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The Court does not consider that the circumstances stated in the proceedings constituted an offence within the meaning of Sec. 9 of the Village Police Act. We, therefore, reverse the conviction and sentence, and order the fine, if paid, to be restored.

Conviction and sentence reversed.

July 22, 30.

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Jurisdiction—High Seas—Offence committed on the High Seas—Substantive Law applicable—Procedure—Penal Code—Abetment—Accessories—9 Geo. IV., c. 74, s. 7—30 & 31 Vict., c. 124, s. 11—Merchant Skipping Acts.

The substantive law applicable to a British-born subject tried in the High Court of Judicature at Bombay for destroying a British ship on the high seas, at a distance of more than three miles from the shores of British India, is the English law, and not the Penal Code, notwithstanding the provisions of Stat. 30 & 31 Vict., c. 124, s. 11.

The same substantive law is applicable to prisoners who conspire together in Bombay to destroy such ship on the high seas, and such ship is so destroyed in consequence.

The procedure applicable in such cases is the ordinary criminal procedure of the High Court.

The question whether the Indian Legislature has power to legislate with reference to offences committed on the high seas considered.

There is not any Act of the Indian Legislature now in force which provides for the offence of destroying a ship, when committed at a greater distance than three miles from the coast, or for the abetment in British India of such an offence so committed.

THE prisoners, Richard William Marks, Christopher Thomas Elmstone, Alfred Whitwell, and George Harriott, were at the Third Criminal Sessions of 1870, before BAYLEY, J., and a Special Jury, charged as follows:—

I. That he, the said Marks, British subject and seaman, on the 12th of June 1870, on board a British ship, the "Aurora," on the high seas and within the Admiralty jurisdiction of the High Court of Judicature at Bombay, feloniously, &c. did set fire to the said ship, against the form of the statutes, &c.

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II. Same as the last, with the addition of an allegation of an intention to defraud the Canton Insurance Office.

III. That he, the said Marks, &c., on board the said British ship "Aurora," being a decked vessel of a burden of upwards of 20 tons, within the jurisdiction of the High Court of Judicature at Bombay, did commit mischief by fire to the said vessel, intending to destroy the said vessel, against the form of the statutes, and of the Acts of the Government of India, in such case, &c.

IV. That he, the said Marks, &c., on board a certain British ship called the "Aurora," on a certain voyage upon the high seas, then being upon the high seas and within the Admiralty jurisdiction of the said High Court, feloniously, &c. did set fire to and destroy the said ship, against the form of the statutes, &c., *and that* the said Elmstone, Whitwell, and Harriott, before the said felony was committed in form aforesaid at Bombay, and within the jurisdiction of the said High Court, did feloniously and maliciously incite, move, aid, counsel, hire, and command the said Marks the said felony, in manner and form aforesaid, to do and commit, against the form of the statutes, &c.

V. Same as the last, omitting the words "set fire to and."

VI. That they, the said Elmstone, Whitwell, and Harriott, on the day and year aforesaid, did abet the committing of mischief by fire to a certain British ship, being a decked vessel of a burden of upwards of 20 tons, called the 'Aurora," intending to destroy the said vessel, by engaging in a conspiracy with the said Marks for the committing mischief by fire to the said vessel, with intent to destroy the said vessel, and that mischief by fire was committed to the said vessel in pursuance of such conspiracy, and within the jurisdiction of the High Court of Judicature at Bombay, against the form of the statutes, and of the Acts of the Legislative Council of India, &c.

VII. The same as the last, with the exception that the abetment was alleged to be "by instigating Marks to commit mischief by fire to the said vessel."

VIII. Same as the sixth, omitting the words "by fire."

IX. Same as the seventh, omitting the words "by fire."

Marks pleaded Guilty generally.

Elmstone, Whitwell, and Harriott pleaded Not Guilty, but were convicted on the fifth, eighth, and ninth heads of charge, and acquitted on the others.

The facts were briefly as follow:—

When, in May 1870, the "Aurora," a British ship of 1,155 tons burden, was being laden in the harbour of Bombay with cotton and other cargo for a voyage to Liverpool, the prisoners Elmstone and Whitwell, who were the brokers of the "Aurora," and Harriott, her master, determined between themselves that "the ship should not reach Liverpool." In order to effect their design, they bribed Marks, the carpenter of the ship, to destroy her. No arrangement was come to as to the manner in which the "Aurora" was to be destroyed, but Marks undertook that she should not reach Liverpool. The object of Elmstone and Whitwell seemed to have been to defraud the underwriters upon certain cargo supposed to have been shipped by Elmstone and Whitwell. Harriott was to receive a share of the plunder.

The "Aurora" sailed from Bombay on the 11th of June 1870 with Harriott and Marks on board, Elmstone and Whitwell remaining in Bombay. On the morning of the 12th of June, when the ship was about fifty miles off the harbour, Marks set her on fire, and, no effort having been made to extinguish the fire, she was burnt to the water's edge, and sank. The master and crew saved themselves in the boat and returned to Bombay, where the four accused persons were arrested, and, by the Chief Magistrate, committed for trial.

The learned Judge (under cl. 25 of the Amended Letters Patent of the High Court) reserved for the opinion of the Full Court the question "whether the prisoners Elmstone, Whitwell, and Harriott could in point of law be convicted on all or any of the charges upon which they had respectively been found guilty, the 'Aurora' having been destroyed by the prisoner Marks (a British subject) by fire on the high

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seas at a distance of fifty miles or thereabouts from the harbour of Bombay." Sentence was deferred until after the decision upon the point reserved.

The point reserved came on for argument, before WESTROPP, C. J., BAYLEY and GREEN, JJ., on the 22nd of July 1870.

The Honorable A. R. Scoble (Acting Advocate General) (with him *Farran*), in support of the conviction, contended that the prisoners Elmstone, Whitwell, and Harriott were properly convicted, as well upon the charges framed under the Penal Code as upon those framed under the Imperial Statutes. 1*st*, as to the Penal Code. If that enactment and the Criminal Law Amendment Act (XVIII. of 1862) stood alone, the conviction could be supported. The act which Marks has committed is one that falls clearly within Sec. 437, and if it had been committed within the territories of British India would be punishable under that section. Though the act of Marks has been committed beyond such territories, and, therefore, may not be punishable under the Indian Acts standing alone, the abetment of it has taken place within those territories; and as the abetment of an illegal act is in itself a substantive offence, under Secs. 107, 108, and 109 of the Penal Code, it is, therefore, punishable under that Code. It will be said that an offence denotes "a thing made punishable by the Code" (Sec. 40), and as the act committed by Marks cannot be punished under the Code, the abetment of it is not an offence under that Code; but that is not so. Sec. 109 provides that whoever abets an offence shall, if the *act* abetted is committed in consequence of the abetment, be punished, &c. The prisoners have in Bombay abetted an offence under Sec. 437, and the *act* abetted has been committed in consequence of such abetment, though the offence, technically speaking, may not have been committed. The section (109) clearly makes a distinction between "offence" and "act." It is true that there is no general specific provision in the Code relating to the abetment of acts committed outside the jurisdiction which if committed within the jurisdiction would be offences under the Code; but

it is submitted that Sec. 109 really cures that defect, and Sec. 20 of the Criminal Law Amendment Act bears out this view. At all events the offence was commenced within the jurisdiction of this court, and that is sufficient to render the prisoners liable to its process: Act XVIII. of 1862, Sec. 30. Any doubt on this subject is removed by 30 & 31 Vict., c. 124, s. 11, which enacts that "if any British subject commits any crime or offence on board any British ship * * *, any Court of Justice in Her Majesty's dominions which would have had cognisance of such crime or offence if committed on board a British ship within the limits of the ordinary jurisdiction of such court shall have jurisdiction to hear *and determine* the case as if the said crime or offence had been committed as last aforesaid." That section gives the court power to determine the offence of Marks as if it had been committed within its local limits. The act of Marks is, therefore, an offence punishable under the Penal Code, and all difficulty as to the punishment of the abetment of it is thus got rid of.

II. The prisoners are also punishable under the English law, Stat. 24 & 25 Vict., c. 97, ss. 42, 43. The Stat. 12 & 13 Vict., c. 96 (extended to India by 23 & 24 Vict., c. 88) renders Marks amenable in this court to punishment according to English law: *The Queen* v. *Thompson* (*a*). The other prisoners are, therefore (if not under the Accessories Act, 24 & 25 Vict., c. 94, ss. 7 and 9), under 9 Geo. IV., c. 74, s. 7, which is still unrepealed, liable as accessories before the fact. The remedy afforded by the Penal Code is cumulative, as that Code and the English Statutes are not inconsistent with one another: *R.* v. *Carlile* (*b*); *Richards* v. *Dyke* (*c*); *Ex parte Warington* (*d*). The Merchant Shipping Act, 1854 (17 & 18 Vict., c. 104), Sec. 267, and the Merchant Shipping Amendment Act (18 & 19 Vict., c. 91), Sec. 21; the Charter of the late Supreme Court, cl. 54, and the Letters Patent of the High Court, cl. 32, were also referred to.

(*a*) I. Beng Law Rep., Or. Cr. Jur. 1. (*b*) 3 B. & Ald. 161.
(*c*) 3 Q. B. 256. (*d*) 3 De Gex M. & G. 159.

