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from a sense of this difficulty that the framers of Bombay Reg. V of 1827 specified hereditary offices as immoveable property, while, in regard to all other such property, they thought that the term "immoveable" would sufficiently explain itself.

What we have to deal with in the present case is an annuity granted by a Hindu sovereign to a Hindu temple. The annuity [337] is not made a charge upon land; and it is not, therefore, according to general principles of construction, immoveable property. That being so, I do not think that we need go further. If the grant had been to a Mahomedan mosque, we should have been forced to decide the question upon the general construction of the term "immoveable;" for there would be no other ground on which we could proceed. And I do not see why we should adopt any other principle, because the grant is to a Hindu temple. That circumstance may render it more probable that the grant was intended to be in perpetuity; but, except to the extent of influencing us in coming to a conclusion as to the intended duration of the grant, I do not think that the circumstance ought to affect our judgment. Indeed, if we are to hold, by reference to Hindu law, that a grant by Hindu Government to a Hindu temple is immoveable property, while a precisely similar grant by a Mahomedan Government to a Mahomedan mosque is moveable property, we must go a step further and hold that every perpetual grant by a sovereign to an individual Hindu is of a different nature and quality from a similar grant to an individual of any other race; for no texts of Hindu law have been shown to us which put grants to temples on any different footing from that of grants to Brahmins, or any other persons. It appears to me that, were we to proceed upon a principle which would conduct us to such a result, we should be acting in direct opposition to the view expressed by the Judicial Committee in *Maharana Fatesangji* v. *Desai Kalianrai*.

For these reasons I am of opinion that the decree of the District Judge should be reversed, and that of the Assistant Judge restored.

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[338] ORIGINAL CRIMINAL—FULL BENCH.

Before Sir Charles Sargent, Kt., Justice, Mr. Justice Melvill and Mr. Justice West.

EMPRESS *v.* S. MOORGA CHETTY. [28th April and 3rd May, 1881.]

Jurisdiction—Receiving and retaining stolen goods within jurisdiction where the theft was committed out of jurisdiction—Indian Penal Code, ss. 410 and 411—Commission to take evidence, power of High Court to grant, on application of prisoner.

The prisoner was tried at Bombay, under s. 411 of the Indian Penal Code, on a charge of having dishonestly received and retained stolen property, knowing or having reason to believe the same to be stolen property. He was also charged under ss. 108 (expl. 3) and 109 with having abetted that offence. It appeared at the trial that the prisoner was a clerk in the employment of a mercantile firm at Port Louis, in the Island of Mauritius. On the 29th October and the 1st November, 1879, certain letters addressed by the firm to their commission agent at Bombay were abstracted from the post office at Port Louis. The letters contained six bills of exchange belonging to the firm for an aggregate amount of Rs. 26,550. On the 1st November, 1879, the prisoner sent all six bills of exchange in a letter to the manager of a bank at Bombay, requesting that the several amounts might be collected on the prisoner's own account, and remitted to him by bills on Mauritius. The sums were accordingly realised by the bank, and duly remitted to the prisoner. It was not denied that the prisoner obtained possession of the money and used it as his own. His defence was that the

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bills had been given to him in payment of a debt. The prisoner was convicted on all the charges, but, the jurisdiction of the Court having been challenged on his behalf, the question was reserved.

Held per SARGENT and MELVILL, JJ., (WEST. J., *dissentiente*) that the bills of exchange having been stolen at Mauritius, in which island the Indian Penal Code is not in force, could not be regarded as "stolen property" within the provisions of s. 410, so as to render the person receiving them at Bombay liable under s. 411; that the High Court of Bombay had, therefore, no jurisdiction, and that the conviction must be quashed.

Previously to the trial at the Sessions, the prisoner had applied to the Court for commissions to Pondicherry and Mauritius to take evidence on his behalf. The application was refused on the ground that the High Court had no authority to issue a commission in such a case, but the learned Judge (West, J.) reserved the question for the full Court.

Held that the High Court had no power to issue a commission out of the jurisdiction in a criminal case on an application by the accused.

[Overruled., 15 Cr. L. J. 207=22 Ind. Cas. 991; F., 19 B. 105 (110); R., 19 B. 72 (76); 30 P. R. 1894 (Cr.).]

UNDER s. 411 of the Indian Penal Code the prisoner was convicted, at the Criminal Sessions held at Bombay in April **[339]** 1881, of dishonestly receiving and retaining stolen property, knowing or having reason to believe the same to be stolen property.

The goods had been stolen at Mauritius, and sent by the prisoner to Bombay.

The learned Judge (West, J.) who presided at the trial, reserved the following points for the decision of the Court:—

1. Whether the property in question having been stolen at Mauritius, in which island the Penal Code is not in force, could be regarded as "stolen property" within the provisions of s. 410 of the Penal Code, so as to render a person receiving it at Bombay liable under s. 411 of the Penal Code.

