PART I.

PENAL LAW.

CHAPTER I.

ORIGIN AND HISTORY OF THE LAW.

THE origin of this provision and the history of its introduction into the Indian Statute Book is both interesting and important. In 1837 it existed *in gremio*, as one of the clauses of Macaulay's draft Penal Code. That Bill, strange to say, was shelved for more than twenty years, and when at last it saw the light in 1860, the sedition clause for some unaccountable reason had been omitted. It was not in fact till 1870, ten years later, that the want of such a provision in a complete Code of Crimes came to be recognised, with the result that a Special Act (XXVII of 1870) was passed by way of amendment to the Penal Code, introducing Macaulay's original clause practically unaltered, thirty-three years after its conception.

Sir James Fitzjames Stephen, when introducing this Bill to amend the Penal Code, on the 2nd of August 1870, observed that the provision in question "was one which, by some unaccountable mistake, had been omitted from the Penal Code as ultimately passed. It stood as section 113 in the draft Code published in 1837, and Sir Barnes Peacock was quite unable to account for its omission when the Code was enacted. It punished 'attempts to excite feelings of disaffection to the Government,' but it distinguished between disaffection and disapprobation, and explained that 'such a disapprobation of the measures of the Government as was compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, was not disaffection,' so that 'the making of comments on the measures

of the Government with the intention of exciting only this species of disapprobation' was not an offence within this section."

On a subsequent occasion (25th November 1870), when presenting the report of the Select Committee, the Hon'ble Member once more reverted to the subject. In repudiating a suggestion that the Bill had been hastily drawn, he referred to a letter written by Sir Barnes Peacock to Mr. Maine his predecessor, on the subject of the omission of Macaulay's clause from the Code. In that letter Sir Barnes Peacock had said—"I have looked to my notes and I think the omission of a section in lieu of section 113 of the original Penal Code must have occurred through mistake, though I have no distinct recollection of it. After the original Code had been carefully revised, the original Code and the revised Code were printed in double columns. I send herewith a copy of the section proposed in the revised Code to be substituted for section 113." And he concluded his letter with the remark: "I am sorry that I cannot throw any further light upon the matter, as I have no note as to the adoption or rejection of that clause. I feel, however, that it was an oversight on the part of the Committee not to substitute some section for section 113." Commenting on these facts Sir James Stephen thought that the letter was "as strong evidence as it was possible to obtain for the assertion made by him that there *was* a section to the present effect, which ought to have been submitted to the Council and to have been passed, and that it was omitted through a mistake or oversight which it was difficult now to account for. He had referred to the debates which took place in the Council, but there was no reference in those debates to any such provision. The result seemed to him to be clear, that when a Bill was finally passed through the Committee, a section equivalent to the present section was omitted by some mistake."

"In an event of this kind," he asked, "what was the duty of the Government? It was to repair the omission, whoever might have been to blame for it." He then proceeded to explain that the Select Committee had anxiously considered the section drawn by Sir Barnes Peacock, when he was Law Member, which had been appended to his letter as the provision "proposed to be substituted for one which appeared in the original draft of the

Code." "The Committee," he added, "with all respect to Sir Barnes Peacock, came to the conclusion that it was not an improvement on the original draft. For one thing, it was *very much more severe*." He then quoted the rejected section to demonstrate the fact. It is unnecessary to cite the provision here, but it will be sufficient to note the somewhat remarkable circumstance that the highly judicial mind of the most eminent of Indian judges should have conceived a more drastic provision than the illustrious biographer of Warren Hastings and Clive.

Referring to the adopted clause Sir James Stephen added that "although he was not prepared to say that it was the best that could have been adopted, the Committee unanimously came to the conclusion that the best course was to leave it as the Commissioners had settled it."

"The clause," he continued, "was somewhat lengthy, but its substance was sound good sense. It provided that any body who attempted to excite disaffection might be punished, but it insisted on the distinction between disaffection and disapprobation. It expressly provided that people might express or excite disapprobation of any measure of the Government that was compatible with a disposition to render obedience to the lawful authority of the Government; in other words, you might say what you liked about any Government measure or public man; you might publish or speak whatever you pleased, so long as what you said or wrote was consistent with a disposition to render obedience to the lawful authority of Government."

He next proceeded to assert that "this law was substantially the same as the law of England at the present day, though it was much compressed, much more distinctly expressed, and freed from a great amount of obscurity and vagueness with which the law of England was hampered."

