LECTURE XIII.

CRIMINAL PROCEDURE (*concluded*)

The Execution of Sentences.

WHEN the judgment has been pronounced and a sentence awarded, the Criminal Procedure Law has further to direct how sentences are to be carried out, and how it is officially known and certified that the punishment has been inflicted.

It is hardly necessary to remind you that while certain sections of the Indian Penal Code (already considered, p. 131 *ff*) prescribe the nature and extent of punishments in general, as a question of substantive law, we have still to look to the Procedure Law to tell us how, and with what precautions, the sentence is, in each case, to be carried into effect.

Sections 381—383 deal with sentences of death and transportation, and provide what is to be done when a woman under sentence of death, is found to be pregnant.

Sentence of *imprisonment* is carried out under a special warrant, signed and sealed by the Judge or Magistrate (sec. 383). This warrant is returned by the Jailor when the time is up (or if otherwise the prisoner is released on due authority), and with an endorsement, under his signature, showing the manner in which the sentence has been executed.

Fines are levied as directed in sec. 386. The Court may issue a warrant for levy by distress and sale of any *moveable* property belonging to the offender: and this is done in all cases whether there has been a sentence of further imprisonment in default of payment or not, since the fine has to be recovered, if possible, in any case. But, of course, as soon as the fine is paid, the prisoner, if in jail only in default of payment, is let go; and if a part of the fine is paid, a corresponding part of the term is also remitted (I. P. Code, sec. 69). This is a matter of substantive law, being part of the nature and conditions of the punishment of fine; so also it should be remarked that

the time within which a fine remains leviable, and the liability of heirs to pay the fine, are matters of *substantive* law (I. P. Code, sec. 70). Fines when recovered, can always, under sec. 545 (C. Pro. Code) be devoted to (1) compensate deserving persons for expenses properly incurred in prosecuting the offender; (2) in compensation for the offence.

Under the Forest Act, special power is given, under sec. 75, to the Local Government, to make rules for the payment of fine proceeds, in *reward to informers*, which, it will be observed, is not contemplated by the Procedure Code.

It will be sufficient here to refer to sec. 388 as giving a power (in case of a sentence of fine *only*) to release the prisoner on bail, instead of at once carrying out the order of alternative imprisonment, and thus giving him a better chance of making arrangements to pay the fine.

While Act VI. of 1864 declares the substantive law of *whipping* as a penalty, the secs. 390—395, C. Pro. Code, add a number of procedure rules as to time, place, mode of administering the whipping, and enact certain precautions against the misuse of the penalty.

There are certain provisions regarding Reformatories for juvenile offenders (sec. 399 and Act V. of 1876) which I must pass over with this mention only.

From the provisions about punishment, the Code naturally passes to sec. 401, which gives a power of *pardon* or commutation of sentence, to the Governor-General in Council and to the Local Government.

In this connection also it is convenient to state the general principle (sec. 403) that a person once acquitted or convicted, cannot again be tried for the *same* offence; *nor on the same facts*, for any *other offence* for which a *different* charge might have been made under sec. 236, or where a conviction might have followed under sec. 237. But a person may be tried again for a *distinct* offence, which he committed in the course of a transaction which comes under sec. 235, par. 1 (*e.g.*, a person is charged with murder and is acquitted: no charge of robbery was made at the trial; but it appears that when the murder was committed, the offender also committed robbery; there is nothing to prevent his being again tried for the robbery).

And so supposing certain *consequences* happen after the trial, and those consequences *alter* the nature of the offence committed: (*e.g.*, a person is convicted of 'causing grievous hurt;' and after the trial, the sufferer dies of the hurt, so that the act becomes culpable homicide or murder according to circumstances: he may be tried again).

Or when the renewed charge is of an offence which the Court which first tried the person had no jurisdiction to try, *e.g.*, A. B. C. D. and E. are tried and convicted by a Magistrate first class, of robbing X. They may afterwards be brought up on the same facts, before the Sessions, for the offence of 'Dacoity' (p. 119) which the Magistrate had no jurisdiction to deal with.

Appeal and Revision.

The criminal cases in which appeals are allowed are less numerous than those which occur under the Civil Pro. Code; nevertheless there is sufficient provision for the rectification of any real errors. The brief examination of the Code which we have made up to this point, will show that a number of *orders* are passed by Magistrates other than *decisions* of 'guilty' or 'not guilty' on actual trials; in fact a distinction can be drawn in general between the "orders" or the "judgments" of a Criminal Court or Magistrate.