2. Whether the Court had power, on the application of the prisoner, to grant a commission to Mauritius to take evidence.

The following is the statement of the case made by his Lordship (Mr. Justice West) in reserving the above points of law:—

"The prisoner in this case was charged before me with having dishonestly received and retained stolen property, and with having abetted that offence, committed in consequence of such abetment by a person not himself having a guilty knowledge or intention. The charges related to a group of five bills of exchange and to another single bill of exchange. These were variously laid as the property of Aroona Chellama, late agent in the Mauritius of a firm at Madras consisting of Chukalingam Chetty and others under the title of Venna Moona Ravana Mana, and as the property of the said Chukalingam and the other members of the firm.

"The theft or dishonest misappropriation of the bills of exchange being laid as having occurred at Port Louis in the Mauritius, the jurisdiction of this Court was challenged by prisoner's counsel, on the ground that no offence cognizable by the High Court was set forth as having been committed within the local limits of its authority. The bills alleged to have been dishonestly obtained by the accused had, according to the charges, been by him sent to a bank in Bombay for collection in Bombay from the drawees of the several amounts; but this, it was contended, implied only a possession continuous with that obtained at Port Louis, not any **[340]** new offence within the jurisdiction of the High Court of Bombay. The possession kept by a thief of property stolen by him does not, it was urged, constitute a receiving or retention of stolen property.

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"I determined that the trial should proceed, subject to my reserving the point of jurisdiction, should it become necessary, for decision by a Court of two or more Judges. The jury unanimously found the prisoner guilty on all heads of the charge.

"On the trial it appeared that a letter sent to the post office at Port Louis on the 29th October, 1879, and addressed by Aroona Chellama to a commission agent at Bombay, named Pena Lena Supramanee Chetty, had been abstracted from the post office at Port Louis. A second letter posted on the 1st November, 1879, similarly addressed, was also abstracted. The first letter contained five bills of exchange drawn on persons in Bombay for an aggregate amount of Rs. 16,550; the second contained a bill similarly drawn for Rs. 10,000. Four were drawn at thirty days' and two at sixty days' sight.

"The prisoner was a clerk in the employment of the remitting firm, of which Aroona Chellama was agent. On the 1st November, 1879, he sent all the six bills I have mentioned in a letter to the Manager of the Comptoir d'Escompte in this place, requesting that the several amounts might be collected on the prisoner's own account, and remitted to him by bills on Mauritius. The sums were accordingly realized by Mons. Vouillon, the Manager, and sent to the prisoner. For the defence it was said that the bills had been transferred by Aroona Chellama to the prisoner in payment of a debt. That the prisoner had possessed and used them as his own, was not disputed.

"I thought that property stolen or criminally misappropriated at Port Louis might properly be designated "stolen property," though punishment for stealing it there could not be inflicted by this Court. A person using such property dishonestly within the jurisdiction, and by means of an agent having it at his disposal and under his control was, I thought, subject to punishment for receiving or retaining stolen property. The dishonest retention in fraud of the true owner could not, I thought, [341] merge for jurisdictional purposes in India, in the theft or criminal misappropriation not committed or cognizable in this country. The prisoner's possession being dishonest was itself punishable as such, unless it could be annexed to some cognizable act so as to constitute an offence of a different description, and in this case, though there had been an act of a criminal character (criminal misappropriation) yet as it was not one cognizable by the Court, the dishonest possession could not be annexed to it.

"As to the charges of abetment of receiving and retaining stolen property, I thought that, as the receipt of the bills and the dealing with them by the manager of the bank at Bombay would have constituted receipt of stolen property if he had had the same guilty knowledge and intention as the prisoner, the prisoner, according to ss. 108 and 110 of the Indian Penal Code, was subject to punishment for abetting the receiving of stolen property, though the manager of the bank had, in fact, acted without any guilty knowledge or intention.

"On behalf of the prisoner I was asked, before the trial began, to issue commissions to Pondicherry and Mauritius to take evidence on his behalf. I did not think I had authority to do this, and I rejected the application.

"I have respited sentence on the prisoner, and remanded him to gaol until the determination of the points above set forth, *viz.*—

"(1) As to the jurisdiction of this Court to try the prisoner, and

"(2) As to whether I had authority as to issue commission to take evidence, and, if I had authority, as to what should be the effect of my refusal to exercise it.

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"I request that they may be decided."

