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nate Judge that in face of that evidence and in consideration of the manner in which the so-called payment was made, that it was not an actual payment as required by the Circular Order.

The petition before me will stand dismissed with costs.

Application rejected.

APPELLATE CRIMINAL.

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February 24.

Before Mr. Justice Knox and Mr. Justice Blair.

IN THE MATTER OF THE PETITION OF R. MACCREA.

Letters Patent s. 32—*Act XLV of* 1860, *ss.* 415, 511—*Attempt—Acts necessary to constitute an attempt.*

Section 511 of the Indian Penal Code was not meant to cover only the penultimate act towards completion of an offence and not acts precedent, if those acts are done in the course of the attempt to commit the offence, are done with the intent to commit it and done towards its commission.

Whether any given act or series of acts amounts to an attempt of which the law will take notice or merely to preparation is a question of fact in each case.

The facts of this case sufficiently appear from the judgment of the Court.

Mr. *A. H. S. Reid,* for the applicant.

KNOX, J.—This is an application under s. 32 of the Letters Patent of 1866, praying that the case of one Robert MacCrea, who was convicted and sentenced at a Criminal Sessions of this Court held in the month of June 1892, might be declared a fit case for appeal to Her Majesty in Council on the grounds—

1st.—That the evidence that the said Robert MacCrea acted with guilty knowledge and intention, was most unsatisfactory and totally inadequate to justify the conviction.

2nd.—That one of the witnesses for the prosecution had stated that, so far as he was aware, no application had been made by the said MacCrea for payment of interest or renewal of any Government promisory note, and that the acts of the said MacCrea had simply amounted to an asking for information and to the despatch of a money order with a view to obtain that information.

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3rd.—That these acts of the said MacCrea, even if they had been accompanied with guilty knowledge, do not amount to more than a preparation for an attempt to cheat, and that such an attempt is not an offence under the Indian Penal Code.

4th.—That no other acts attributed to the appellant could be held to constitute the offence of attempting to cheat under the Indian Penal Code.

5th.—That with the substantive charge the charge of abetment must fail.

6th.—That, even if the conviction on the charge of abetment be good, the sentence passed was illegal.

The charges upon which the petitioner was convicted were three in number. They consisted of:—

(1) An attempt to cheat, and thereby fraudulently to induce the delivery of a valuable security.

(2) Conspiracy with one Asad Ali, and thereby abetment of the offence of cheating and thereby inducing the delivery of a valuable security.

(3) Abetment of an attempt to cheat, committed by the aforesaid Asad Ali.

Upon conviction of the three offences thus charged, MacCrea was sentenced to rigorous imprisonment for two years.

No argument was addressed to us upon the fifth and sixth grounds taken in this petition. The first ground is directed to matters of fact which were distinctly within and were left to the decision of the jury. There was evidence upon which such a finding could be based. That evidence was found by a majority of the jurors to be satisfactory and sufficient for a conviction.

The only question really pressed upon our consideration was whether the jury had been rightly directed when told that if they were satisfied that the acts covered by the evidence and said to have been committed by the said MacCrea were so committed, those acts

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performed with guilty intent did amount to an attempt at cheating under the Indian Penal Code.

It is important first to set out that portion of the charge which related to the first charge on the charge-sheet, *viz.* the attempt to commit an offence under s. 420 of the Indian Penal Code. A careful note of this portion of the charge was made before it was delivered to the jury, and the jury were directly charged from the note thus recorded. The instruction to them was that before they could find the prisoner MacCrea guilty of an attempt at cheating as charged, they must satisfy themselves that there was proof of an intention on his part to cheat and thereby induce the delivery to himself or to Asad Ali of a Government promissory note which he knew to be the property not of the late brother of Asad Ali but of one Muhammad Husain Ali Khan.

That, coupled with proof of such intention to cheat on his part, there was proof of an act or acts done by the said MacCrea towards such cheating.

That those acts if proved, were sufficiently important to be taken notice of by the law, and also that they were sufficiently near to the act of cheating intended and contemplated.

The various acts deposed to on the part of the witnesses for the Crown were then detailed, and the evidence bearing on them pointed out and commented on, and it was left to the jury to find and to pronounce whether the evidence proved that those acts had been committed by the prisoner, and whether they were evidence of an intention on his part to cheat and thereby induce delivery of a valuable security.