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McCulloch and *Starling* (with them *Latham*), for Elmstone and Whitwell, admitted that the prisoners were liable to punishment under the Penal Code, and contended that the English law had no application. If the Stat. 30 & 31 Vict., c. 124, had not passed, then Marks would have been punishable under the English law, Stat. 24 & 25 Vict., c. 97, ss. 42, 43, and Stat. 9 Geo. IV., c. 74, s. 7, would have rendered the Stat. 24 & 25 Vict., c. 97, s. 42, applicable to the other prisoners. That is the effect of *The Queen* v. *Thompson*; but since the passing of that statute (30 & 31 Vict., c. 124, s. 11) Marks must be tried and punished as if his offence had been committed in India. That this is so is clear from the words used in Sec. 11: "The Courts shall have jurisdiction to hear *and determine* the offence, as if it had been committed within their local limits." In Sec. 287 of the Merchant Shipping Act the words used were: "All offences committed afloat out of Her Majesty's dominions by any seaman * * * shall be liable to the same punishment, and shall be inquired of, heard, tried, determined, and adjudged in the same manner * * * as if such offences had been committed within the jurisdiction of the Admiralty of England." That statute made offences committed on the high seas by seamen triable and punishable according to English law. Then came 18 & 19 Vict., c. 91, sec. 21, which extended the scope of the former Act and introduced the local criminal procedure, but left the punishment to be inflicted the punishment which would have been inflicted if the offence had been tried in England, the words used being "that if any person being a British subject charged with having committed any crime or offence on the high seas is found within the jurisdiction of any Court of Justice in Her Majesty's dominions . . . . such court shall have jurisdiction to hear *and try* the case as if such crime or offence had been committed within such limits." The substitution in Stat. 30 & 31 Vict., c. 124, of the words "hear and determine" for the words "hear and try" in Stat. 18 & 19 Vict., c. 91, indicates the desire of the Legislature to substitute the substantive criminal law of the place in which

the offence is tried (as well as its procedure) for the substantive English law. If, then, the offence of Marks is, by the statute last cited, rendered punishable by the Penal Code, the other prisoners are also punishable under that Code for abetting the offence of Marks; and under that Code only; for Sec. 2 enacts that "every person shall be liable to punishment under this Code, and *not otherwise*, for every act or omission contrary to the provisions thereof of which he shall be guilty," &c. Even without that provision, the Penal Code, on being made applicable to this offence, would have repealed the former law, as it alters the punishment to be inflicted: *Michell* v. *Brown* (*e*), *Rex* v. *Cross* (*f*), *R.* v. *Davis* (*g*); and changes the class of the offence. The case of *Reg.* v *A'lú Párú* (*h*) was also referred to and commented upon at large on both sides, and the power of the Indian Legislature to legislate for crimes committed on the high seas was discussed.

The Honorable A. R. Scoble in reply.

Cur. adv. vult.

July 30th, 1870. WESTROPP, C.J.:—This case comes before the Full Court on a point of law reserved by my brother Bayley, under the 25th and 26th sections of the High Court Charter of 1865.

Upon the original charges on which the prisoners stood committed for trial by the Magistrate, they, with the consent of the Crown, have not been arraigned. They were arraigned upon the additional charges filed by the Clerk of the Crown, under the authority conferred upon him by Sec. 4 of Act XIII. of 1865.

One of those additional charges, founded upon the English statutes, described the prisoner Richard William Marks as a British subject and seaman, and alleged that he, "on the 12th day of June 1870, on board a British ship or vessel called the 'Aurora,' on a certain voyage upon the high seas, and within the Admiralty jurisdiction of the High Court of Judicature at Bombay, feloniously, unlawfully, and

(*e*) 1 Ellis & E. 267. (*f*) 1 Ld. Raymond 711.
(*g*) Say. 133; I. Leach 271.
(*h*) Perry Or. Ca. 551; 3 Moo. Ind. App. 488, S. C.; 5 Moo. P. C. C. 296.

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maliciously did *set fire* to and destroy the said ship 'Aurora,' against the form of the statutes in such case made and provided, and against the peace of our Lady the Queen, her Crown and Dignity." Another of those additional charges was "that he, the said Richard William Marks, afterwards—to wit, on the day and year aforesaid—on board the said ship 'Aurora,' on a certain voyage upon the high seas, then being upon the high seas, and within the Admiralty jurisdiction of the High Court of Judicature at Bombay, feloniously, unlawfully, and maliciously did *set fire* to the said ship, with intent thereby to prejudice 'The Canton Insurance Office,' which had before then underwritten a certain policy of insurance on certain goods then being on board the said ship, which said policy was then in full force and operation, against the form of the statutes in such case made and provided, and against the peace of our Lady the Queen, her Crown and Dignity."

To both of those charges Marks pleaded Guilty.

The prisoners Christopher Thomas Elmstone, Alfred Whitwell, and George Harriott were charged as accessories before the fact to the felonies comprised in those two charges, but, having respectively pleaded Not Guilty thereto, have been tried and acquitted of those charges.

The prisoners were further charged by the Clerk of the Crown as follows:—

"That the said Richard William Marks, British subject and seaman, on the day and year aforesaid, on board a certain British ship or vessel called the 'Aurora,' on a certain voyage upon the high seas, then being upon the high seas, and within the Admiralty jurisdiction of the High Court of Judicature at Bombay, feloniously, unlawfully, and maliciously did destroy the said ship 'Aurora,' against the form of the statutes in such case made and provided, and against the peace of our Lady the Queen, her Crown and Dignity; and that the said Christopher Thomas Elmstone, Alfred Whitwell, and George Harriott, before the said felony was committed in form aforesaid, at Bombay, and within the jurisdiction of the

said High Court of Judicature, did feloniously and maliciously incite, move, aid, counsel, hire, and command the said Richard William Marks the said felony in manner and form aforesaid to do and commit, against the form of the statutes in such case made and provided, and against the peace of our Lady the Queen, her Crown and Dignity." To this Marks, as alleged principal, pleaded Guilty, and Elmstone, Whitwell, and Harriott, as alleged accessories before the fact, pleaded Not Guilty, but have, as such accessories before the fact, been found guilty by the jury.

The prisoners Elmstone, Whitwell, and Harriott stood further charged on two counts by the Clerk of the Crown, under Acts of the Government of India (which, of course, include the Indian Penal Code), with having abetted the committing of mischief *by fire* to the same vessel, with intent to destroy her; and, on pleading Not Guilty thereto, have been acquitted. They, however, stood further charged, on the Indian Penal Code, by the Clerk of the Crown, as follows:—

"3. That they, the said Christopher Thomas Elmstone, Alfred Whitwell, and George Harriott, afterwards—to wit, on the day and year aforesaid—at Bombay aforesaid, did abet the committing of mischief to the said British ship called the 'Aurora,' being a decked vessel of a burden of upwards of twenty tons, intending to destroy the said vessel, by engaging in a conspiracy with the said Richard William Marks, a British subject, for the committing of mischief to the said vessel, with intent to destroy the said vessel, and that mischief was committed to the said vessel in pursuance of such conspiracy, within the jurisdiction of the High Court of Judicature at Bombay, against the form of the Statute, and of the Act of the Legislative Council of India, in such case made and provided, and against the peace of our Lady the Queen, her Crown and Dignity.

4. "That they, the said Christopher Thomas Elmstone, Alfred Whitwell, and George Harriott, afterwards—to wit, on the day and year aforesaid—did abet the committing of

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mischief to the said British ship called the 'Aurora,' intending to destroy the said vessel, by instigating the said Richard William Marks, a British subject, to commit mischief to the said vessel, with intent to destroy the said vessel, and that mischief was committed to the said vessel in consequence of such instigation, within the jurisdiction of the High Court of Judicature at Bombay, against the form of the Statute and of the Act of the Legislative Council of India in such case made and provided, and against the peace of our Lady the Queen, her Crown and Dignity."

To these two latter charges (in which it will be observed that neither fire nor any other means of destruction is specified) Elmstone, Whitwell, and Harriott pleaded Not Guilty, but were found guilty upon them by the jury.

The point as reserved was "whether the prisoners Elmstone, Whitwell, and Harriott could in point of law be convicted on all or any of the charges of which they have been respectively found guilty, the 'Aurora' having been destroyed by the prisoner Marks (a British subject) by fire on the high seas, at a distance of fifty miles or thereabouts from the harbour of Bombay." The form which that question assumed in argument was, whether the English or Indian law is the *substantive* law properly applicable to the cases of the four prisoners, or of any of them. All four prisoners have been present during the argument. Counsel on behalf of Elmstone and Whitwell only have argued the point. Harriott was not, during the argument, represented by counsel. Counsel on behalf of Marks, who pleaded Guilty, did not seek to have any point of law reserved as to him, and, therefore, has not addressed this court. His reason, no doubt, for not seeking to have any point reserved was that the maximum amount of penal servitude to which Marks would be subject under either law is the same (Indian Penal Code, Sec. 438, combined with Sec. 56; Stat. 24 & 25 Vict., c. 97, ss. 42, 43). It will, however, be necessary to ascertain on which of the charges to which he has pleaded guilty—those under the Indian, or those under the English, law—the sentence to be passed on him should be entered. It was admitted by the

Advocate General, on behalf of the Crown, and by Mr. McCulloch and Mr. Starling on behalf of Elmstone and Whitwell, that the law of procedure applied to the case was properly that prevailing in the High Courts of Calcutta, Bombay, and Madras in the exercise of their original criminal jurisdiction. We also are of the same opinion. It is supported by the decision, unanimous on that point, of Sir Barnes Peacock, C.J., and Phear and Macpherson, JJ., in *The Queen* v. *Thompson* (1 Bengal L. R., Cr. Ca. 1). But as to the substantive law—the law under which the punishment should be inflicted—counsel for Elmstone and Whitwell contend that, so far as regards them and Harriott, the substantive law properly applicable is Sec. 437 of the Indian Penal Code (Act XLV. of 1860) taken in combination with Secs. 56 and 109 of the same Code; Sec. 20 of Act XVIII. of 1862 (both of which latter sections relate to abetment), and Stat. 30 & 31 Vict., c. 124, s. 11. The Advocate General contends that those three prisoners are punishable either under the English law, or the Indian law, at the option of the Court.