Starling, for the prisoner.—I submit that this Court has no jurisdiction to try the prisoner for the offence with which he is charged. It is admitted that he is not an Indian subject, but a native of Mauritius. The question is, whether the offence comes within the provision of s. 411 of the Penal Code. It is necessary that the property received should be stolen property as defined by s. 410. It is alleged that a theft of the property in question was committed, and that, therefore, it comes within the definition. But the theft must be theft contrary to the provisions [342] of the Penal Code and punishable by it, while in this case the alleged theft took place at Mauritius where the Code is not in force: *R.* v. *Debruiel* (1), *R.* v. *Prowes* (2), *R.* v. *Madge* (3), *Reg.* v. *Elmston* (4). The Indian Legislature had no power to affect persons residing out of India by its legislation: 3 and 4 W. IV. Where the Penal Code makes an act done outside the jurisdiction part of an offence punishable by its provisions, it does so in express words: *e.g.*, ss. 121, 125, 126. The doctrine contended for by the prosecution would lead to great confusion. Property obtained by extortion is stolen property according to s. 410, but extortion is not a criminal offence outside of India. So that a man might innocently obtain property in England, which, if he sent it to India, would immediately become "stolen property" and the receiver of it could be made liable under s. 411. In many other ways also the possession of property might be obtained by acts innocent abroad, but criminal within s. 410 and other provisions of the Penal Code. It would thus be necessary for all persons dealing with India, wherever residing, to know and to obey the Indian Penal Code, which would then be practically in force everywhere, and not limited in its operation as directed in s. 2. Counsel referred to *Reg.* v. *Advigadu* (5), Extradition Act XXI of 1872, Act XI of 1872, *Reg.* v. *Thurborn* (6), *Reg.* v. *Preston* (7), *Reg.* v. *Dixon* (8), *Reg.* v. *Christopher* (9).

As to the power of the Court to issue a commission there does not appear to be any authority upon the point. The High Court Criminal Procedure Act (X of 1875) only provides for the issue of a commission within the jurisdiction. See also Act XXI of 1879, s. 19. He also cited *Reg.* v. *Pirtai* (10).

Kirkpatrick, for the Crown.—It must be admitted that, if the Court decides in favour of its jurisdiction, the difficulties that have been suggested may possibly arise; but, on the other hand, if the Court disclaim jurisdiction, much more serious consequences will certainly result. It will be possible for an inhabitant of Bombay to [343] employ agents in the Mauritius or in Native States for the purpose of dishonestly obtaining possession of property belonging to other inhabitants of Bombay by acts which would be criminal according to the Penal Code, but which are not criminal by the imperfect laws of the places where the acts are done. These agents will be at liberty to transmit the property to their employers at Bombay, whom the real owners will be unable to make criminally responsible for their crime.

We contend that the receiving of stolen property is a separate and independent offence. If the act of receiving be committed within the jurisdiction, the case is triable here. No doubt the criminality of that act

(1) 11 Cox 207. (2) 1 Mood. 349. (3) 9 C. & P. 29.
(4) 7 B.H.C.R. 89 (117). (5) 1 M. 171. (6) 1 Denison C. C. 387.
(7) 2 Denison C. C. 353. (8) Dearsley C.C. 580. (9) Bell C. C. 27.
(10) 10 B.H.C.R. 356.

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depends upon whether the property is "stolen property" within the meaning of s. 410 of the Penal Code, but there is nothing in that section which indicates that the dishonest transference of possession which brings property within the class of "stolen property" must take place within any territorial limit. The object of the two ss. 410 and 411 is to punish the dishonest receipt and retaining of property within the jurisdiction. The main element in the offence is the dishonesty. That is not dependent on locality, and s. 410 does not intend to make it so. Conspiracy to commit an illegal act, is triable in the English Courts; although the act, illegal by the English law, may be committed abroad where that law is not in force: *R.* v. *Kohn* (1), *R.* v. *Barnard* (2).

Reg. v. *Elmston* (3) is not in point. There the offence tried was committed outside the jurisdiction; here the offence was within it. The only English case in point is *R.* v. *Debruiel* (4). That was a case tried under Stat. 7 and 8 Geo. IV, c. 29, s. 54. But that section introduces an element of locality into the offence, for it makes the receiving of stolen property a criminal act only when the theft has been a felony "by virtue of this act or at common law," so that, except the theft was committed in a place governed by that statute or by English common law, the English Courts had no jurisdiction. There is direct authority in support of the jurisdiction: *Reg.* v. *Lakhya Govind* (5), *Empress* v. *Shunker Gope* (6). **[344]** In England it has been held that a person who outside the jurisdiction instigates a crime within the jurisdiction, may be tried where the offence in committed: *R.* v. *Johnson* (7). See, also, *per* Campbell, C.J., in *R.* v. *Garrett* (8). [WEST, J., referred to *R.* v. *Brisac* (9).]

As to the power of this Court to issue a commission out of the jurisdiction in a criminal case, that is a power which must be given by the Legislature [*R.* v. *Inhabitants of Upton* (10)] and no Statute or Act has conferred this power upon the High Court (11).

JUDGMENT.

May 3. SARGENT, J.—At the hearing of this reference it was admitted that no authority could be found for granting a commission in a case like the present.