As to whether the acts, or any of them, were sufficiently great for the law to take note of, the jury were instructed that, if they were satisfied that MacCrea had, as alleged by the Crown, towards the offence of cheating, used the letters of administration granted by the Subordinate Judge of Lucknow, knowing them to be false in the material point that they set out Government promissory note No. 9764 to have been the property of Husain Ali Khan, chabuk

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sawar, this was an act sufficiently great for the law to take note of, and an act which it would take note of.

As regards proximity, the jury were instructed to consider whether any of the acts were sufficient to excite reasonable apprehension that the act attempted would be carried out and accomplished with the intent to cheat.

It is contended by Mr. *Reid* who appears for the petitioner, that no act committed by MacCrea amounted to more at the outside than a preparation for an attempt to commit the crime, and that no act was punishable under the Indian Penal Code as an attempt, unless it was an act which, if successful, would have resulted in the commission of the crime attempted.

In the argument which he addressed to us, the learned counsel drew our attention mainly and almost entirely to the various letters which were addressed by MacCrea to the Comptroller-General's office, and passed by without comment the various other acts committed by MacCrea in the interval between the 17th day of June and the 18th day of October 1891. His contention was two-fold; first, that none of the communications addressed to the Comptroller-General, did, as a matter of fact, deceive that officer, or any of the officers through whose hands they passed, and, second, that beyond those acts there would necessarily have followed several other acts, some of them to be done by himself or by Asad Ali, extending over a period of time which might have amounted to two years, before the Comptroller-General would have paid over either the principal or the interest due upon the Government note No. 9764.

But the notes of my charges to the jury show that their attention was directed to various other acts which the Crown sought to establish, and notably to the acts committed by the prisoner in making use of the letters of administration granted to Asad Ali Khan and in the preparation of a so-called copy of the lost note and its production before the city magistrate in October 1891.

In support of his contention, the learned counsel referred us to the case of *The Queen* v. *Ramsarun Chowbey* (1). That was a case

(1) N.-W. P., H. C., Rep. 1872, p. 46.

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in which upon the findings that a prisoner intending to procure a forged document had directed a servant to purchase blank stamped paper on which the document might be executed, and to describe himself to the stamp vendor as the person who, the prisoner wished it to be deemed, was the executant of that document, and that the stamp vendor had endorsed upon the bond an endorsement stating that he had sold the stamp paper to the person personated by the servant, the said prisoner was convicted of an attempt to forge a valuable security. Sir Charles Turner in that case held that the provisions of s. 511 of the Code would not extend to make punishable, as attempts, acts done in the mere stage of preparation, "although," he continued, "such acts are doubtless done towards the commission of the offence, they are not done *in the attempt* to commit the offence, in the construction which I think should be put on the term 'attempt' as used in this section. I regard that term, as here employed, as indicating the actual taking of those steps which lead immediately to the commission of the offence, although nothing be done or omitted which of itself is a necessary constituent of the offence committed."

In considering this case, it is to be noted, first, that the learned Judge who arrived at this decision confesses that he arrived at that conclusion not without some doubt, and that he considered the endorsement no part of the document intended to be forged, and that the act of the prisoner in procuring the endorsement would not immediately lead to the forgery. He further observed that the prisoner had had a most narrow escape. The grounds upon which he acquitted the prisoner were, because he considered that no act proved against him went beyond the stage of preparation.

We were next referred to the case of *The Empress* v. *Riasat Ali* (1). In that case the learned Chief Justice appears to have acted upon English precedents, and those precedents, precedents of no modern date. So far as I am concerned, I feel myself unable to follow the English law, because there appears to me a wide difference between the meaning of the word 'attempt' as understood by

(1) I. L. R., 7 Calc., 352.

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English lawyers in the phrase "attempt to commit a felony," and the word "attempt" as actually defined in the Indian Penal Code.

If there be such a difference, I have no hesitation in affirming that we are bound to follow the Code. In *Reg.* v. *Cheeseman*, one of the cases followed by Sir R. Garth, it is laid down that if the actual transaction had commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime. In *McPherson's* case, the second case followed, it is said that "the word 'attempt' clearly conveys with it the idea that if the attempt had succeeded, the offence charged would have been committed. An attempt must be to do that which, if successful, would amount to the felony charged." Now it is impossible to read these definitions of attempt and to fail to see that the language used differs very greatly from the language used in s. 511 of the Indian Penal Code. Sir Charles Turner in the case just cited (*The Queen* v. *Ramsarun Chowbey*) (1) points out that in his opinion the language and the illustrations used in s. 511 were designed to extend to a much wider range of cases than would be deemed punishable as offences under the English law. With all respect therefore to the learned Judges who decided the case of *The Empress* v. *Riasat Ali*, I have no doubt myself that the interpretation laid down by them is not a sound and exhaustive interpretation of the word "attempt" as used in s. 511.