He then went on to state how the law of England stood on this subject. "It consisted of three parts. There was first the Statute, commonly called the Treason-Felony Act (11 Vic., c. 12); secondly, the Common Law with regard to seditious libels; and thirdly, the law as to seditious words. He might observe in regard to this law that section 2 of the Penal Code enacted that

every person shall be liable 'to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof.' Hence the criminal law which prevailed before the passing of the Penal Code was still in force as to such offences as the Code did not punish. The result might very possibly surprise some gentlemen, especially those who were connected with the Press in the presidency towns, and he would draw attention to it. In the presidency towns the Criminal law of England was still in force, except in so far as it was superseded by the Penal Code. Any person who within the Mahratta ditch or in Bombay or Madras wrote anything which at Common Law would be a seditious libel would be liable to the penalties which the law of England inflicted, which were fine and imprisonment at least, to say nothing of whipping and the pillory. No doubt the penalties last mentioned would not now be enforced, but the law still existed, and he wished to point out that, so far from enacting a severe law they were, in truth, doing away to a considerable extent with severe laws. As for the Mofussil, it appeared that the Muhammadan Criminal law prevailed so far as it was not superseded by the Penal Code. He had tried to ascertain what the Muhammadan law was. He had found nothing on the subject of seditious libel, but had found much on the subject of rebellion, which however was so vaguely expressed that it might possibly justify the infliction of very strange penalties for sedition and libel." Such were the dangers that beset the path of the unwary journalist, prior to 1870.

The further observations of Sir James Stephen on the law of England as then adapted to the exigencies of India are also of much weight. Section 3 of the Treason-Felony Act (1848) was as follows :—"And be it enacted that if any person whatsoever after the passing of this Act shall, within the United Kingdom or without compass, imagine, invent, devise or intend to deprive or depose our most Gracious Lady the Queen, Her heirs or successors, from the style, honour, or royal name of the Imperial Crown of the United Kingdom, or of any other of Her Majesty's dominions and countries, or to levy war against Her Majesty, her heirs or successors, within any part of the United Kingdom, in order by force or constraint to compel her or them to change her or their measures or counsels, or in order to put

any force or constraint upon or in order to intimidate or overawe both houses or either house of Parliament, or to move or stir any foreigner or stranger with force to invade the United Kingdom, or any other Her Majesty's dominions or countries under obeisance of Her Majesty, her heirs or successors, and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed, every person so offending shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than seven years, or to be imprisoned for any term not exceeding two years, with or without hard labour, as the Court shall direct."

That in plain English meant that "any one who conceived in his heart any one of all these intentions, and who showed that intention either by any act or any writing was liable to transportation for life." This clearly showed that of the two "the law of England was more severe." "The proposed section says, if you excite feelings of disaffection, either by speaking or writing, you shall be liable to punishment; and the law of England says, in substance, that if you yourself feel disloyal towards the Queen and show that feeling by any writing, you shall be liable to punishment. The proposed section did not relate to a man's feelings or wishes, but simply to his writings or words, and the feelings which they were intended to produce in others. But the great peculiarity of the English law of treason was to regard every thought of the heart as a crime which was to be punished as soon as it was manifested by any overt act. That was the English law as it stood according to the Treason-Felony Act."

After such a lucid exposition of the Statute law of England and its analogy to the proposed measure, it is to be regretted that the learned jurist did not proceed to expound the principles of seditious libel in the Common Law, and trace their analogy in the same manner. But he merely added that "in the book which was commonly quoted on all subjects connected with English Criminal law (Russell on Crimes), there was a very long history about seditious libel compiled from various authorities. The law was very vaguely expressed, and he hoped that

some one might soon reduce to a few short sentences the great mass of dicta on the subject."

Whether the vagueness of expression complained of was reflected in the proposed measure, or the great mass of judicial dicta which adorn the English State trials created unforeseen difficulties it is impossible to say. But the fact remains that shortly after the new law began to operate and was brought to the test of concrete cases, though that was not till more than twenty years later, it was found necessary to amend it.

The Hon'ble Member next addressed himself to the various objections that had been raised in derogation of the Bill, and his observations on its probable effect on the freedom of the Press are terse and forcible. "There was one last objection to which he would refer in a more general way. It was the general phrase that this was an interference with the liberty of the Press. Short phrases of this kind involved a surprising quantity of nonsense. He thought that that unfortunate phrase in particular had been made the subject of more fallacies than almost any other sentence. Liberty and law simply excluded each other: liberty extended to the point at which law stopped: liberty was what you might do, and law was what you might not do. To advocate the liberty of the Press absolutely would be nothing else than to advocate the doctrine that everybody should be allowed to write what he liked. That was obviously absurd. Everybody admitted that personal slander ought not to be permitted. Hence the phrase 'liberty of the Press' was mere rhetoric. It contained no definite meaning whatever. The question was not whether the Press ought or ought not to be free, but whether it ought to be free to excite rebellion. He did not believe that any sane man would say in so many words that all people ought to commit any crime whatever, so long as they did not commit overt acts themselves; but no degree of liberty short of this would justify a journalist or any one else in exciting people to commit rebellion."