As to the objection that the possession of the bills within the jurisdiction of the High Court was only a possession continuous with that obtained at Port Louis in the Mauritius and did not constitute a new offence within the jurisdiction, it was not insisted on in argument. The remarks of my learned colleague on this point in the reference are, to my mind, quite conclusive as to its invalidity. There being no act of a criminal character of a different nature cognizable by the Court to which the possession could be annexed, it was properly punishable as a substantive offence under the Penal Code if such as to satisfy the conditions of s. 411 of the Penal Code.

The only ground on which the conviction was challenged in argument, was that the bills, having been dishonestly obtained at Port Louis, could not be designated as "stolen property" within the meaning of s. 411 of

(1) 4 F. & F. 69. (2) 4 F. & F. 240. (3) 7 B.H.C.R.Cr.Cas. 89.
(4) 11 Cox 207. (5) 1 B. 50. (6) 6 C. 307.
(7) 7 East 65. (8) Dearsley C.C., at p. 241.
(9) 4 East 164. (10) 10 Q.B. 835.
(11) When the motion for the commission was before the Court, the following authorities and statutes were referred to:—Archbold's Practice (Common Law Division), pp. 316, 317; 3 B. 334; Statute 13 Geo. IV, c. 63, ss. 40, 44; 1 W. IV, c. 22, ss. 1—4; 19 & 20 Vic., c. 113; 22 Vic., c. 20.

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the Penal Code, and that, consequently, no offence was committed cognizable by the High Court. "Stolen property" is thus defined by s. 410: "Property, the possession whereof has been transferred by theft or by extortion or by robbery, and property which has been criminally misappropriated, or in respect of which the offence of criminal [345] breach of trust has been committed, is designated as 'stolen property.'" It was contended for the prisoner that the theft, robbery, criminal misappropriation and criminal breach of trust, referred to in this section, must be construed to mean the *offences* of theft, robbery, criminal misappropriation and criminal breach of trust respectively, and that as an 'offence' is defined by s. 40 to denote "a thing made punishable by this Code," except, indeed, in chapter iv and the sections mentioned in cls. 2 and 3 of the section (in which s. 411 is not included), the circumstances under which the prisoner became possessed of these bills in the Mauritius did not give them the character of "stolen property" within the meaning of s. 411. On the other hand, it was contended for the prosecution that, as the definition of "stolen property" does not contain any territorial term, it is immaterial where the act occurred, provided it falls within the definition of theft, or of robbery, or of criminal misappropriation, or criminal breach of trust. The case of *Reg.* v. *Lakhya Govind* (1) was relied on in support of that contention. In that case the prisoner was charged with dacoity committed in the territory of His Highness the Gaikawar; the Session Judge considered that the circumstance of the stolen property being found in the Surat District gave his Court jurisdiction. On appeal, the Court, consisting of our learned colleagues, Mr. Justice West and Mr. Justice Nanabhai, quashed the conviction of dacoity, being of opinion that s. 67 of the Criminal Procedure Code did not apply, and that the offence was completed at Velanpur. They altered, however, the charge to one of retaining stolen property known to have been obtained by dacoity, and upheld the sentence. In the case of *Empress* v. *Shunker Gope* (2) the High Court of Calcutta, consisting of Garth, C.J., and Maclean, J., expressed their opinion on a reference under s. 296 of the Criminal Procedure Code, on which it is stated in the report there was no argument, that the facts were similar to those of *Reg.* v. *Lakhya Govind* (1), and sustained the conviction on the authority of that case. On neither of those occasions had the Court the advantage of hearing argument.

[346] The question has now been fully argued before us; and, much as I regret the practical inconvenience which may doubtless arise from an opposite decision (at least until it can be remedied by legislation), I feel myself unable to adopt the view of the law which was acted upon in the above cases. It is stated in the judgment in the case of *Reg.* v. *Lakhya Govind* (1) that the legal character of the retaining depended on circumstances, the definition of which does not involve a territorial term. This, I apprehend, having regard to ss. 40 and 7 of the Code, must depend upon whether the terms "theft, extortion, robbery, &c.," in s. 410 mean the several 'offences' of theft, extortion, robbery, &c., under the Code, or only the particular circumstances independent of locality which go to make up the definitions of those several terms. Now, chap. 17 of the Penal Code is headed "Of offences against property," meaning, of course, to imply that the chapter treats of those offences. Similarly the chapter contains numerous sections with the respective headings "Of theft," "Of extortion,"

(1) 1 B. 50. (2) 6 C. 307.

showing that the terms are used to denote the several offences of the nature described in the heading of the chapter. If that be so, why in s. 410, which treats of the offence of receiving "stolen property," are we to put a different meaning upon the terms "theft, extortion, robbery, &c.," from that which they have clearly had in all the previous sections of that chapter? Ought we not, when so much depended upon the accurate use of terms, to give the draftsman credit for having, in the absence of the expression of a contrary intention, intended to use terms in one and the same sense throughout the chapter. This view also derives confirmation from the language of the section itself, for we find "*the offence* of criminal breach of trust" mentioned as the last illustration of the manner in which the property may have been dealt with so as to constitute it "stolen property." Indeed, it is obvious, I think, that as the language does not contain any verb denoting the act of breach of trust, as the verb "misappropriate" denotes the act of misappropriation, the draftsman made use of a periphrasis to explain what would have been expressed by a verb if there had been a comprehensive verb at his disposal. There is no reason to suppose that the word "offence" was introduced [347] in the case of "criminal breach of trust" expressly to mark a distinction between that and previous illustrations.