The case of *The Queen Empress* v. *Dhundi* (2), which was next cited to us, is not a case in point. The Judge who referred that case and whose reasons were adopted by this Court, points out that the person upon whom the fraud had to be perpetrated had not been approached in any way by the prisoner Dhundi.

The words used in s. 511 by which whoever attempts to commit an offence punishable by the Code and in such attempt does any act towards the commission of the offence, is guilty of an attempt, appear to me to be quite wide enough to cover the acts committed by MacCrea. There was a stage in which he was undoubtedly only making preparations, and had not got beyond the stage of preparation. These were such acts as those when he first commenced

(1) N.-W. P., H. C., Rep. 1872, p. 46. (2) I. L. R., 8 All., 304.

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making inquiries from the Public Debt Office to find if the note No. 9764 was still outstanding; when he instituted inquiries at the Bahrampur Hospital as to the death of Husain Ali Khan and the disposal of his bedding. These were acts in the preparation stage. But a majority of the jury have found, and I agree with them, that MacCrea committed a long series of acts subsequent to that which showed a distinct intention to cheat; acts committed for the purpose and with the intent to bring all his preparations to bear upon the mind of the person to be deceived; that with those acts, beginning with the procuring of letters of adminstration setting out Asad Ali Khan as the lawful owner of Government promissory note No. 9764, the forwarding of those false letters of administration and draft notice for publication in the Gazette, had begun an attempt to cheat; that in that attempt he had committed more than one act of distinct crime and sufficiently near towards completion to arouse apprehension and alarm that the attempt, if not interrupted, would end in the commission of the offence. I do not hold, and have no hesitation in saying, that s. 511 was never meant to cover only the penultimate act towards completion of an offence and not acts precedent, if those acts are done in the course of the attempt to commit the offence, are done with the intent to commit it and done towards its commission.

It is no doubt most difficult to frame a satisfactory and exhaustive definition which shall lay down for all cases where preparation to commit an offence ends and where attempt to commit that offence begins. The question is not one of mere proximity in time or place. Many offences can easily be conceived where, with all necessary preparations made, a long interval will still elapse between the hour when the attempt to commit the offence commences and the hour when it is completed. The offence of cheating and inducing delivery is an offence in point. The time that may elapse between the moment when the preparations made for committing the fraud are brought to bear upon the mind of the person to be deceived and the moment when he yields to the deception practised upon him may be a very considerable interval of time. There may

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be the interposition of inquiries and other acts upon his part. The acts whereby those preparations may be brought to bear upon the mind may be several in point of number, and yet the first act after preparation completed will, if criminal in itself, be, beyond all doubt, equally an attempt with the ninety and ninth act in the series.

Again, the attempt once begun and a criminal act done in pursuance of it towards the commission of the act attempted, does not cease to be a criminal attempt, in my opinion, because the person committing the offence does or may repent before the attempt is completed. The attempt to defraud a widow of valuable security commenced by an act of criminal intimidation committed in such attempt and towards the fraud does not cease to be an attempt because the perpetrator repents and abstains from completing the attempt.

The question whether the act is an act of preparation or an act in the attempt and towards commission is a fact to be determined upon the evidence. It is in most cases a question for the jury to distinguish between an act before attempt has begun, an act after attempt begun, and towards commission of the offence attempted, and an act independent of the attempt altogether. It cannot be said that there was not evidence in this case upon which the jury could find under which of these heads the acts committed by MacCrea properly fell.

I gave the case most careful consideration before I charged the jury. I have listened with minute care and attention to the very able and lengthened argument of the learned counsel who appeared for MacCrea and have given that argument most careful consideration; but I do not find in it all one word which makes me hesitate or doubt that the conviction was a proper and sound one. I do not think the case a fit case for appeal and reject the application.

BLAIR, J.—I wish to add a few words upon the sections of the Indian Penal Code applicable to this case.

The offence, an attempt to commit which was the subject of the charge before us, is created by s. 415 of the Indian Penal Code. The words run as follows :—

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"Whoever by deceiving any person fraudulently or dishonestly induces the person so deceived to deliver any property or to do certain other acts." Converting that section into a section dealing with attempts it would read :—"Whoever by deceiving or attempting to deceive any person fraudulently or dishonestly attempts to induce, &c."