It has been proved that the "Aurora" was a decked vessel of 1,155 tons burden, and was destroyed by Marks, her carpenter, at the instigation of the three other prisoners —Elmstone and Whitwell, her brokers, and Harriott, her master. That instigation took place in Bombay, before the "Aurora" sailed for England, and while she was lying in Bombay harbour, within the local limits of the ordinary original criminal jurisdiction of this court. The choice of the means of destruction seems to have been left to Marks. He, subsequently, when the vessel was on the high seas on her voyage to England, about fifty miles off the coast, selected fire as the medium of destruction, and burnt her. Harriott, the master, was on board, but was not present in that part of the vessel which Marks set on fire, when the latter did so. Elmstone and Whitwell remained in Bombay. We have already stated that Elmstone, Whitwell, and Harriott were acquitted on the charges, founded on the English statutes, of being accessories before the fact to the

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destruction of the vessel *by fire*, and also on the charges, under the Indian law, of abetment of destruction *by fire*, but, subject to the point reserved, have been convicted on the charge, under the English statutes, of being accessories before the fact to the destruction of the vessel, and upon the charges, under the Indian law, of abetting her destruction.

First, as to the local law—the law of British India—three questions have been touched upon in argument: (1) Had the Indian Legislature power to legislate for the high seas, in such cases as the present? (2) Is there an enactment of the Indian Legislature, applicable to this case, now in existence? (3) Assuming that the Indian Legislature has legislated as to the destruction of vessels, but had not power to legislate for such cases occurring on the high seas, has the Imperial Legislature, by subsequent enactment, rendered the Indian legislation as to the destruction of vessels, or the abetment thereof, applicable to such destruction when occurring on the high seas, or to the abetment thereof? If all of these questions, or if the 2nd and 3rd questions, must be answered in the negative, it was not denied that the enactment (Stat. 24 & 25 Vict., c. 97, ss. 42, 43) now in force in England, relating to the offence of destroying ships, was that under which the punishment should be inflicted.

The Indian Legislature, which passed Act XXXI. of 1838 and the Indian Penal Code (Act XLV. of 1860), to which enactments we shall presently have occasion to refer, was the Governor General in Council, whose legislative authority was created by the Imperial Stat. 3 & 4 Wm. IV., c. 85 (passed in 1833), "An Act for effecting an arrangement with the East India Company, and for the better government of His Majesty's Indian Territories, till the 30th day of April 1854," which, by Sec. 34, enacted that "the said Governor General in Council shall have power to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force, or hereafter to be in force, *in the said territories or any part thereof*, and to make laws and regulations *for all persons, whether British or Native,*

foreigners or others, and for all Courts of Justice, whether established by His Majesty's Charters or otherwise, and the jurisdictions thereof, and for all places and things whatsoever, *within and throughout the whole and every part of the said territories,* and for all servants of the said Company within the dominions of Princes and States in alliance with the said Company; save and except that the said Governor General in Council shall not have the power of making any laws or regulations which shall in any way repeal, vary, suspend, or affect any of the provisions of this Act, or any of the provisions of the Acts for punishing mutiny and desertion of officers and soldiers, whether in the service of His Majesty or the said Company, *or any provisions of any Act hereafter to be passed in any wise affecting the said Company, or the said territories, or the inhabitants thereof,* or any laws or regulations which shall in any way affect any prerogative of the Crown, or the authority of Parliament, or the constitution or rights of the said Company, or any part of the unwritten Laws or Constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the Sovereignty or Dominion of the said Crown over any part of the said territories." Some variation was made as to the members of the Council by Stat. 16 & 17 Vict., c. 95 (passed in 1853), but none as to its powers, except by Sec. 25, which in effect authorised the Governor General in Council to pass, with the previous sanction of the Crown, laws or regulations affecting the royal prerogative. We have occasionally, in arguments here, heard the authority of the Governor General in Council, under those statutes, to legislate for the high seas, disputed, sometimes to the extent of any legislation whatsoever, at other times to the extent of any legislation in respect of vessels not belonging to British India, or in respect of persons not natives of British India. In *The Queen* v. *A'lú Párú* (*a*) it was contended at the trial "that the court had no jurisdiction, for that the offence (of burning the ship "Belvidere") being committed by Stephenson (the master) on the high

(*a*) Perry's Or. Ca. 551. A'lú Párú was sentenced to transportation for life, not for ten years, as erroneously stated in the report in Or. Ca. 551.

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seas, the Legislative Council had no authority to legislate for offences there committed, and that if there was no jurisdiction over the principal, there was none also over the accessory." Sir Erskine Perry overruled the objection. The enactment upon which Alú Párú was indicted, convicted, and sentenced was the Indian Act XXXI. of 1838, Secs. 24 and 36. The objection was again raised (several months after sentence had been passed) upon an application to the Full Court for leave to appeal to Her Majesty in Council (Perry's Oriental Cases, p. 555). That application was refused. The report does not furnish the grounds on which Sir Henry Roper, C.J., rested his refusal. The reasons on which Sir E. Perry acted, he stated, were, that "upon analysis of the arguments urged on behalf of the prisoner, they will be found to amount to this, that the words 'against the form of the statute' are not inserted in the indictment.* For it is quite obvious that Stephenson (the principal) might have been indicted for this offence under the Stat. 9 Geo. IV., c. 74, according to the argument of Mr. Howard, or under 7 Wm. IV. and 1 Vict., c. 89; in either of which cases the words I have mentioned would have been sufficient. This being so, and supposing the objection to be a good one, I cannot conceive that it is one to which the Court ought to give way, urged, as it is now for the first time, nine months after the trial, and after the sentence of transportation has been carried into effect, provided, that is to say, that the Court has any discretion to exercise upon the matter." The learned Judge, however, went further than this, for after referring to the 43rd section of the Stat. 3 & 4 Wm. IV., c. 85, which we have already quoted, and to the words in it, "within and throughout the whole and every part of the said territories," he said: "It is contended that these latter words apply to the persons who are to be legislated for, as well as to the places and things with which they are immediately collocated. But the express distinction, which is made in the Act, between persons and things, lies deeply seated, I apprehend, in the principles of legislation, and

* NOTE.—See Act XVIII. of 1862, Sec. 40, as to formal conclusion of a count or charge.—ED.

corresponds with the distinction well known to jurists between personal and real statutes." He then proceeds to assign reasons in support of his view that the Stat. 3 & 4 Wm. IV., c. 85, had conferred power on the Indian Legislature to legislate for the high seas, with which reasons we cannot say that we are altogether satisfied. One of them seems to be in the nature of an *argumentum ab inconvenienti*, namely, that the Indian Legislature has the power to legislate for the high seas, because it would be inconvenient that it should not have such a power. He says: "But can it be contended for a moment that it is not essential to a government like that of India, to be able to prevent excesses and enormities committed on its coasts, or on the uninhabited and barbarous islands in the Indian seas?" We may observe that the Privy Council declined to resort to similar reasoning *ab inconvenienti* as to the construction of the Stat. 9 Geo. IV., c. 74, s. 56, in the case of *Nga Hoong* v. *The Queen* (*b*). The appellants in that case, who were natives of Burmah, and native subjects of the East India Company, representing the Crown, were convicted before the Supreme Court of Calcutta, in 1857 of having, in 1855, murdered a man in Wah Gyoon, one of the Coco Islands, in the Bay of Bengal. The Judges of the Supreme Court differed as to their jurisdiction; Colvile, C.J., and Buller, J., upholding the jurisdiction, and consequently the conviction, and Jackson, J., dissenting. On appeal the Privy Council agreed with him, and held that the Supreme Court had no jurisdiction, and that the judgment of death against the appellants could not be sustained. Sir E. Perry, J., in *Reg.* v. *A'lú Párú*, continued: "Suppose that the fishermen on this coast were discovered to be engaged in a series of fraudulent transactions half a mile from the shore, can it be contended that, under the clause which enables the Governor General in Council to legislate 'for all persons, whether British or Native,' no power exists to regulate fisheries?" Possibly, we may observe, for such a case as that, the Indian Legislature may have power to legislate, though it may be not for

(*b*) 7 Moo. Ind. App. 72, 103; S. C. Boulnois' Rep. 189, 281.