No appeal lies from any such *orders;* and an appeal lies from any *judgment* only when *expressly* provided by the Code, or by some special provision in any other law.[1]

Speaking generally, there is one appeal from a *conviction* by a Magistrate, or by the Sessions Court:—but not, if the accused has pleaded guilty (unless it is a question of the extent or legality of the sentence). And, further, there is *no appeal* (sec. 413)—

(1) from any Court of Session, District Magistrate, or Magistrate of first-class, when the

sentence does not exceed { one month's imprisonment only; / fine up to 50 Rupees only; / whipping only.

[1] *E.g.* (as Dr. W. Stokes remarks), no appeal is possible, under sec. 123, from an order by a District Magistrate, directing a person to be detained in prison until he should find security for his good behaviour; nor under sec. 22 of the Cattle Trespass Act (I. of 1871).

(Imprisonment ordered as an alternative, in default of payment of fine, does not give an appeal.)

(2) in summary cases (sec. 414) by a Magistrate empowered under sec. 260, when the sentence

does not exceed { three months' imprisonment only; fine not exceeding 200 Rupees only; whipping only.[1]

(3) Ordinarily there is no appeal from an *acquittal:* but (sec. 417) the Local Government may specially order the Public Prosecutor to present such an appeal from the judgment of any Court except a High Court.

Appeals when admissible, are both as to the *law* and the *facts:* except where the trial is by jury, when the appeal is on law only (sec. 418).

As to the *Appellate Courts;* judgments of Magistrates of the second and third class (or a bench of such Magistrates) are appealable to the District Magistrate (sec. 407)—with certain proviso as to a first-class Magistrate being specially empowered to hear appeals).

From an Assistant Sessions Judge, a District Magistrate, or a first-class Magistrate, the appeal is to the Sessions Court—but with certain *provisos* (sec. 408). N.B. *Assistant* Sessions Judges do not take part in the appellate work of the Sessions Court (*Joint* or *Additional* Sessions Judges do).

From convictions by the Sessions Court (other than by an Assistant Sessions Judge) the appeal is to High Court (sec. 410).

These are the *general* provisions of the Code on this subject.

If the appeal is from an *acquittal:*—

the Court may order

(*a*) further enquiry,

(*b*) or that the accused be retried or committed for trial, as the case may be.

(*c*) or may find the person guilty and pass sentence.

If the appeal is from a *conviction:*—

the Court may reverse the conviction and order,—

(*a*) an acquittal or discharge.

[1] In both these cases if the person accused is a European British subject, the secs. 413, 414 do not apply. And in any case, any *combination* of sentences gives an appeal.

(*b*) a retrial or committal.
(*c*) may alter the finding and maintain the sentence.
(*d*) may reduce the sentence with or without alteration of the finding.
(*e*) may alter nature of sentence but not enhance it (with or without alteration of the finding).

The verdict of a jury can only be set aside on the ground that the verdict is erroneous owing to the misdirection of the jury by the judge, or to the jury misunderstanding the law as laid down by the judge.

There are further details about suspending the sentence and taking bail during appeal, and about taking further evidence, which I do not go into.

Revision.

As the power of appeal is limited, it is desirable that there should be certain other provisions for correcting errors and seeing that justice is done.

We may pass over the power which Presidency Magistrates have of making a "reference" to the High Court for a ruling on a doubtful point of law, and call attention to the important sections 435—439 on the subject of "Revision." That means, that certain authorities can, either on request of any interested person, or from their own knowledge, *e.g.*, from noting the case in the statistical returns and abstracts of work (which are submitted by the subordinate courts to the superior), call for any record and see if a proper *order* or *judgment* has been passed, and if not, then take certain measures as provided.

The High Court, the Court of Sessions and the Magistrate of the District[1] are empowered (by sec. 435) to satisfy themselves as to the "correctness, legality or propriety" of any "finding, sentence or order" within their local jurisdiction.

The Court of Session and the District Magistrate are restricted to the action provided in secs. 436, 437 respectively, the High Courts have the more extended powers in sec. 439: so that if the former authorities, on getting up the record of a case, think

[1] And a subdivisional magistrate, with certain limitations, sec. 435 (2nd clause).

that some alteration is needed beyond what they can themselves order under secs. 436, 437, they will forward the case with a report, and the High Court may then act under sec. 439.

The powers under sec. 436 refer only to cases triable exclusively by the Court of Session, where there has been no committal, but a discharge which the revising authority considers improper. The offender may be rearrested and committed for trial on the evidence already taken; or if necessary (because some other offence seems likely to be established) a new enquiry may be directed: when a committal is ordered, the accused must be heard as to any objection he may be able to offer. Under sec. 437, the High Court, or the Court of Session, is also empowered to take notice of *any* case of improper discharge, or of an improper dismissal of complaint (under sec. 203).

