor is different from that of the person abetted; where (*b*) one act is abetted and another is done; where (*c*) an offence consists of several acts conjoined, and one person of a party does one act, and another another.

On these three heads I may now offer some remarks :—

Ad (I.) The provisions relating to abetment in general (*i.e.* apart from the several sections which make certain abetments specific offences) are not all in one place in the Code. Thus sections 34, 35, 37, and 38 (in the Chapter of general explanations) belong to this subject, and the general definition and penalty provisions are found in secs. 107—117, 118, 120, and 123.

Ad (II.) As to the general subject of abetment, it will naturally be asked what constitutes abetment or participation? Sec. 107 defines :—

(1) By *instigation* :

e.g. where A. suggests to B. (who perhaps has otherwise no idea of acting) to do something; he incites him to action in some way. There may be instigation or incitement, by inducing a false belief through *misrepresentation*, or wilful concealment of a fact which the instigator was bound to disclose.

(2) By *conspiracy* : here all the parties have a desire to act, and they agree and consult together as to how they shall proceed.

In abetment by conspiracy, it is necessary that, as a conse-

quence of the conspiracy, some overt act or illegal omission takes place.

(3) By *intentionally aiding* (by any act or illegal omission) in the doing of a thing. The aid may be given either prior to the commission of the offence, or at the time of committing it (both coming under the head of "accessory before the fact"): all that is necessary is that the act done should be in order to facilitate (and should thereby facilitate) the commission of the offence.

Abetment of *any* "offence" is punishable; for by definition, "offence" here includes all offences under Local and Special Laws as well as under the Code. The penalty provided, depends, partly on whether the abetment results in the offence being committed or not, and partly on the gravity of the offence abetted. *If the offence is committed*, the abettor is liable to the full penalty for the offence itself.

This, I may repeat, refers to abetments coming under the general section; the specific cases of abetment are each provided with an appropriate penalty in the section applicable.

If the offence *is not committed*, then the abettor is liable to a less punishment,—graduated according to the character and gravity of the offence abetted (secs. 115, 116). It is here necessary to call attention to sec. 114, which provides that whenever a person who would, *if absent* from the actual scene of the offence, be liable only as an abettor, is *present* at the commission, he becomes liable as a principal.

Ad (III.) It is necessary to give some explanations regarding the cases noted under the (III.) head, viz. Where differences in the intention or knowledge (and other special incidents of the kind) are observable in connection with the conduct of the abettor. Sec. 34, for instance, provides that if several persons take action with a *common intention*, and a criminal act is done in furtherance of that intention, all the parties are liable as if each had done the act alone. And sec. 35 adds that if the act done is one which is criminal only when done with a certain knowledge and intention, then the liability extends to all or as many of the party (as the case may be) as had the necessary knowledge or intention (this will appear from the circumstances of the case). When an offence is made up of several acts, and several persons

are concerned,—one doing one act, and another another, in furtherance of the offence, each person is held guilty of the offence itself.

On the other hand, several persons may be engaged or concerned in committing a criminal act, and may be guilty of different offences, by means of that act.

Thus A. is engaged in killing B., and C. comes up and helps A.: here it may be that A. has received grave and sudden provocation, and his offence might be culpable homicide not amounting to murder: C. on the other hand, has had no sudden provocation, but acts out of an old hatred of his own to B. Here C. (although the transaction is the same) would be guilty of murder.

The guilty *knowledge or intent of the abettor* may also have to be considered (sec. 108). A. abets B., a young child or a lunatic, in some offence; A. is guilty, although the person abetted is incapable of an offence by reason of want of understanding (under the chapter of General Exceptions). Or A. instigates B. to murder X. B. succeeds only in wounding X. B. would only be guilty of an "attempt to murder," but A. would be guilty as an abettor of murder (which he intended).

The sections 110—113 may be read in this connection, as giving some further cases which are likely to arise when abetment is in question.

Section 110 deals with the case where the principal acts with one intent or knowledge, and the abettor has a different intent. The abettor, is liable for the offence which would have been committed if the principal had had the same knowledge and intent as himself.

Section 111 contemplates the frequently occurring case, where *one act is abetted* and *another act is done*. And here the abettor is liable for what has actually been done, provided that the doing of it was a natural and probable result of the abetment, and was committed under the influence of the instigation, or conspiracy, which constituted the abetment. For example:—

A. desiring to kill Z., instigates B. a child, to put poison in Z.'s food, providing the poison for the purpose; the child makes a mistake, and puts the poison in Y.'s food, acting however under the instigation: A. is liable exactly as if he had instigated poisoning Y.'s food.