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the high seas at large. According to writers on international law, the territorial right extends to at least three geographical miles, a sea-league, from the coast, that having been supposed to be the range of a cannon-shot: the rule being, according to Bynkershoek, *potestatem terræ finiri ubi finitur armorum vis* (*De Dominio Maris, Cap. II.*). This distance of three miles was the limit lately laid down by the Privy Council, in *Rolet* v. *The Queen* (*c*), for the operation of the Revenue Laws of Sierra Leone. Sir R. Phillimore, in his Commentaries, Vol. 1, plac. CXCVII. (and *see* Vol. 3, plac. CCCLII.) says: "But the rule of law may be now considered as fairly established:—namely, that this absolute property and jurisdiction does not extend, unless by the specific provisions of a treaty, or an unquestioned usage, beyond a marine league (being three miles), or the distance of a cannon-shot from the shore at low tide." He adds, however, that Great Britain and the United States have, for some special purposes relating to the revenue in time of peace, and to the hovering of foreign belligerent vessels in time of war, extended the limit to four leagues. Wheaton (*d*) speaks to the same effect. His commentator, Mr. Lawrence (*e*), suggests that "the distance that a cannon-shot will reach has been increased in a remarkable degree by modern inventions; and, consequently, the sovereignty over the coast may be deemed to be proportionally extended." Adhering, however, for the present, to the distance of three miles from low-water mark, laid down by the Privy Council in *Rolet* v. *The Queen*, as the limit of what is called maritime territory, we must guard ourselves against any supposition that we mean to suggest that the Admiralty Jurisdiction of this court does not commence until that limit be passed. That jurisdiction commences where the open coast terminates. The coast is not the sea adjacent to the land, but is the land which bounds the sea: it is the limit of the land jurisdiction. This limit varies according to the state of the tide.

(*c*) L. R. 1 Priv. C. Ca. 198.
(*d*) Ed. by Lawrence, 1864, pp. 320 to 323.
(*e*) *Ibid.*, p. 321, n. 103.

When the tide is in, and covers the land, the space so covered is sea; when the tide is out the unoccupied space is land as far as low-water mark. The interval between high and low water mark must, therefore, be considered as *divisum imperium*, unless the water be, as Sir John Nicholl says, within a county. (*See* 3 Haggard Adm. Rep. 275, 283.) The case of *Regina* v. *The Pauline* (*f*) well illustrates this doctrine. The vessel in that case was wrecked on the Pole Sands, near the mouth of the Exe, and was taken possession of while stranded there. She then was lying aground within low-water mark, but the tide had not so far ebbed as to leave her dry. In fact the boat, by means of which she was boarded, floated alongside her. The question was whether she was *wreccum maris*, or a droit of the Admiralty; if the former, she belonged to the Lord of the Manor; if the latter, to the Crown. Judgment was given in favour of the Crown. In the course of it Dr. Lushington said: "I apprehend that the distinction taken in all books, and not only with respect to civil rights, but also with respect to criminal jurisdiction, as the law stood before the statute (4 & 5 Wm. IV., c. 36, s. 22), immediately attaches, namely, that the jurisdiction of the Admiralty subsists at the time when the shore is covered with water; the jurisdiction of the common law, and, consequently, the rights of Lords of Manors, at the period when the land is left dry. The doctrine is thus laid down in East's Pleas of the Crown, under the title 'Piracy'—'Upon the open sea-shore it is past dispute that the Common Law and the Admiralty have alternate jurisdiction between high and low water mark. But in harbours, or below the bridges in great rivers near the sea, which are partly inclosed by the land, the question is often more a matter of fact than of law, and determinable by local evidence. There are, however, some general rules laid down upon this point, which it would be improper altogether to omit. It is plain that the Admiralty can have no jurisdiction in any rivers, or arms or creeks of the sea, within the bodies of counties, though within the flux and reflux of the tide.'" The Central Criminal Court

(*f*) 9 Jur. 286; S. C., 3 Notes of Cases, 616.

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in a recent case, unanimously held that the Bristol Channel, at a place where it is ten miles wide, between Glamorganshire and Somersetshire, is within the bodies of these two bounding counties, the line of division being, it would seem, *ad medium filum aquæ*. Therefore, a felony committed on board a ship within three-quarters of a mile of the Glamorganshire shore was held to be committed within the body of the county of Glamorgan: *Reg.* v. *Cunningham* (*g*).

We have said thus much on the Admiralty jurisdiction merely in order to prevent any confusion of its extent with the extent of maritime territory, for which, without travelling beyond the words "within and throughout the whole and every part of the said territories," relied on by counsel in *Reg.* v. *A'lú Párú*, as narrowing the powers of the Indian Legislature, it may probably legislate. In the present case, however, the destruction of the vessel was effected neither *inter fauces terræ*, nor within the three-mile limit of maritime territory, but unquestionably on the high seas, and, therefore, within our Admiralty jurisdiction.

The Stat. 24 & 25 Vict., c. 67, s. 22 (passed A.D. 1861), enabled the Governor General in Council, as by that statute constituted, to make laws and regulations for "all persons, whether British or Native, *foreigners* or others, and for all Courts of Justice whatever, and for all places and things whatever *within the said territories* (of India), and for all servants of the Government of India within the dominions of Princes and States in alliance with Her Majesty." It provided, however, that this Indian Legislature should not have the power of legislating so as to repeal, or in any way affect, certain Imperial statutes specified therein, "or any provisions of any Act passed in this present session of Parliament (1861), or hereafter to be passed, in any wise affecting Her Majesty's Indian territories, or the inhabitants thereof, or which may affect the authority of Parliament," &c.

(*g*) 28 L. J., N. S., Mag. Ca. 66; S. C. 5 Jur. N. S. 202; 1 Bell C. C. R. 66.

The power given both in that statute, and in the earlier statute (3 & 4 Wm. IV., c. 85, s. 43), to legislate, not only for all persons British and Native, but also for *foreigners*, perhaps furnishes an argument in favour of the construction which applies the words "within and throughout the whole and every part of the said territories" in the one statute, and "within the said territories" in the other, as well to "persons" as to "places and things," as it is scarcely to be supposed that a general power to legislate for foreigners beyond those territories was intended; and if the word "foreigners" be limited to persons within the territories, so must the words "all persons British or Native." It may be said that the intention was to give the power to legislate for foreigners beyond the territories so far as international law would permit, *e.g.*, for foreigners on board British registered or Anglo-Indian registered ships. It is, however, difficult to understand why the Imperial Legislature should delegate to the Indian Legislature, or to any other provincial legislature, the power to legislate *generally*, either for British subjects or foreigners in British registered ships on the high seas. Were it to do so, British subjects and foreigners in British ships might be subjected to conflicting laws in respect of their conduct on the high seas. Yet if the construction of the Stat. 3 & 4 Wm. IV., c. 85, s. 43, which Sir E. Perry put forward in *Reg.* v. *A'lú Párú* be correct, it would seem to involve such a power. It is not improbable that had the Imperial Legislature intended to confer any power upon the Indian Legislature to legislate for the high seas beyond the maritime territory of British India, that power would have been limited to natives of India or persons domiciled in India, and perhaps to British subjects and foreigners in ships belonging to or registered in India. No such distinction is taken in the statutes. Nothing whatever is said as to the high seas, but words are introduced which, consistently with good grammar and the probable intention of Parliament, may be applied so as to limit the general power of legislation to the territory constituting British India. It is evident that the restriction to the territories of British India

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is not confined to the words "all places and things whatever." Common sense requires that in one sense at least that restriction should be also applied to the words "all Courts of Justice whatever." Courts of Justice outside our Indian territories and their dependencies could not have been intended; and, this being so, it is not very easy to say why the territorial restriction should cease there, and not be equally applied to the preceding words, "all persons, whether British or Native, foreigners or others." We have said that in one sense at least the territorial restriction should be applied to the words "all Courts of Justice whatever," that is, as respects the locality of those courts; we should, however, also notice the subsequent words, "and the jurisdictions thereof," which occur in the Stat. 3 & 4 Wm. IV., c. 85, s. 43, but are omitted in the Stat. 24 & 25 Vict., c. 67, s. 22. To these words there would be some difficulty in applying the territorial restriction. They have not been noticed in the judgment in *Reg.* v. *A'lú Párú*, yet it would seem that an argument might have been based on them in support of Sir E. Perry's views as to the authority of the Indian Legislature. On the other hand, the power to legislate for a servants of the Company in one statute (*h*), and for all servants of the Government of India in the other statute (*i*), respectively within the dominions of Princes and States in alliance with the Company or Her Majesty, is special and exceptional, and furnishes a very strong reason for supposing that the previous general power of legislation conferred by the same statutes is limited to the territories of British India. That special power was, in 1865, extended by Stat. 28 & 29 Vict., c. 17, to "all British subjects of Her Majesty within the dominions of Princes or States in India in alliance with Her Majesty, whether in the service of the Government of India or otherwise."

We may here mention a passage at page 24 of Mr. Forsyth's Collection of Cases and Opinions on Constitutional Law, in which he refers to an opinion given by the Law

(*h*) Stat. 3 & 4 Wm. IV., c. 85, s. 43.
(*i*) 24 & 25 Vict., c. 67, s. 22.