Sec. 439 states the further powers of the High Court, which, as already remarked, are exercised of its "own motion"[1] or on the report of the Session Court or District Magistrate (sec. 438). These extend to doing anything that could be done on appeal, and even to *enhancing* a sentence that is improperly lenient. It is only necessary to remark on this provision, that a failure to pass an adequate sentence is just as much a failure of justice, as far as the public security is concerned, as an improper discharge, or an improper conviction. In every case of enhancement, however, the accused *has a right* to be heard: and when the High Court enhances a sentence, it does so within the *limits* of the *powers* of the *original court*; in other words, it only passes such a sentence as the original court might (and ought to) have passed.

It might be asked, if there is this wide power of correcting errors by revision, why is any appeal allowed at all? Because in an appeal, the accused has always a right to be heard by his advocate, pleader, &c., and can raise any plea he likes; whereas in revision (sec. 400) no one has a *right* to be heard, unless it is a case of enhancing the punishment. As a matter of fact, however, if a prisoner sends an agent and asks leave to address the

[1] When the Court acts "on its own motion" that means that either it has noticed the case in one of the returns of work (with lists of cases) sent up to it periodically by the subordinate Courts, or that some one has by petition, called its attention to a case and induced it to call for the record.

Court, he always is heard: but still there is not the same latitude as there is in appeal.

Of certain Special Proceedings.

The matters dealt with under part VIII. of the Code might have been included under the head of trials, but would have lengthened and confused the chapter. This "Part" relates to the Trial of European British subjects, who have always possessed certain privileges, chiefly with a view to render their liability to Criminal Courts as like what it would be at home as possible. A controversy arose about these privileges in 1884; and this resulted in certain modifications of the Procedure law, *the general feature* of which (as it now stands) is, that a European British subject has lost the privilege of being *exclusively* triable by a Court presided over by a European British subject (and Justice of the Peace), but still can only be dealt with by a Native Judge who holds a certain (superior) rank and dignity, and is therefore *ex officio* a Justice of the Peace. And the trial is also limited and conditioned in other ways, so as not to deprive the accused (practically) of certain rights which he would have in his own country.

To state the matter more in detail, every European British subject is liable to be tried (or committed for trial as the case may be) by the Courts of—

The Presidency Magistrate.

The District Magistrate.

The Sessions Judge himself,[1]—

whatever nationality the Judge or Magistrate is of.

But even then the accused has certain privileges:

(1) The District Magistrate cannot act under his special powers (secs. 30, 34) in provinces where such powers are conferred.

(2) The Presidency Magistrate and District Magistrate respectively can only pass sentence up to the limits stated in sec. 446.

(3) If he is charged with an offence which will not be adequately met by such sentence, he must be committed to the Sessions Court (or in the Presidency towns to the High Court). And if the offence is punishable with death or transportation for life, always to the High Court. And even when triable by the

[1] A Joint or *Additional* Sessions Judge or an *Assistant* Sessions Judge cannot try a European British subject unless he is himself a European British subject: and in the case of an Assistant Sessions Judge also, unless he has held office for three years, and has been specially empowered (sec. 444).

[2] These officers are *ex officio* Justices of the Peace (p. 145).

Sessions Court, the Judge can only give him a sentence of imprisonment up to one year, or fine (unlimited) or both; if therefore the case is graver than such a sentence is adequate for, the trial must be transferred to the High Court (sec. 449).

(4) In trials before the Sessions or the High Court there are certain privileges of having a mixed jury (sec. 451) (*i.e.* at least part being Europeans or Americans).

(5) In trials before a District Magistrate (either in a summons or a warrant case) the accused may require (by applying before a certain stage in the proceedings) to be tried by a mixed jury: and the details may be learned by reference to secs. 451A., 451B.

With regard to *other* Magistrates, *any* Magistrate who can take cognizance of cases on complaint, may do so in case a European British subject is charged or complained against, but he must make the process he issues (for appearance) returnable before a Magistrate having jurisdiction to hear the case (*i.e.* one who is able to try a European British subject).

No Magistrate, not being a Presidency or District Magistrate, can try (or hold an enquiry for committal) in the case of a European British subject, unless he is himself both a European British subject, a Magistrate of the first class, and a Justice of the Peace. And then he cannot pass a sentence above three months' imprisonment or 1,000 rupees fine or both (sec. 446, cl. 1) (so that if there is a grave charge, he must commit to the Sessions or the High Court as the case may be).

The chapter concludes with details regarding the mode of pleading the privilege as European British subject; and the decision on the merits as to whether the accused person has such a privilege; the waiver and non-pleading of the privilege; the application of a European British subject alleging unlawful detention; and rules about mixed juries.

Another instance of special proceeding is, when an accused person appears to be *insane*. I can only refer to Chapter XXXIV. on the subject.