Lastly, the structure of the entire Code shows that the framers of it had in their contemplation only those acts which are made punishable by this Code itself. But it may be said that the gist of the offence contemplated by s. 411 is the dishonest intention and knowledge that the property has been dishonestly taken out of the possession of the lawful owner, and that it may be presumed to have been the intention of the Legislature to treat the receiving and retaining of property accompanied by such knowledge as an offence quite independently of the question as to where the act was committed by which the property was so transferred from the possession of the legal owner. This I am unable to admit. The presumption in construing a Penal Code which by s. 2 is confined to acts and omissions within the territories of British India, would rather be, that an offence, such as receiving and retaining stolen property which is in its very nature accessory to the principal act, should be confined to those acts which are made criminal by the Code itself. This question presented itself in England in 1861 under the Act of 7 and 8 Geo. IV, c. 29, in the case of *R.* v. *Debruiel* (1). At the trial of that case the question arose as to whether the prisoner could be convicted of stealing goods in Guernsey, or of receiving stolen goods, having bought the goods in England. Byles, J., after consulting Channel, B., and after deciding that a larceny in Guernsey could not be taken notice of any more than a larceny in France, said: "Nor could the prisoner be convicted of receiving, because that crime consisted in the guilty receipt of stolen goods; that is to say, goods stolen according to the law of England, and that law does not recognize a stealing in a foreign country as a crime which it will punish." But it was said that the Act of Parliament then in force making the receiving stolen goods criminal, speaks of goods, "the stealing, taking, extorting, obtaining, embezzling or otherwise dispossessing whereof shall amount to a felony;" thereby, it was said, clearly pointing to an act cognizable by English law. But the words "amount to a felony" is only a mode of describing [348] the nature of the offence contemplated by the Act, and afford no stronger argument in support of limiting the goods stolen to goods

(1) 11 Cox 207.

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stolen according to the law of England, than the terms theft, extortion, robbery, &c. (which by the Penal Code are the names given to certain offences under that Code), afford in favour of the limitation contended for on behalf of the prisoner. Mr. Justice Byles' inference—that the goods stolen must be goods stolen according to the law of England, by which I understand him as meaning that this was necessary in order to constitute an offence in England—would appear to have been the result of general considerations.

It has been said, however, that the construction contended for by the prosecution is demanded by an enlightened view of criminal jurisprudence as well as by the great practical inconvenience which under the special circumstances of this country will result from a more limited construction of the section. I fully admit the force of this argument, but it is one of which, in my opinion, the Court cannot take notice when the proper construction of the Act upon the language of the Act itself is as entirely free from doubt as I deem it to be in the present case. To give effect to it would be to travel out of the legitimate province of judicial construction. The proper remedy for such defect as there may be, is in fresh legislation. I wish, however, to add that such legislation will require careful consideration. Theft, extortion, robbery, criminal misappropriation and criminal breach of trust are all technical offences, the definitions of which vary very differently in different countries. It is, indeed, only within the last twenty years that breach of trust has been made under certain circumstances a criminal offence in England. If s. 411 be construed as broadly as is contended for by the prosecution, a foreigner might be convicted here of retaining goods, although in his native country he would not have been criminally liable for getting them into his possession.

For the reasons I have given, I am of opinion that this Court had no jurisdiction to try the prisoner, and that the conviction must, therefore, be quashed.

[349] MELVILL, J.—I am of the same opinion.

The Penal Code (s. 40) defines the word "offence" as "a thing made punishable by this Code." The meaning of the term has been somewhat enlarged by subsequent legislation, but for our present purpose we may confine ourselves to the original definition. Having thus defined the word, and having distinctly declared (s. 7) that it is used in every part of the Code in the sense stated in the definition, and in no other sense, the Code proceeds to classify criminal acts under different chapters, which are headed "Of offences against the State," "Of offences relating to the Army and Navy," and so on. Each act constituting an offence is defined, a name is given to it, and its punishment is provided for. Having regard to the whole structure of the Penal Code as thus described, it seems to me clear that the Code only affects to deal with criminal acts, in so far as they are offences, or things punishable by the Code. It restricts itself carefully within its own province; not defining, nor even giving a name to criminal acts committed by persons for whose punishment it is unable to provide. "Whoever" does a certain act "is said to commit theft." "Whoever commits theft shall be punished" with a certain punishment. Every person, therefore, who is said to commit theft is punishable under the Code. It follows that a person who is not punishable under the Code is not even said to commit theft.