Officers of the Crown in February 1855 (Sir J. Harding, Queen's Advocate, Sir Alexander Cockburn, A. G., and Sir R. Bethell, S.G.), as to British Guiana; they said: "We conceive that the colonial legislature cannot legally exercise its jurisdiction beyond its territorial limits three miles from the shore, or, at the utmost, can only do this over persons, domiciled in the colony, who may offend against its ordinances even beyond these limits, but not over other persons;" and an opinion given by Sir J. Harding, in August 1854, on the question within what distance of the coasts of the Falkland Islands foreigners might be legally prevented from whale and seal fishing, he said: "Her Majesty's Government will be legally justified in preventing foreigners from whale and seal fishing within three marine miles (or a marine league) from the coasts, such being the distance to which, according to the modern interpretation and usage of nations, a cannon-shot is supposed to reach." And at page 32 Mr. Forsyth says that a "question arose with respect to the validity of Act I. of 1849 (of the Government of India), by which jurisdiction was given over offences committed by *all* British subjects in foreign States; and the Law Officers of the Crown and myself (Mr. F.) were of opinion, in 1866, that in the case of offences committed in foreign States by *native* Indian subjects of the Crown, the Governor General in Council had not the power to make laws for their apprehension and punishment in British India, for we thought that the power was restricted by Stat. 24 & 25 Vict., c. 67, s. 22, and 28 & 29 Vict., c. 17." In consequence of that opinion, Parliament, in 1869, passed the Stat. 32 & 33 Vict., c. 98, empowering the Governor General in Council to make laws and regulations for all *native Indian subjects* of Her Majesty, her heirs and successors, without and beyond, as well as within the Indian territories under the dominion of Her Majesty. The same statute (Sec. 2) provided that "no law heretofore passed by the Governor General of India, or by the Governors of Madras and Bombay, respectively, in Council, shall be deemed to be invalid solely by reason of its having reference to native subjects of Her Majesty not within the

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Indian territories under the dominion of Her Majesty." This statute, as well as the Stat. 28 & 29 Vict., c. 17, still leaves the power of the Indian Legislature to bind British subjects on the high seas, or foreigners in British vessels on the high seas, an open question. Beyond saying that we do not think that the remarks in the case of *Reg.* v. *A'lú Párú* can be considered as having conclusively settled that question, we do not, for reasons which will presently appear, think it necessary to give any positive opinion upon it, and have said so much out of respect to the arguments at the bar founded upon the remarks in that case. It should be recollected that *A'lú Párú* and the two other persons convicted with him under Act XXXI. of 1838 were accessories in India, not principals upon the high seas. Whether it is possible that the decision there was right, although the remarks in that case as to the power of the Governor General in Council to legislate for crimes committed on the high seas may not have been sustainable, we do not purpose to give any opinion. Assuming that such a power does not belong to the Indian Legislature, it may be that it has authority to legislate for accessories on shore, within our Anglo-Indian territories, to crimes committed upon the high seas, or elsewhere beyond these territories. That it has professed to legislate against abetment, within these territories, of certain special offences committed beyond them, shall presently be shown.

The proviso in the Stat. 3 & 4 Wm. IV., c. 85, and 24 & 25 Vict., c. 67, that the Indian Legislature shall not repeal, or in any way affect, certain Imperial statutes, it will be necessary that we should hereafter refer to.

We now turn to the second point, namely, Has the Indian Legislature, for cases such as the present, legislated, or affected to legislate, for the high seas, either as regards principals or accessories before the fact? Before mentioning any Indian Acts, it is necessary first to refer to the Imperial Stat. 9 Geo. IV., c. 74, passed A.D. 1828, for improving the administration of criminal justice in the East Indies, and which

extended (Sec. 1) to "all persons and all places, as well on land as *on the high seas*, over whom or which the criminal jurisdiction of any of His Majesty's Courts of Justice, erected or to be erected, within the British territories under the Government of the United Company of Merchants trading to the East Indies, does or shall hereafter extend." By Sec. 117 of that statute it was enacted "that, if any person shall unlawfully and maliciously set fire to, or in any wise destroy, any ship or vessel, whether the same be complete or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in any wise destroy, any ship or vessel, or shall unlawfully and maliciously set fire to any goods being on board any ship or vessel as cargo, with intent to burn or destroy such cargo, or ship, and with intent thereby to prejudice any owner or part-owner of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon."

Sec. 7 of the same statute, "for the more effectual prosecution of accessories before the fact to felony," enacted that "If any person shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at Common Law, or by virtue of any statute or statutes made or *to be made*, the person so counselling, procuring, or commanding shall be deemed guilty of felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal shall, or shall not, have been previously convicted, or shall, or shall not, be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished; *and the offence of the person so counselling, procuring, or commanding, howsoever indicted, may be inquired of, tried,*

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determined, and punished by any Court which shall have jurisdiction to try the principal felon, in the same manner as if such offence had been committed at the same place as the principal felony, although such offence may have been committed either on the high seas, or at any place on land, whether within His Majesty's dominions or without; and that in case the principal felony, and the offence of counselling, procuring, or commanding, shall have been committed in different places, the lastmentioned offence may be inquired of, tried, determined, and punished in any of His Majesty's Courts of Justice within the British territories under the Government of the said United Company, having jurisdiction to try either of the said offences: Provided always that no person who shall be once duly tried for any such offence, whether as an accessory before the fact, or as for a substantive felony, shall be liable to be again indicted or tried for the same offence."

Neither the first section, stating the scope of that statute, nor the seventh section, relating to accessories before the fact to any felony at Common Law, or by virtue of any statute or statutes made, *or to be made*, appears to have been repealed either by the Indian or English Legislatures. But Act XXXI. of 1838 of the Government of India purports (Sec. 1) to repeal (amongst others) Sec. 117 of that statute (9 Geo. IV., c. 74), relating to the destruction of ships by fire or otherwise, and to substitute for that section the following enactments by its 22nd and 24th sections: Sec. 22— "Whosoever shall unlawfully and maliciously set fire to, cast away, or in any wise destroy, any ship or vessel, either with intent to murder any person, or whereby the life of any person shall be endangered, shall be guilty of felony, and, being convicted thereof, shall suffer death" (which section is identical in language with that of the English Stat. 7 Wm. IV. & 1 Vict., c. 89, s. 4). Sec. 24: "Whosoever shall unlawfully and maliciously set fire to, or in any wise destroy, any ship or vessel, whether the same be in a complete or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in any wise destroy, any ship or vessel, with intent thereby to prejudice any

owner or part-owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported to such place as the Court shall direct, for life, or for any term of years, or to be imprisoned for any term not exceeding four years."

It was upon that section (24), combined with Sec. 36 of the same Act, relating to accessories, that A'lú Párú and his two accomplices were indicted as accessories before the fact to the burning of the "Belvidere" by Stephenson. Sec. 24 was taken, but not *verbatim*, from the English Stat. 7 Wm. IV. & 1 Vict., c. 89, s. 6 (referred to by Sir E. Perry, Oriental Cases, p. 555). This Act of the Indian Legislature (XXXI. of 1838) purported (Sec. 2) to "extend to all persons and over all places over whom or which the criminal jurisdiction of any of Her Majesty's Courts of Justice within the territories under the Government of the East India Company extends, but not further or otherwise." If these words "within the territories," &c. are to be understood as merely indicating the locality of the Courts of Justice, and not as applicable to and limiting the sense in which the words "the criminal jurisdiction" are here employed, the Indian Legislature did, by Act XXXI. of 1838, legislate for the high seas, because the Supreme Courts had an Admiralty criminal jurisdiction over them; and the first question, already discussed, would arise as to whether the Indian Legislature had power to pass Secs. 22 and 24, so far as regarded the high seas, beyond the three-mile limit, and could repeal Stat. 9 Geo. IV., c. 74, s. 117, so far as it affected the high seas, beyond that limit. If Act XXXI. of 1838 is to be considered as affecting the territories of India only, then it did not repeal Stat. 9 Geo. IV., c. 74, s. 117, so far as it related to the high seas beyond the bounds of the maritime territory of India. These were important questions when A'lú Párú's case was at issue, but it

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is not necessary that we should now determine them, as Act XXXI. of 1838 was wholly and expressly repealed by Act II. of 1869. Act XXXI. of 1838 had previously, so far as regards our Indian territories at least, been virtually repealed by the Indian Penal Code (XLV. of 1860), when it came into operation, namely, on the 1st of January 1862. (See Act VI. of 1861.)

The Indian Penal Code, Sec. 437, enacts that "Whoever commits mischief to any decked vessel, or any vessel of a burden of twenty tons or upwards, intending to destroy or render unsafe, or knowing it to be likely that he will thereby destroy or render unsafe, that vessel, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine." Upon two charges founded on that section, coupled with Sec. 109, relating to abettors, the prisoners Elmstone, Whitwell, and Harriott have been, as already stated, convicted. Sec. 438 enacts that "Whoever commits, or attempts to commit, by fire or any explosive substance, such mischief as is described in the last preceding section, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine." To a charge based upon that section, Marks, as already stated, pleaded Guilty.

As to those enactments (Secs. 437 and 438), it should be observed that they do not mention the high seas, or necessarily apply to the destruction of vessels, by fire or otherwise, thereon. A sufficient field for the operation of those enactments presents itself in the rivers, creeks, harbours, estuaries, &c., of British India, and all round its coast to a distance of three miles. That the true scope of those sections (437 and 438) did not, at all events, exceed this, is, we think, shown by the earlier sections in the Indian Penal Code itself.