On the other hand, A. incites B. to set fire to C.'s house (in revenge perhaps). B. takes the opportunity to commit a theft in the house on his own account: the theft has nothing to do with the incitement, and A. is not liable for it.

In such cases, it may be a question of some difficulty, whether the act done *was* a consequence, probable and natural, of the act proposed by the abettor, *e.g.*, where a housebreaking is abetted, and in the course of it a murder is committed.

Section 112 is the natural corollary to this; if the additional act committed is a separate and distinct offence, the abettor *may* become liable for both.

Lastly, section 113 deals with the case where the abettor abets an act which is to have a particular effect, and *some other effect* follows: the abettor will be liable for the effect actually produced, just as if he had intended that effect; provided, of course, that he knew the act he abetted to be one likely to produce such a result.

e.g. A. abets B. in causing grievous hurt to X. The hurt is inflicted, but X. dies of it; here A. is liable as if he had abetted the murder, provided he knew that the grievous hurt abetted was likely to result in death.

Lastly, let me observe that it is possible to abet an *offence by the public*, or a crowd, or group, or class, of more than ten persons; for this, section 117 has a special penalty.

Illegal concealment of a design to commit certain offences is treated of in sections 118—120: this is not exactly abetment, but it is a form of indirect or secondary aid, which is analogous to abetment.

I may take occasion, in connection with the present subject, to mention, that apart from actual instigation or other form of abetment, no one is *criminally* liable for any one else's act, merely *by reason of a relation subsisting* between them, although he may be liable to civil damages (p. 40). A master, for instance, is not responsible for an offence committed by his servant (unless expressly made so by special provisions), nor is a guardian criminally liable for his ward's act.

Attempts.

Certain "attempts" (which are an inchoate state of crime—a crime begun but not completed) are made specific offences: such are—attempt to wage war against the Queen; attempt to obtain an illegal gratification; attempt to pass counterfeit coin; attempt to put a person in fear of injury or accusation in order to commit extortion; and there are others.

Attempts in general, are punished by section 511; but only with regard to offences under the Code, not under special or local laws. No "attempt" to commit an offence solely punishable under the Forest Act, can be prosecuted.[1] I shall not go into detail on the subject, especially as reference can be made to Dr. Stokes's excellent note (A.-I. Codes, Vol. I. 68 ff.). To constitute an "attempt," section 511 requires the doing of "any act towards the commission of the offence;" and the *general* penalty (*i.e.*, when the attempt is not made a specific offence) is *half* that provided for the completed offence.

Presumably the act "towards" the commission, must be an outward and visible act, which (as a question of fact) is a step towards, or an incipient stage of, the crime: *e.g.*, mere preparation of materials, unconnected with any actual use of them in connection with any property or person, would not be an attempt; nor would a threat or expression of intention, amount to one. What *is* sufficient, must be gathered from the illustrations added to section 511.

Legal Punishment.

I have for convenience reserved to the last, what the Code places in Chapter III.

The only punishments known to the I. P. Code are (section 53):—

(1) Death.

(2) Transportation (penal servitude in the case of Europeans or Americans). (Section 56.)

[1] Nor is it desirable; for such offences are mostly of a petty character. If justice required that an "attempt" should be prosecuted, it would be in the graver cases which could be brought under the Code (*e.g.*, an attempt to steal valuable logs, or an attempt to set fire to a forest maliciously).

(3) Forfeiture of property.
(4) Imprisonment ("simple" or "rigorous").
(5) Fine.

To these Act VI. of 1864 has added (6) *Whipping*, in certain cases.

The Forest Act also provides confiscation of property obtained and implements used, in committing a forest offence: this may be said to constitute a special form of penalty peculiar to forest cases, but it will be better to reserve the details till we come to speak of the Forest Law, under which head I shall again have to allude to penalties.

The student will bear in mind that the Substantive law deals only with the nature and amount of punishment, and the cases in which each kind is appropriate; and that the Adjective or Procedure law also has to go into various further matters connected with the amount of penalty the different grades of Courts are competent to award; the *mode* of inflicting the punishment; the *place* of imprisonment; the mode of levying fines; the instrument with which whipping is to be administered, and so forth.

Death means always death inflicted by hanging.

Forfeiture of all property (including that which may come by inheritance) can be ordered only in a few very grave cases. Partial forfeiture can be ordered under sections 126 and 127 (confiscation of the property which is being improperly used); and so in sections 206 and 207, and under the Merchandise Marks Act (IV. of 1889), where the property wrongly purchased, or in respect of which fraudulent marking has taken place, may be confiscated.