Chapter XVII is headed "Of offences against property." Sections 378 to 409 define and provide punishment for five such offences which

the Code chooses to designate as "theft," "extortion," "robbery," "criminal misappropriation," and "criminal breach of trust." Then comes the section (s. 410) with which we have now specially to deal, and which is as follows: "Property, the possession whereof has been transferred by theft or by extortion, or by robbery, and property which has been criminally misappropriated, or in respect of which the offence of criminal breach of trust has been committed, is designated as stolen property." Even if the word "offence" had not been used in this section, I should still hold that we should be disturbing the whole harmony of the Code if we were to attach to the words "theft," "extortion," &c., in s. 410 a different signification from that which they bear in the sections immediately preceding. In those sections [350] the terms are confined to offences against the Code. It would, as it seems to me, be illogical to suppose that in s. 410 the same terms are extended to acts, which, though of a similar character, are not punishable under the Code.

There would probably have been no doubt about this question, if the framers of the Penal Code had not seen fit to adopt such familiar terms as "theft," "robbery," and "extortion." Supposing that five persons were to commit in England what is commonly called a robbery, and that the property so acquired were to find its way to India, one would certainly feel great difficulty in holding that the receiver could be convicted, under s. 412, of receiving property stolen in the commission of a dacoity. The idea of describing a crime committed in London as a dacoity would present itself to the mind as an absurdity. But when such a popular word as "theft" is used, the mind naturally, perhaps, but illogically, is inclined in a precisely opposite direction, and its first idea is that it is an absurdity to say that theft is not theft all the world over. Every one fancies that he knows what theft is. In point of fact every one does not know it, for I remember having had the greatest difficulty in making a Bombay jury understand that a person who had received a bracelet as a gift from a married woman had been guilty of theft from her husband. But no doubt the popular understanding of the word "theft" is, in general, sufficiently correct; and when any one is told that the legal definition of "stolen property" is that it is property, the possession of which has been transferred by theft, his natural impulse is to say that property purloined by a foreigner in a foreign country is just as much stolen property as if the theft had been committed in India. The fallacy seems to me to lie in using the word "theft" in its popular, and not in its legal sense, and in forgetting that it is, so to speak, a mere accident that the Indian Legislature has employed the common expression "theft," when it might have revived the obsolete word "latrociny," or used any other unfamiliar term, whereby to designate a certain criminal act. The truth is—and the whole matter is summed up in this—that the words "theft," "robbery," "extortion," and so on, as used in the Penal Code, must be regarded as purely technical terms, peculiar to Indian criminal law; and, therefore, it would be just as [351] incorrect to say that property dishonestly obtained by a foreigner abroad had been acquired by theft, as to say that it had been obtained by dacoity or thuggee.

I am decidedly of opinion that property is not stolen property within the meaning of s. 410, unless the act by which it has been acquired has been committed either in British India or elsewhere by a person who is liable to be tried in British India for offences committed elsewhere (Act XXI of 1879, s. 9).

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WEST, J. —The question in this case of whether there was a dishonest receipt or retention of stolen property, resolves itself practically into one of whether "stolen" is a word properly applicable to property dishonestly taken from its owner out of India. To unprofessional persons it must seem strange that a doubt can be entertained as to whether stealing is possible beyond the limits of British India: unpleasant experience has satisfied many of them that a thing is possible in other countries to which they can assign no other name. In the Indian Penal Code, s. 410, however, it is said that "property, the possession whereof has been transferred by theft or by extortion, or by robbery, and property which has been criminally misappropriated, or in respect to which the offence of criminal breach of trust has been committed, is designated as stolen property." The part of the definition "in respect of which the offence of criminal breach of trust has been committed" is one, it is said, which, as it includes the word "offence," can be satisfied only when the breach has been committed in India. In s. 40 it is said that "offence denotes a thing made punishable by this Code." Under s. 2 a person is generally "liable to punishment, under this Code, for every act contrary to the provisions thereof, of which he shall be guilty within the said territories" (*i.e.*, British India). For anything done outside those territories a person is not generally liable to punishment under the Code. He has, therefore, it is said, committed no offence. Criminal breach of trust outside British India is not an offence at all. If it has been committed with regard to any property therefore, such property does not thereby become "stolen property." The word offence is not joined, in the description of stolen property, to [352] the words "theft," "extortion" and "robbery;" but as it is annexed to "criminal breach of trust," the inference is that it is to be understood with the other designations of crime also. By "theft," for instance, must be understood the "offence of theft," by the "offence of theft" theft punishable under the Code though having been committed in British India. If property has been appropriated (let us say) elsewhere by a person not its owner, there has, consequently, been no theft, because there is no punishment prescribed for the transaction by the Indian Code; and, as there has been no theft, there can in such a case be nothing to be "designated stolen property."