"Journalism," he continued, "when properly conducted, was as honourable a pursuit as any other. He could not imagine a worse policy than to permit journalists to do what they would not permit other people to do. If we wished the Indian Press to be what it ought to be; if we wished it to be con-

ducted honestly, and to criticise the proceedings of Government fairly; we could not do worse than treat it like a spoiled child. It would be monstrous to say to any newspapers, native or English, 'we permit you to slander private persons and to excite the public at large to rebellion and massacre, because we want to nurse you up into something great.' That was not the way to bring the Press or any other profession to good. We should protect them so long as they did not commit crime, and punish them if they did. It had been said that a few prosecutions would crush the native Press, and that they were not strong enough to bear the possibility of being misunderstood and punished for expressing intentions which they had never entertained. Such apprehensions appeared to him contemptible. Men must be content to take the risks incidental to their profession. A journalist must run the risk of being misunderstood, and should take care to make his meaning plain. If his intentions were really loyal there could be no difficulty in doing so. If not, he could not complain of being punished."

He then went on to consider whether such a danger really existed. "One paper had said, 'If this law passes, we shall never know what we might say and what we might not.' If they wanted to see what they might say, all they had to do was to read the English newspapers, which were published under the same law, and *they* did not write very much as if they were under tyrannical rules. Their liberty included the following items at least. They might refute any thing which had been put forward and abuse anybody for bringing it forward; and if they wanted to see more particularly what sort of things they were perfectly at liberty to say, they had only to refer to the files of the English newspapers printed during the last eight months, and read the articles on the Income-tax. Nobody ever said or thought that the authors of those articles were exciting disaffection. So long as the English papers in this country published what they did publish, about every man, every measure, every principle which they thought it right to discuss, the native papers need not be under the smallest apprehension that they would fall under the pale of the law. He would appeal to anybody who knew what English public life was, whether any Government which existed in this country was ever likely to bring

a newspaper published in this town into Court on a charge of exciting sedition for mere discussion, however violent, personal or unfair."

The concluding remarks of the Hon'ble Member on this point are equally forcible. To his mind the position was perfectly clear. There was not the slightest danger of any one who honestly meant to be loyal, infringing the law unwittingly. "So much with regard to what people might say. He would now state what they might not say. They might not say anything of which the obvious intention was to produce rebellion. It might be difficult to frame a definition which would, by mere force of words, exactly include the liberty of saying all that you meant to allow to be said, and exclude the liberty of saying all that you did not mean to allow to be said. But although there was considerable difficulty in framing a definition of the kind, there was none whatever in drawing the line for yourself. Every man who was going to speak, every man who was going to write, ought to know perfectly well whether he intended to produce disaffection. If he did, he had himself to thank for the consequences of his acts: if he did not, he was quite sure of this, that no words which that man could write would convey to other people an intention that he did not intend to express. He did not believe that any man who sincerely wished not to excite disaffection ever wrote anything which any other honest man believed to be intended to excite disaffection."

"You could no more mistake the severity of criticism, or the severity of discussion, for the writing of a person whose object was to produce rebellion or excite disaffection against the Government than you could mistake the familiarity of friendship for the familiarity of insult. Try to define what it was that made a difference between that neglect of ceremony which you expect from a friend, and that neglect of ceremony which was intended for insult, and you would be unable to express it in words. But no one could mistake the two things, and it was the same with exciting political disaffection."

The Bill then passed into law as Act XXVII of 1870, an Act to amend the Indian Penal Code. The provision relating to sedition is contained in section 5, and is as follows:—

"Whoever by words, either spoken or intended to be read, or by signs, or by visible representation or otherwise, excites or attempts to excite feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine.

Explanation.—Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore the making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation, is not an offence within this clause."

Section 13 of the Act made Chapter IV (General Exceptions), and Chapter V (Abetment) of the Penal Code applicable to the offence. It also applied Chapter XXIII (Attempts *to Commit* Offences), but with what object it is difficult to see, for the section itself provides for attempts.

Section 14 provided that no charge of such an offence should be entertained by any Court unless the prosecution be instituted by order of, or under authority from, the Local Government.

The law of sedition thus inaugurated on the 25th November 1870, continued in force unmodified till the 18th February 1898, a period of twenty-seven years. It will be necessary to consider how it operated during this long period, but before doing so, it seems desirable to interpose a short summary of the law of sedition in the Common Law, a subject which was left untouched by Sir James Stephen in his speech in Council.