Transportation is carried out by deporting prisoners to the Andaman Islands; the Governor-General in Council may appoint the place. If a youth under sixteen is sentenced to transportation, he may be sent instead (by the Court) to a Reformatory School for not less than two, or more than seven, years (Act V. of 1876).

Penal servitude is substituted in sentences on Europeans and Americans, so as to conform to the practice at home (where transportation has been abolished). The Governor-General in Council directs which prisons in British India are to be used for the purpose.

Imprisonment can be of two kinds, "simple,"[1] and "rigorous," *i.e.*, with hard labour. In Acts after 1868 (by the effect

[1] Simple imprisonment does not necessarily mean that the prisoner in jail is to do nothing; only that he is not liable to be set to "hard labour."

of the General Clauses Act I. of 1868), when only "imprisonment" is mentioned, it means "of either kind," in the discretion of the Court. The Code itself (first enacted in 1860) always specifies the nature of the imprisonment,—sometimes prescribing "simple," and sometimes "rigorous," and sometimes leaving it to the Court (according to the circumstances of the case) to award either one or the other.[1] In case rigorous imprisonment for seven years or more is ordered, the Court may direct that transportation be substituted (section 56). When rigorous imprisonment has been ordered, a limited portion of it (regulated by sections 73, 74) may be ordered to be passed in solitary confinement.

Confinement in a Reformatory School (Act V. of 1876) may be ordered in lieu of imprisonment (in graver cases) for juvenile offenders.

Fine, in this Code, is sometimes unlimited, and sometimes limited to a maximum amount named.

In all cases it is required to order that if the fine is not paid, a term of imprisonment shall be undergone in default of payment: this of course terminates as soon as the fine is paid; or a proportionate part of it, if part only of the fine is recovered. The alternative imprisonment may be (as ordered) of any description to which the offender might have been sentenced for the offence, and must not exceed one-fourth of the maximum imprisonment fixed for the offence. If the offence is punishable with fine only, the alternative imprisonment is *simple*, and for a time calculated according to section 67.

Where fine is "unlimited," section 63 declares that the fine must not be excessive (*i.e.*, with reference to the circumstances of the case and the prisoner's means (*e.g.*, whether he has obtained a large booty or profit by the crime, &c.)). An appeal lies on the ground of excessive fine.

Fines when recovered, always go to Government; but there is

[1] It may be convenient to note that in calculating terms of imprisonment, fractions of a day are neglected; and that in a "calendar" month (which is what is counted in awarding "one month," or "six months'" imprisonment), the term expires at midnight of the day of the next (or subsequent) month (as the term may be) numerically corresponding with the day from which the sentence counts as having commenced; and if there is no day so corresponding, then at midnight of the last day of the following month (*e.g.*, sentence of a month's imprisonment on 31st of January would count from midnight of 30th and expire at midnight of 28th February, or in leap year, 29th (for there is no 30th).

a procedure provision which enables a fine or part of it to be applied by the Court in a certain way, of which hereafter.

In the Code, fine alone is sometimes prescribed; sometimes both fine *and* imprisonment. Fine *or* imprisonment is mentioned in one section (254). "Fine or imprisonment *or both*" is provided in a large number of cases.

Whipping is awarded chiefly because of its highly deterren character; and, as provided by law in India, it is not onl useful, but entirely unobjectionable.

It cannot be inflicted on females nor on males over 45 years of age; and the Crim. Pro. Code (sections 391—5) contains other safeguards as to mode and instrument of infliction, which preclude undue severity. It is not necessary to repeat the details of Act VI. as to when it is applied; but it may be mentioned that it is as an *alternative* punishment in certain cases, and as an *additional* punishment, in certain others, such as second conviction.

Boys may be sentenced to flogging instead of to other punishment; but then it is with a light cane by way of school discipline.

Flogging can only be ordered for an offence under the Code (unless of course a special law contains an express provision, as do the Cantonment Act, Criminal Tribes Act, &c.). The Forest Act contains no such provision; consequently flogging can never be ordered (not even to boys) for any offence constituted solely by the Act, *i.e.*, not coming under the Code also.

Some Special Incidents of Punishment.

There are some circumstances which *aggravate* offences; and these are usually treated in the Code, as entering into the constitution of a new or separate offence. As, for instance, where "housebreaking" is done by night, or where a riot is rendered more serious by the use of deadly weapons. But it may be that the existence of some particular circumstance, is of itself an aggravation which may attach to any offence, enhancing its penalty, without altering its character or the section under which it is charged. Of this we shall find instances in the Forest Law.