This is a rather long and subtle chain of deduction, it may be said, by which to free some men from penal liability for acts absolutely identical in their moral character with those for which other men are imprisoned and transported. But, even in the absence of the word "offence" in s. 410 at a place where it could not well be avoided without a certain awkwardness of expression, I should not have felt any doubt that by "theft" was meant the "offence of theft," and by "robbery" the "offence of robbery." "Theft" and "robbery" are words defined in the Code, and must be supposed to be used everywhere in the sense assigned to them (1). If the possession of property has been transferred by a theft which is not an offence, that property is not "designated stolen property."

The use, however, of the word "theft," into which I have thus casually fallen, shows that the conception of that crime is really satisfied by facts which may take place anywhere, and that, therefore, in itself it is independent of locality. So also in the case of robbery or criminal misappropriation. The definitions given of these offences,

(1) Penal Code, s. 7.

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(as I will provisionally call them), in the Penal Code agree, as in a penal law they ought to agree, at least generally, with the popular conception. "Theft" is a moving of property with a view to take it dishonestly from its possessor; robbery is theft effected by violence. Such definitions can be satisfied anywhere where human beings exist with property of which one can deprive another. There are, on the other hand, [353] cases in which locality is included in the definition. Kidnapping from British India is a crime that can be perpetrated only on a person in British India. In such cases the specification of place is essential to the complete statement of the crime; in other cases it seems necessary only to show that the act imputed as an offence falls within the legislative authority and the jurisdiction which have to be applied to it. The act or conduct itself is the same wherever it takes place; the locality is important only because the Government of one country does not and cannot deal with crimes confined to another, however well their character may be recognized. Wherever, then, the mention of a particular place enters necessarily into the definition of anything as punishable under the Indian Penal Code, there is no offence if the thing has been done at a place not included in the definition; where no place is mentioned in the definition, place is not an essential constituent of the offence as an offence—a thing of which pœnality may be predicated, but conceivable apart from that pœnality. That is, locality is a separable accident which may be present or absent without effect on the substance of the thing defined.

"Offence," it is said, denotes "a thing made punishable by this Code;" that is, offence is a name by which such a thing is called; and then such things are set forth. They are punishable so far as a thing is punishable at all; a previous rule had determined who, as to person and place, were to be subject to penalties. If verbal criticism is to have a preponderating influence, I may observe that there is an inaccuracy in s. 40. "A thing", meaning an act or omission, is not susceptible of punishment. What is meant is "a thing for which he who is guilty of it is punishable." It had been provided already in ss. 2, 3 and 4, what persons in what places acting contrary to the Code might be punished under it. What remained was to define the acts themselves. They are the things which make the person punishable—"things" determined by themselves as having the particular attribute, and thus fulfilling one, not all, of the three requisites as to person, place, and quality of the act done. It is obvious, indeed, that an "act or omission" having no corporeal existence has really no locality, fills no place in space, but is merely a movement or abstinence from movement [354] of one who does fill such a place. Locality is, therefore, rightly connected in the Code with the person and the general conditions of possible responsibility. These being ascertained, the definitions or descriptions follow of the acts and omissions themselves, abstracted generally from time and place (and indeed from personality also), which in each case induce punishableness. These are offences, though a personal or local condition of liability may be wanting(1),

(1) The true relations of the several ideas may be presented in this way. The subject-matter of the Indian Penal Code is crimes and the punishment of those who commit crimes—

Cognizable Crime = { an act or omission contrary to the provisions of the Code = Quality of act = Offence + on the part of a person responsible = Personality + in British India (generally) = Locality.

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Thus a theft by a child of eleven and of immature understanding is declared not to be an offence in the child. It is not in him punishable and not an offence. But suppose the property taken is received by the child's father, is there no receipt of stolen property on his part? My learned brothers must say no, because theft means the offence of theft, and hence there is no offence. I, on the other hand, think that the father would be liable for an act contrary to the provisions of the Code, an act generally penal, and penal in him, because as an act the stealing was contrary to the provisions of the Code, and as an act his receipt of the property was contrary to its provisions as connected with the previous act, albeit that previous act in the particular instance could not be punished. Offence denoting a thing made punishable, the non-penality of the child's act is indicated by saying *it is not an offence in him*. This is a personal exception. It is as a child that the child is not subject to punishment. The act itself retains its character as an offence, because made in the abstract "punishable," and, being so, *it gives a penal character to the dishonest* receipt of the property by the father.