The Indian Penal Code, by Sec. 1, takes effect "throughout the whole of the territories which are or may become vested in Her Majesty by the Stat. 21 & 22 Vict., c. 106,"

passed in 1858, and which transferred British India to the Crown. Those were: "All the territories in the possession or under the Government of the East India Company." The 2nd section of the same Code enacts that "every person shall be liable to punishment under this Code, and not otherwise, *for every act or omission contrary to the provisions thereof,* of which he shall be guilty *within the said territories*" after the Act came into force. That section would exclude the destruction of a vessel at a distance of more than three miles from the coast, as being an offence committed beyond the said territories. The 3rd section enacts that "any person liable, *by any law passed by the Governor General in Council,* to be tried for an offence committed *beyond the limits of the said territories,* shall be dealt with according to the provisions of this Code for any act committed beyond the said territories, in the same manner as if such act had been committed within the said territories." The present case is not one provided for by any *extant* Act of the Governor General in Council. The 4th section applies to servants of the Queen who commit offences against this Code within the dominions of any Prince or State in alliance with the Queen. The 5th section is as follows:—"Nothing in this Act is intended to repeal, vary, suspend, or affect any of the provisions of the Stat. 3 & 4 Wm. IV., c. 85, or of any Act of Parliament passed after that statute, in any wise affecting the East India Company, or the said territories, or the inhabitants thereof; or any of the provisions of any Act for punishing mutiny and desertion of officers and soldiers, in the service of Her Majesty, or of the East India Company, or of any Act for the government of the Indian Navy, or of any special or local law."

So far as regards the case of the prisoner Marks, it is clear that it does not come within the Penal Code standing alone, and unaided by any other enactment. The offence to which he has pleaded Guilty was committed at a distance of about fifty miles from the coast of India, and, therefore, not within the territories which are vested in Her Majesty by the Stat. 21 & 22 Vict., c. 106 (namely, the territories in

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the possession or under the government of the East India Company), as required by Secs. 1 and 2 of the Penal Code, nor was he a person liable by any law passed by the Governor General in Council to be tried for an offence committed beyond the limits of the said territories, as required by Sec. 3 of the Penal Code, nor was he a servant of the Queen within its 4th section.

If the case of Elmstone, Whitwell, and Harriot can be brought within the Indian Penal Code, the section which, in conjunction with Sec. 437, would be applicable to it, is Sec. 109. It is as follows:—"Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence." For the scope and meaning of the word "offence," occurring in this section, we must look to Sec. 40, which forms part of the glossary to the Code. It states, in language neither felicitous nor logical, that "the word 'offence' denotes a thing made punishable by this Code." Mr. Mayne, accordingly, upon Sec. 109, rightly observes: "The offence of abetment can only be committed in respect of offences under the Penal Code; not of offences punishable under a special or local law (3 R. C. C., C. R. 31, 33); nor of offences punishable under the English law. This defect is not cured by Act IV. of 1867. Possibly a person who instigated another to commit an offence against the Railway Act, or to commit a murder on the high sea, might be successfully indicted as an accessory before the fact." The authorities referred to by Mr. Mayne for the proposition that the offence of abetment cannot be committed of offences punishable under a special or local law, are contained also in the 7th volume of the Calcutta Weekly Reporter, at pages 53 and 54; one was *The Queen* v. *Kullimoodin*, in 1867, where the prisoner had been convicted of abetting the sale of liquor to a European soldier, such sale being contrary to a special law—the Excise Act XXI. of 1856—which did not contain any provision for the punishment of abetment. The other was *The Queen* v. *Ramlugun Lall*

Moonshee and others also in 1867, where one of the prisoners was convicted, under Sec. 109 of the Penal Code, of abetting an offence under Sec. 48 of a special Act—the Post Office Act (XIV. of 1866)—which did not provide any punishment for abetment. The High Court of Calcutta (Kemp and Glover, JJ., present) quashed both of these convictions. We are aware of the case reported in the Appendix, p. xi., of the 3rd volume of the Madras High Court Reports, in which a majority of the Judges of that Court held that an offence committed against special or local laws, being, in their opinion, represented or recognised by Sec. 5 of the Penal Code as punishable, should be regarded as coming within the meaning given to the word "offence" in Sec. 40, and accordingly be regarded as "a thing made punishable by this Code." It is impossible not to value highly the ingenuity and ability by which that construction was arrived at, but, independently of the aid which can now be derived from subsequent legislation, we should have been disposed to adopt the opinion expressed in the able judgment of Innes, J., that the words "a thing made punishable by this Code" mean "an act or omission which by this Code is constituted one to which a punishment is attached," and also his view of Sec. 5, of which he says: "It cannot be viewed, as it seems to me, as incorporating into the Code, or even giving the authoritative recognition of the Code to, special and local criminal laws, in such a sense as would warrant our saying that it represents, as punishable, acts and omissions in violation of the provisions of these special and local laws. The liability under such laws is simply stated to be left unaffected, in order to define clearly the extent to which the old law is rendered inoperative." The Indian Legislature has, by the preamble to Act IV. of 1867, placed it beyond all doubt that the word "offence," as used in the Penal Code, did not include acts or omissions made punishable by any special or local law. Act IV. of 1867, after reciting that "it is expedient *to enlarge* the meaning of the word 'offence' in certain sections of the Indian Penal Code, so as to make it denote not only anything made punishable by the

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said Code, but also anything made punishable by any special or local law, as therein defined," enacted that certain sections, which it specified, of that Code "shall be construed as if the word 'offence' denoted anything made punishable by the said Code, or by any special or local law as therein defined;" and certain other sections, which it also specified, "of the said Code shall be construed in the same way, when the thing made punishable by the special or local law is punishable by such law with imprisonment for a term of six months or upwards, whether with or without fine." That Act left unmentioned and untouched (amongst many other sections) the sections 109, 437, and 438 of the Penal Code.

Certain recently passed special Acts of the Governor General in Council testify that abetment of the offences constituted by those Acts would not, without special provision to that effect, be punishable under the general provisions contained in Ch. V. of the Indian Penal Code relating to abetment, and that it was necessary expressly to provide that abetment of those offences should be so punishable. One of those special Acts is Act V. of 1869 (the Indian Articles of War), Tit. II., Ch. VI., Art. 71. Another is Act XVIII. of 1869 (the General Stamp Act), Sec. 36.

Hence it follows that, if Imperial statutes, providing generally for the trial and punishment of persons committing offences upon the high seas, *e. g.*, such as the Merchant Shipping Act and the Acts passed in amendment of it, should be considered "special laws," as defined by Sec. 41 of the Indian Penal Code, which says that "a special law is a law applicable to a particular subject," the circumstance, that special laws are expressly saved by Sec. 5 of the same Code, does not render offences coming within such statutes offences within the meaning of Sec. 109 of the Indian Penal Code. If, on the other hand, those statutes cannot be considered as special laws, then, inasmuch as the crime here abetted was committed on the high seas, and not within the territories vested in Her Majesty by the Stat. 21 & 22 Vict., c. 106, and, therefore, not an offence made punishable by

the Penal Code, the abetment thereof is not punishable under Sec. 109 of that Code, so far as the Code itself, standing alone and unaided by any other enactment, is concerned.

While discussing this subject of abetment, we think it right not to pass over Secs. 121, 125, and 236 of the Penal Code. Sec. 121 enacts that "whoever wages war against the Queen, or attempts to wage such war, or *abets the waging of such war*, shall be punished with death, or transportation for life, and shall forfeit all his property."

The second illustration (b) to that section is as follows:—"A in India abets an insurrection against the Queen's Government of Ceylon, by sending arms to the insurgents; A is guilty of abetting the waging of war against the Queen."

Here we find abetment, in British India, of an offence itself committed beyond British Indian territory, namely, in Ceylon, specially rendered punishable in British India. It may be that the Indian Legislature had power so to legislate as to abetment in India of an offence committed out of India, and may not have had power to legislate for the principal offence itself if committed beyond British Indian territory.

No such *special* provision has been made by the Indian Penal Code, or any other Act of the Government of India now extant, for the punishment of abetment in India of offences such as the present when committed on the high seas at a distance exceeding three miles from the coast.

Sec. 125 enacts that "whoever wages war against the government of any Asiatic power in alliance or at peace with the Queen, or attempts to wage such war, *or abets the waging of such war*, shall be punished with," &c.

The extent of the operation of this section may be doubtful. In dealing with it, the fact that it is an enactment prior in time to the Stat. 28 & 29 Vict., c. 17, and 32 & 33 Vict., c. 98, should be remembered.

Sec. 236 enacts that "whoever, being within British India, *abets* the counterfeiting of coin out of British India, shall be punished in the same manner as if he abetted the counterfeiting of such coin within British India." This is

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special legislation, similar to that in Sec. 121. The remark made upon that section applies to this also.

Act XVIII. of 1862, Sec. 20, enacted that "a person may be indicted and punished for abetting an offence which has been committed in consequence of the abetment, notwithstanding the person who committed the offence shall not have been indicted or found guilty, or shall not be in custody or amenable to justice; and every abettor of an offence may be indicted, tried, and *punished* for the abetment as a substantive offence, and may be tried, either jointly with the principal offender or separately, and punished, by any of Her Majesty's Supreme Courts of Judicature which would have power to try the principal offender, or which would have power to try the abettor if he had committed the offence himself, either in the place in which he is guilty of the abetment, or in the place in which any act shall have been committed in pursuance of the abetment." That Act was passed, as stated in its preamble, because, in consequence of the passing of the Indian Penal Code, many of the provisions of Act XVI. of 1852 had become inapplicable, and others required amendment; and it was expedient to repeal that Act, pending the preparation of a Code of Criminal Procedure for the Queen's Courts, to re-enact some of the provisions of that Act, and to make further provision for the administration of criminal justice. Amongst these provisions which had become inapplicable was Sec. 15, relating to accessories to felonies. The Indian Penal Code substituted, by its 5th chapter, the new law of abetment, for the old law of accessories before the fact. Sec. 20 of Act XVIII. of 1862 regulated the time when, and the manner in which, the abettor should be tried, whether jointly or separately with the principal, and declared that the abetment might be dealt with as a substantive offence, which, in fact, Sec. 108 (of the Penal Code), and the first four accompanying explanations of it, had already done. But we do not understand that Act XVIII. of 1862, Sec. 20, rendered any abetment of an offence punishable, which was not so under the Penal Code, or under special enactments of the Government of

India, and it does not seem to have any bearing on a case still subject to the law as to accessories before the fact. This is clearly shown by Secs. 55 and 56 of the Act.