It has already been mentioned (p. 162) that a *sanction* is required under sec. 195, before certain complaints, &c., will be entertained; and among these are cases of false evidence and other matters affecting cases in Court. Chapter XXXV. speaks of similar cases where the Court itself thinks right to take action, because the offence is committed before it, or is brought to its notice in the course of its judicial proceedings.

And sec. 480 deals with cases of contempt of Court (here there is no privilege of European British subject).

This part concludes with a chapter on maintenance of wives and children, which except that they are heard by *Magistrates*, are really not criminal matters at all, and would have been better dealt with in a separate Act.

Supplementary Provisions—Public Prosecutor, &c.

The Code concludes with several chapters containing details on matters which might have been placed along with other provisions, but which would have swelled the earlier chapters and rendered reference more difficult. Here then we find directions for the appointment (either for local areas, or classes of cases) of a Public Prosecutor. This officer has a right to appear in all Criminal Courts; and if any private person appoints a pleader, &c., in his own interest, this pleader will act under the directions of the Public Prosecutor.

Sec. 495 is important as settling who may conduct a prosecution when no Public Prosecutor is acting. Forest officers may be empowered under this section to conduct official prosecutions.

In this part too will be found the details about *bail* already spoken of (secs. 496–501) and about *bonds* entered into as security for appearance, or other purposes (secs. 513–516). Among them only I note sec. 513, which enables a person (with permission) to deposit a sum of money in Government securities in lieu of a bond with sureties.

The sections dealing with "commissions" to examine absent witnesses, and certain details about a Chemical Examiner's formal report being admitted in evidence, need no remark.

Chapter XLIII. relates to the cases where orders about property are required, *e.g.*, property regarding which an offence has been committed. Sec. 519 is the only one calling for notice; it allows of the disposal of money found on a person convicted of theft or of receiving stolen property, by paying it (or so much of it as may be required) to an *innocent* person who bought stolen property not knowing its character, and who has had to restore it to its owner, and so would otherwise lose his purchase money.

Chapter XLIV. collects together the orders about the transfer of cases from one Court to another, under certain circumstances.

Effect of Irregularity in Procedure.

Of the remaining chapters, that relating to the *effect of irregularity* (Chapter XLV.) is worthy of notice. Sec. 529 provides that certain acts of Magistrates, if done in good faith, are not to be set aside merely because the Magistrate was not technically empowered. But if he does the things enumerated in sec. 530 without authority, his acts are void.

Sec. 531 next provides that no finding, order, or sentence of any Criminal Court can be set aside merely because the proceeding was held in the *wrong local area*, unless the error occasioned a failure of justice.

And with reference to *confessions of accused* or other *statements* which require certain forms of record under sec. 364 or 164; the confession, &c., is not rendered invalid for want of form (the provisions of the section not being fully complied with) but evidence must be taken that the statement was duly made: and the statement will then be admissible, unless indeed the error has "injured the accused as to his defence on the merits" (sec. 533).

After some other details (which I pass over) as to errors by omission to frame a formal charge, as to trying by jury instead of with assessors, or *vice versâ;* sec. 537 gives the important provision, that no sentence, order, or finding can be altered or reversed, either on *appeal* or *revision*—

(1) On account of error or irregularity in the various acts and stages of the trial or enquiry;
(2) Any want of formal sanction under sec. 195;
(3) Any defect of revision of list of jurors or assessors;
(4) Misdirection to a jury;

unless a failure of justice has been occasioned thereby.

Miscellaneous Provisions.

Of the further provisions (Chapter XLVI. Miscellaneous) I shall only call attention to sec. 545, which allows of the *fine* being awarded, wholly or in part, in defraying costs of prosecution, or in compensation for the injury done; and if any civil suit for damages is subsequently filed, the Court will take into

account any sum which has been paid or recovered as compensation under this section.

Sec. 555 gives the usual rule that no magistrate, judge, &c., can try or commit any case (except with permission of the Appellate Court) in which he is personally interested.

The Local Government determines what is the "language of the Court" (sec. 556).

Lastly, ten sections have been added by Act IV. of 1891 (sec. 2) which are out of place; one (sec. 561) does not concern us, but sec. 560 replaces sec. 250, which is repealed and belongs to the chapter on Summons cases, and also to those on warrant cases. If on a Magistrate's trial, the accused is discharged or acquitted (of any offence) and the Magistrate is satisfied that the accusation against him was frivolous or vexatious, he may order the person on whose complaint or information the accusation was made, to pay compensation up to fifty rupees, or to suffer simple imprisonment not exceeding thirty days. The compensation is recoverable as a fine. There are certain "provisos" as to appeal and otherwise, which need not be here referred to.

END OF PART II.