The Indian Penal Code recognizes the case of relapse (*récidive*

of French law). Provision is made by section 75, that any person who has been convicted of any offence under Chap. XII. (Offences relating to Coin and Stamps) or Chap. XVII. (Offences against Property) (theft, robbery, breach of trust, receiving of stolen property, cheating, mischief, criminal trespass, &c.)—the said offence being punishable with imprisonment of three years or upwards, and is again convicted of *any offence* punishable under these chapters, and which is of the same magnitude as regards punishment, he may be transported for life, or receive double the amount of punishment otherwise awardable (up to a limit of ten years in the case of imprisonment).[1] The Whipping Act also (as I have noted) provides that flogging may be *added* to other punishment in certain cases of second conviction (of the *same* offence, however).

Under this head I might also consider the case of a number of punishable acts committed in one transaction. This has already been dealt with (see pp. 97, 8). I need therefore only here refer to section 71, Indian Penal Code (and sections 35 and 235 of the Crim. P. Code must in practice, be taken with it). Where the acts do *not* form a single transaction (and get treated as one offence) and there are several sentences, one begins on the expiry of the former: there is, however, a proviso against the aggregate of punishments exceeding a certain total or maximum.[2]

Limitation as regards Time of Prosecution.

Lastly, I may mention that our criminal law does not recognise any period of limitation as doing away with an offence or preventing its prosecution.

In theory there is no reason why such a limit should be set; and although it would be absurd that a petty offence should be raked up against a man after many months or years, practically such a thing never happens: the proof of a small offence would be sure to disappear, and the magistrate would also have excellent ground to refuse a summons: it is therefore judged

[1] See some special remarks on the subject of aggravation, in the lecture on the Protection of Forests by law.

[2] Nothing is said in the Code about "concurrent sentences;" that is, sentences which are separately pronounced, but are ordered to take effect *concurrently*. These are often passed in England. The effect is so far real, that if on appeal one sentence were quashed, the other would remain in force.

better to leave the subject entirely alone, except in some special cases where prosecutions are expressly required to be instituted within a certain period.[1]

General Remarks on Prosecutions.

It is perhaps unnecessary to say that in all grave cases, care is required, and advice of a lawyer, as to the charge to be preferred, and what is necessary to be proved.

Generally it may be observed that the prosecutor must be prepared to make out *affirmatively* the charge he makes; he cannot make a charge and (in effect) say, "I cannot prove it very well, though I have the strongest suspicion: but you defend yourself, and, if your defence is not complete, that will show you are guilty." It is only when an *offence* is *primâ facie* completely established, that the accused must either clear himself or be convicted.

For example, a man's cottage near a river is found roofed with water-worn sleepers. It is of course likely enough that he has misappropriated them, because it can be shown that it would not have paid him to employ sleepers that he had *bought*, for such a purpose. But the prosecution cannot simply charge the man and say, "I will stand by while you prove how you got the sleepers." It should establish first, such a strong case that the sleepers could not have been bought and must have been misappropriated from stranded pieces which he had no right to touch, that the burden of proof to the contrary, is laid on the accused.

Whenever there is *primâ facie* an offence, but the act is excused if it comes within the terms of some General Exception in the I. P. Code, or some special exception or proviso contained in the Code or other law defining the defence, the

[1] Instances are under the Excise Act, the Arms Act, Police Act, the Copyright Act, and the Act for Protecting Wild Elephants (VI. of 1879). There is a complete list of Acts in Anglo-Indian Codes, Vol. II., pp. 14–16.

The Scotch, French, and some German laws are different. The Bavarian Forest Law (Art. 71) requires forest offences to be prosecuted within one year from the day of perpetration. The French Code For. (Art. 185–187) (with some exceptions) fixes three months as the limit, if the *procès verbal* specifies the delinquent, and six months if it does not; the "prescription" runs from the date on which the offence was formally recorded (*constaté*). If there has been no *procès verbal* at all, the case is held to come under the ordinary criminal law, which gives one year or three, according to the gravity of the offence.

accused must plead it and prove the exception. Thus, the prosecution need not charge nor prove that the offender was of sound mind, that there was no grave and sudden provocation, &c., for if the accused raises that as a defence, *he* must allege and prove it.

These matters, perhaps, belong more to the Code of Criminal Procedure and the law of Evidence, but they are more likely to come to notice if brought in in this place. Sec. 185 of the Evidence Act (Act I. of 1872), and sec. 221, &c., Cr. P. Code, should be referred to.