We should here observe that the Merchant Shipping Act, 1854 (17 & 18 Vict., c. 104), Sec. 267; the Merchant Shipping Amendment Act, 1855 (18 & 19 Vict., c. 91), Sec. 21; and the Stat. 23 & 24 Vict., c. 88, which became law on the 13th of August 1860, and extended Stat. 12 & 13 Vict., c. 96, to India, having been passed subsequently to the Stat. 3 & 4 Wm. IV., c. 85, it would seem that, having regard to the express provisions of its 43rd section as to statutes to be subsequently passed by Parliament, the Indian Legislature, which in 1860 passed the Penal Code,* and whose powers at that time were limited by those provisions as to statutes passed or to be passed subsequently to the Stat. 3 & 4 Wm. IV., c. 85, could not have legislated so as to repeal, vary, or affect the statutes which I have named at the commencement of this sentence, and carefully guarded itself against any supposition that it did so legislate (Sec. 5, Penal Code). We must presently refer again, with greater particularity, to those statutes.

As to Elmstone, Whitwell, and Harriott, we did not understand their learned counsel as seriously contending that the Indian Penal Code and Act XVIII. of 1862 *per se* governed the case of those prisoners. But they relied strongly on the Imperial Stat. 30 & 31 Vict., c. 124, s. 11 (passed in 1867), as rendering the Penal Code applicable to the cases as well of those three prisoners as of Marks, and, if so applicable, as excluding, by virtue of its second section, the English law. The 30th clause of the Charter of this Court, granted in 1865, might perhaps be relied upon also, if the Penal Code be applicable, as excluding the English law. That clause ordains that "all persons brought for trial before the said High Court of Judicature at Bombay, either in the exercise of its original jurisdiction, or in the exercise

* It received the assent of the Governor General on the 6th of October 1860. Its 2nd section provided that it should take effect on the 1st of May 1861, but by Act VI. of 1861 that date was altered to 1st January 1862.

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of its jurisdiction as a court of appeal, reference, or revision, charged with any offence for which provision is made by Act No. 45 of 1860, commonly called the 'Indian Penal Code, or by any Act amending or excluding the said Act, which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts, and not otherwise." It must, however, be observed that the statute alleged to have rendered the Penal Code applicable was not itself passed until 1867, two years subsequent to the date of the Charter.

The contention of the learned counsel as to that statute brings us to the third question, namely, assuming that the Indian Legislature has not legislated as to the destruction of vessels on the high seas at a distance of more than three miles from the shore, or as to the abetment thereof, but has legislated for such cases occurring within the territories of British India, has the Imperial Legislature by any subsequent enactment rendered that Indian legislation applicable to the destruction of vessels on the high seas, or the abetment thereof?

The Stat. 30 & 31 Vict., c. 124 (which we have mentioned as so strongly relied upon by Mr. McCulloch and Mr. Starling for the prisoners), by its 11th section, enacted that "if any British subject commits any crime or offence on board any British ship, or on board any foreign ship to which he does not belong, any Court of Justice in Her Majesty's dominions which would have had cognisance of such crime or offence if committed on board a British ship within the limits of the ordinary jurisdiction of such Court, shall have jurisdiction to hear and determine the case as if the said crime or offence had been committed as last aforesaid."

At first sight, and without combining with it the Merchant Shipping Act of 1854 and certain Acts in amendment of it, to which we shall presently refer, we certainly were very much struck by the enactment contained in that section. The direction, to hear and *determine* the case as if the crime had been committed within the limits of the ordinary jurisdiction of the Court, seemed to point towards the law prevailing

within those limits as the substantive law applicable to the case.

The common form of a Commission of Oyer and Terminer is to authorise the Commissioners, or three or four of them, of which number such or such a person is to be one, to inquire, by the oaths of twelve men, of all treasons, felonies, and misdemeanours, &c. in such and such place, and to hear and *determine* the same at such times and places as such Commissioners shall appoint, &c., for which purpose the King acquaints them that he has sent a writ to the sheriffs of such counties, commanding them to return juries before them at such days and places as shall be notified by them, &c.: 2 Bac. Ab., Tit. Court of the Justices of Oyer and Terminer, A., p. 155; Fitzherbert, N. B. by Hale, 255 (110); 2 Hawkins, P. C. 27; 2 Hale P. C. 23. By virtue of such a commission, although it may not in terms specify that the Commissioners may adjudge or pass sentence, or award execution, we think that, ordinarily at least, they may do these acts under the authority of the word "determine."

Finding that Stat. 30 & 31 Vict., c. 124, is intituled "an Act to amend the Merchant Shipping Act, 1854," and by its first section enacts that "this Act may be cited as the Merchant Shipping Act, 1867, *and shall be construed with, and as part of, the Merchant Shipping Act*, 1854, hereinafter termed the principal Act," it became necessary to examine the principal Act, and the various Acts passed in amendment of it, or other Acts relating to the punishment of offences committed on the high seas, and which may have been grafted on, or connected with, the Merchant Shipping Code.

The Merchant Shipping Act (1854), 17 & 18 Vict., c. 104, s. 267, is as follows:—

"All offences against property or person committed in or at any place, either ashore or afloat, out of *Her Majesty's dominions*, by any master, seaman, or apprentice who at the time when the offence is committed is, or within three months previously has been, employed in any British ship, shall be deemed to be offences of the same nature respectively, and be inquired of, *heard, tried, determined, and adjudged*, in the

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same manner, and by the same Courts and in the same places, *as if such offences had been committed within the jurisdiction of the Admiralty of England;* and the costs and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England."

The observations to be made on that Act are: (1) that it applied to masters, seamen, and apprentices employed in British ships only; (2) that the law to be administered, both of procedure and of punishment, was to be that which would be administered as if the offences had been committed within the jurisdiction of the Admiralty of England; (3) that the Legislature has not contented itself with the usual phraseology of a Commission of Oyer and Terminer, namely, "inquire, hear, and determine," but said "inquired of, heard, tried, determined, and adjudged;" (4) that the phrase "Her Majesty's dominions" used in that section (267) includes India, as will appear on referring to Sec. 2 of the same statute, which defines that phrase; (5) Marks, being a British seaman, and charged and convicted as such, comes within Sec. 267.

We must next refer to an earlier statute, already mentioned. It is the Stat. 12 & 13 Vict., c. 96, which was "an Act to provide for the prosecution and trial in Her Majesty's colonies of offences committed within the jurisdiction of the Admiralty" (passed in 1849 for the colonies, and extended to India, as above mentioned, on the 13th of August 1860, by Stat. 23 & 24 Vict., c. 88), and which enacted, by Sec. 1, that "if any person within any colony shall be charged with the commission of any treason, piracy, felony, robbery, murder, conspiracy, or other offence, of what nature or kind soever, committed upon the sea, or in any haven, river, creek, or place where the Admiral or Admirals have power, authority, or jurisdiction, or if any person charged with the commission of any such offence upon the sea, or in any such haven, river, creek, or place, shall be brought for trial to any colony, then and in every such case all Magistrates, Justices

of the Peace, Public Prosecutors, Juries, Judges, Courts, Public Officers, and other persons in such colony, shall have and exercise the same jurisdiction and authorities for *inquiring of, trying, hearing, determining, and adjudging* such offences, and they are hereby respectively authorised, empowered, and required to institute and carry on all such proceedings for the bringing of such person so charged as aforesaid to trial, and for, and auxiliary to, and consequent upon, the trial of any such person for any such offence wherewith he may be charged as aforesaid, as by the law of such colony would and ought to have been had and exercised or instituted and carried on by them respectively if such offence had been committed, and such person had been charged with having committed the same, upon any waters situate within the limits of any such colony, and within the limits of the local jurisdiction of the Courts of Criminal Justice of such colony." This section, standing alone, might give an impression that as well the substantive law as the procedure law of the colony was to be administered; but the next section speedily removes that impression, so far as the substantive law is concerned. It should also be observed that the Legislature, as well in this first as in the second section, uses, in addition to the expressions "inquire, hear, try, and determine," the word "adjudge."

The second section is: "Sec. 2.—Provided always, and be it enacted, that if any person shall be convicted before any such court of any such offence, such person so convicted shall be subject and liable to, and shall suffer, all such and the same pains, penalties, and forfeitures as by any law or laws now in force persons convicted of the same respectively would be subject and liable to in case such offence had been committed, and were *inquired of, tried, heard, determined, and adjudged,* in England, any law, statute, or usage to the contrary notwithstanding."

This section shows conclusively that the law of punishment prescribed by that statute was the law of England, and no other.