That which is done in furtherance of the dishonest attempt, is to attempt to deceive, the act being one which must have a tendency to induce the person so deceived to do that which is dishonestly desired by the deceiver.

The definition of "attempt" is conveyed in s. 511, Indian Penal Code. The words are "whoever attempts to commit an offence punishable by this Code"—"or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, &c."

It seems to me that that section uses the word "attempt" in a very large sense; it seems to imply that such an attempt may be made up of a series of acts, and that any one of those acts done towards the commission of the offence, that is, conducive to its commission, is itself punishable, and, though the act does not use the words, it can mean nothing but punishable as an attempt. It does not say that the last act which would form the final part of an attempt in the larger sense is the only act punishable under the section. It says expressly that whosoever in such attempt, obviously using the word in the larger sense, does any act, &c., shall be punishable. The term "any act" excludes the notion that the *final* act short of actual commission is alone punishable, and the notion that any of the other acts would be without the range of this section is probably derived from the rulings in the English cases cited by Mr. *Reid*. An illustration is fortunately appended to the section by which we are enabled to test the soundness of that interpretation. Illustration (*a*).

"*A* makes an attempt to steal jewellery by breaking open a box and finds after opening the box that there is no jewellery in it.

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He has done an act towards the commission of theft and is therefore guilty under this section."

That is an illustration applicable to theft, and yet, upon the very face of the statement it would not be an attempt having regard to the definition of theft in the Indian Penal Code, within the meaning of the contention of Mr. *Reid*. The essence of theft is *asportatio*, *i.e.*, removal. The opening of a box which might or might not contain valuables is not an attempt to remove its contents; it would require some act further than that to constitute an attempt within the meaning of the English cases cited by *Mr. Reid*.

Now in the present case the acts done were acts bearing, and intended to bear, upon the mind of another person. The acts having been done, that mind was left to operate. If therefore that which was done amounted to the commission of an act towards deceiving, in a case where such deception would operate as an inducement to the person deceived to deliver any chattels or to do or omit any of the things mentioned in s. 415, then I think, within the meaning of s. 511 read together with illustration (*a*), an attempt to deceive and thereby induce within the meaning of that section has been proved in this case.

It may be that further acts having a tendency to deceive might have been required to complete the influence intended upon the mind of the deceived. It may have been that preliminary inquiries and steps of other kinds must have intervened between the act of deception and its entire success; but that would not, in my opinion, render an act tending directly towards deception the less an attempt within the meaning of s. 511, even though a further act of deception did not follow, which might probably have been required to complete the offence of attempt within the meaning of the English law.

The difficulty with s. 511 might easily have been removed by saying that where in such an attempt, using the word in the larger sense, any person does any act towards the commission of an offence he shall be held to have committed an "attempt" within the

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meaning of this section. That I take to be the real meaning and drift of the section, differentiating in a marked manner the definition of "attempt" in the Indian Penal Code and the accepted English doctrine.

I agree that this is not a fit case to be sent to the Privy Council.

Application rejected.

1893
March 6.

Before Mr. Justice Aikman.

BANNA MAL (APPLICANT) *v.* JAMNA DAS AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code, ss. 244, 336, 622—*Insolvency—Surety for filing petition—Revision.*

One B. M. became surety under s. 336 of the Code of Civil Procedure on behalf of one G. R., a judgment-debtor, to the effect that G. R. would appear before the Court when called on, and would within one month file an application to be declared an insolvent. G. R. did so apply, but on the surety's asking the Court to declare him discharged of his liability the Court refused to do so. *Held*, (1) that the surety's liability was discharged by the judgment-debtor applying to be made an insolvent, and (2) that the order refusing to discharge him was not appealable was therefore open to revision under s. 622 of the Code. *Koylash Chandra Shaha* v. *Christophoridi* (1) referred to.

THE facts of this case sufficiently appear from the judgment of Aikman, J.

Babu *Rajendro Nath Mukerji*, for the applicant.

Munshi *Ram Prasad*, for the opposite party.

AIKMAN, J.—This is an application under s. 622 of the Code of Civil Procedure, asking for revision of an order of the Munsif of Cawnpur, dated the 4th of June 1892. The following are the circumstances of the case. One Ganga Ram, judgment-debtor, was arrested in the execution of a decree for money. When brought before the Court under the provisions of s. 336 of the Code of Civil

* Application No. 53 of 1892 to revise an order of Lala Banke Behari Lal, Munsif of Cawnpur, under s. 622, Civil Procedure Code, dated the 4th June 1893.

(1) I. L. R., 15 Calc. 171.