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After that, the Merchant Shipping Act, 1854, already mentioned, was passed. The statute next in order is the Stat. 18 & 19 Vict., c. 91 (passed in 1855 in amendment of the Merchant Shipping Act, and directed to be taken as part of it and construed accordingly—Sec. 1). It enacted, by s. 21, that "If any person, being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, or in any foreign port or harbour, or if any person not being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, is found within the jurisdiction of any Court of Justice in *Her Majesty's dominions* which would have had cognisance of such crime or offence if committed within the limits of its ordinary jurisdiction, such Court shall have jurisdiction to *hear and try* the case as if such crime or offence had been committed within such limits: Provided that nothing contained in this section shall be construed to alter or interfere with the Act (*k*) of the thirteenth year of Her present Majesty, Chapter ninety-six." Here, again, occurs the phrase "Her Majesty's dominions," which must receive the construction given to it by the Merchant Shipping Act, 1854. This enactment, therefore, applies in India. It is an advance upon the Merchant Shipping Act, 1854, Sec. 267, which was confined to masters, seamen, and apprentices. This renders any British subject charged with having committed a crime on board a British ship on the high seas, or in any foreign port, &c., liable to justice in any Court in Her Majesty's dominions which would have cognisance of the crime if committed within the limits of its ordinary jurisdiction. The words are "hear and try" only. The concluding salvo contained in this enactment of the Stat. 12 & 13 Vict., c. 96, shows that the Legislature adhered to its policy that the law of England was to be the law of punishment.

The next statute to be referred to has been already mentioned, Stat. 23 & 24 Vict., c. 88, which received the Royal

(*k*) 12 & 13 Vict., c. 96.

assent on the 13th of August 1860, and extended Stat. 12 & 13 Vict., c. 96, to India.

Upon this state of the law the case of *The Queen* v. *Thompson* (*l*) was decided, on the 3rd of September 1867, by the High Court of Calcutta. It came on points reserved at the trial by Phear, J., before Peacock, C. J., Phear, J., and Macpherson, J. The charge against the prisoner, Charles Thompson, was, under the Stat. 7 Wm. IV. and 1 Vict., c. 85, s. 2, that he, "on the 25th day of May 1867, on board the British ship or vessel 'Scindia,' upon the high seas, and within the Admiralty jurisdiction of this Court (High Court, Fort William), with a certain knife, feloniously, unlawfully, and maliciously stabbed, cut, and wounded one Edward Ned, with the intent, in so doing, him, the said Edward Ned, thereby then to disable, against the form of the statute in such case made and provided," &c. The jury found the prisoner (under Stat. 14 & 15 Vict., c. 19, s. 5) guilty of "unlawfully wounding" only. The Court held that the procedure adopted was properly the Indian procedure, but that the charge and conviction were properly founded on the English statutes, and that the punishment must be according to English law, Phear, J., concurring with Peacock, C. J., and Macpherson, J., as to the procedure, but doubting "whether the offence should be measured by English law or local law" (*m*). We fully agree with Peacock, C.J., in thinking that the prisoner was there rightly charged and convicted, and was punishable according to English law; and, with Macpherson, J., to that extent. It should be observed that Thompson, not being a master, seaman, or apprentice, did not come within the Merchant Shipping Act, 1854, Sec. 267; and in that respect his case differs from that of Marks, who is charged as having committed the principal offence when a British seaman on board a British ship, and who, therefore, comes within Sec. 267 of the Merchant Shipping Act, 1854. But Thompson, being a British subject,

(*l*) 1 Beng. L. R., Cr. Rul. 1.

(*m*) The extract, made at pp. 9, 10 of the report of that case, from Sec. 21 of the Merchant Shipping Act, 1855 (18 & 19 Vict., c. 91), is inaccurate.

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and having committed the offence on board a British ship, did come within the Stat. 12 & 13 Vict., c. 96, and 23 & 24 Vict., c. 88.

The Stat. 30 & 31 Vict., c. 124, which received the Royal assent on the 21st of August 1867, was not mentioned in *The Queen* v. *Thompson*, and could not have reached Calcutta at the time that case was decided; and even if it had, it could scarcely have applied to an offence committed before that statute became law. Hence there was not any expression of the Court's opinion as to its effect. It made an advance upon the preceding statutes, by rendering not only, as the last of them had done, any British subject, charged with having committed a crime on board a British ship, liable to justice in any Court in Her Majesty's dominions, which would have had cognisance of the crime if committed within the limits of its ordinary jurisdiction, *but also any British subject charged with committing a crime on board any foreign ship to which he does not belong*. That last addition to the law, we are of opinion, was the object of the Legislature in enacting the 11th section. We feel bound by the direction contained in the 1st section of the same Act to construe that statute as though it were part of the Merchant Shipping Act of 1854, and of the Acts passed in amendment of it. There is no recital or evidence of any intention in the Stat. 30 & 31 Vict., c. 124, s. 11, to depart from the well-marked policy of the principal and amending Acts, in prescribing the English law as the substantive law by which cases should be decided. The word "determine" is not, in our opinion, of itself any sufficient indication of such an intention, contrary as it would be to the Merchant Shipping Code, which the principal and amending Acts form. Recollecting that the Stat. 30 & 31 Vict., c. 124, s. 11, applies to all of the colonies as well as to India, we should not feel warranted in giving that phrase any such extensive effect as to substitute throughout Her Majesty's dominions other than the United Kingdom the local law of each colony or province for the law of England.

Sir B. Peacock, C.J., said, with much force, in *The Queen* v. *Thompson*, in speaking of the Stat. 12 & 13 Vict.,

c. 96, "I can well understand that Parliament would prefer to make such person subject to the punishment imposed by English law, rather than by that of the colony. They might not be certain what that law was, or, if aware of it, might not wish to extend it." We think that the Stat. 30 & 31 Vict., c. 124, s. 11, was intended to be merely supplementary, and not antagonistic, to the previous enactments.

It appearing, then, that the English law is the substantive law applicable to the case, we proceed to refer to the statute which, in the course of the argument, it was admitted would be applicable to the case of the destruction of a vessel on the high seas by a British-born subject if the Indian Penal Code were not so. That statute is the 24th & 25th Vict., c. 97 (passed in 1861), which enacted as follows :—

"Sec. 42. Whosoever shall unlawfully and maliciously set fire to, cast away, or in any wise destroy, any ship or vessel, whether the same be complete or in an unfinished state, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.

"Sec. 43. Whosoever shall unlawfully and maliciously set fire to, or cast away, or in any wise destroy, any ship or vessel, with intent thereby to prejudice any owner or part-owner of such ship or vessel, or of any goods on board the same, or any person that has underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

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These sections make no distinction as to punishment between the destruction of ships by fire and their destruction by other means. To charges framed on each of these sections Marks has pleaded Guilty. Upon a charge framed on the first of them (Sec. 42) Elmstone, Whitwell, and Harriott have been convicted as accessories before the fact to the destruction of the "Aurora." With respect to accessories, Sec. 56 of the same statute enacts that "in the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act puinshable, &c." And here it is important to revert to the Stat. 9 Geo. IV., c. 74, already above mentioned, which was passed expressly with relation to the administration of criminal justice in the East Indies; and (Sec. 1) applied to *all persons* and places, *as well on land as on the high seas*, over whom or which the criminal jurisdiction of any of the Royal Courts erected or to be erected in British India did or should thereafter extend, and the 7th section of which provided that "if any person shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at Common Law, or by virtue of any statute or statutes made *or to be made*, the person so counselling, &c., shall be deemed guilty of felony, and may be indicted as an accessory before the fact to the principal felony," and, further on, provided that "the offence of the person so counselling, procuring, or commanding, howsoever indicted, *may be inquired of, tried, determined, and punished* by any Court which shall have jurisdiction to try the principal felon, *in the same manner as if such offence had been committed at the same place as the principal felony, although such offence may have been committed on the high seas*," &c. This section we have already stated to be in full force, and the result of it, so far as it now calls for notice, is that the offence of Elmstone, Whitwell, and Harriott, as accessories before the fact, may be tried, determined, and punished in the same manner as if that offence had been committed at the same place, namely, on the high seas, where Marks committed the principal offence; and,

inasmuch as persons, who on the high seas are principals or accessories before the fact to the unlawful and malicious destruction of ships, are liable to the punishment prescribed by the Stat. 24 & 25 Vict., c. 97, s. 42, Elmstone, Whitwell, and Harriott are, in our opinion, so liable, as well as Marks, who is also liable under Sec. 43 of the same statute.

For these reasons, we are of opinion that the prisoner Marks is only liable to punishment upon the charges against him, founded upon the English law, to which he has pleaded Guilty; and the prisoners Elmstone, Whitwell, and Harriott are only liable to punishment upon the charge against them, founded upon the English law on which they have been convicted. My brother Bayley, who tried the case, will, previously to passing the sentences on these charges, hear the observations which it has been intimated to us that the prisoners, or their respective counsel on their behalf, desire to make in mitigation of punishment. On all of the charges against the four prisoners, or any of them, founded on the Indian law (*i. e.*, the Acts of the Government of India), on which they stand convicted, we think that judgment should be arrested.

In conclusion, we hope that it may not be deemed presumptuous on our part to say that the Imperial Legislature might, with great advantage to the public, consolidate, and render more clear and easy of access, the present enactments relating to offences committed upon the high seas, and accessories thereto, either on sea or on land. The length of this judgment is in itself a strong testimony to the necessity for such an improvement.

NOTE.—The prisoners Elmstone and Whitwell were sentenced by Mr. Justice Bayley to penal servitude for life; the prisoners Harriott and Marks to penal servitude for fifteen and ten years respectively.