All, then, I think that the word "offence" connotes, is an attribute of punishableness belonging to the act inducing a liability of the person who does it whenever such person is in himself a proper subject of punishment under our laws. Exceptional non-pœnality in particular instances does not exclude the crime from this category, or make some connected act innocent [355] which would otherwise be penal. The definitions in each case enumerate all the elements of "the thing"—that is, the act—which *qua* act subjects to punishment, and is, therefore, called an offence. When they are realized, an offence is constituted. There may thus be an offence—that is, an act—in itself of a class to which the Code assigns punishment, though, from the fact of its having been committed abroad, a condition may intervene which in the particular instance intercepts the punishment.

This view of what is the real comprehension of the term "offence" is illustrated by the case of *Reg.* v. *Chill* (1). In that case the prisoner was charged with wrongul confinement and compelling labour in the territory of Tonk. Nothing had been done within British India; yet the learned Judge, Sir Charles Sargent, says: "The charge against the prisoner alleges an act which was undoubtedly an offence under the Penal Code." The alleged act answered to a description, and so came within a class punishable under the Penal Code; but, having been done in foreign territory, it was not in the particular instance subject to punishment under the Code. If the place, therefore, were part of the "thing" intended by s. 40, there would have been no offence; but, taking "thing" to mean the act consisting in its physical and moral ingredients apart from mere local circumstances, there was an offence. "Offence" is thus a compendious expression for an "act or omission contrary to the provisions" of the Code, which, according to s. 2, must be punished under the Code when committed within the British territories in India. By the Statute 33 Geo. III, c. 52, European British subjects are made amenable to Courts of Justice for offences in Native States in the same manner as if they had been committed within the British frontier, but this does not say what are "offences" on the part of such persons. Their misdeeds are not things made punishable by the Penal Code, if locality is of the essence of such things. The Code, however, really provides for their punishment in so far as they are acts of

(1) 8 B H.C.R. Cr. Ca. 92.

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particular types; the statute says that the usual, but not essential, condition of place shall in part be dispensed with. So, in the charter of the late Supreme Court, jurisdiction was given to try crimes and [356] misdemeanours committed in Native States. What was the test of such a crime or misdemeanour? Simply the liability to punishment of the act, as an act, under the law prevailing in Bombay,—not its liability to punishment in the particular instance, which could not be assumed without begging the question. Thus the character of the act itself as an offence is distinguished from the capacity of our Courts to punish for it, and punishableness in one state of local circumstances is declared to be predicable of it when it is found to be predicable in another. "This Court" Sir Charles Sargent says, "has criminal jurisdiction in respect of all acts committed by British subjects in Native States which *would be* offences if committed in British territories." What the charter says is "crimes .....misdemeanours,.....&c.," not acts which *would be* crimes, misdemeanours, &c., if committed within the jurisdiction. The identity of the two classes of acts (those which *are* crimes and those which *would be* crimes) implies that an act may by the law of a country be regarded as of a particular criminal description even when committed abroad and at a place where the description or designation assigned to it could have no legal force. "It might not," the learned Judge says, "be an offence in Tonk, but that is immaterial." Having the characteristics of an offence in British India, it is an offence in British India, though wanting the local circumstances which would be necessary to make it punishable here, but for the special provisions of the statute and the charter which bear upon it when, but only when, it is otherwise an offence.

If it be said that the true sense of the statute is simply "that which is an offence in British India shall be deemed an offence if committed in a Native State," there is an express drawing of criminal acts committed abroad within the Penal Code. But this attribution of criminality to acts apart from, or even in opposition to, the local law shows that, in the opinion of the Legislature, foreign standards of pœnality may properly be discarded where there has been an injury to society which the law of India esteems a crime, and such crime is the subject of trial in a British Indian Court of Justice (1). This goes much further than saying that stolen property is stolen property in the hands of the [357] receiver, even though it may not have been stolen in India. If our Legislature can make that an offence which locally is no offence, much more can it recognize that theft and fraud are crimes which the commonsense of mankind condemns and punishes (2). We cannot suppose that theft is approved by the law of any civilized community, and there is, consequently, no fear that in punishing for the dishonest receipt of property stolen abroad we shall be checking any beneficial commerce, or pronouncing any act culpable which in its own country is approved. In the case of an act committed abroad, which was innocent in the country where it was done, I should think the principle ought to be applied which is stated by Cockburn, C.J., in *Phillips* v. *Eyre* (3) that "an act authorized by the law of the country in which it takes place, cannot be subject of a legal proceeding here." "Such is the conclusion of the French law on that point (4) and also that

(1) Comp. Stat. 18 & 19 Vic. c. 42, sec. 4.
(2) Story's Confl. of Laws, secs. 637, 637*a*.
(3) L.R. 4 Q.B. 225. See Story's Confl. of Laws, sec. 18.
(4) Ortolan Op. Cit. secs. 907, 918.

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of North Germany (1). But in every case it rests on the accused to plead and prove the justification which legally excused him at the place where he acted. It is not for the prosecution to prove that murder charged under s. 9 of 24 and 25 Vic, c. 100 is murder by the law of the place where the homicide was committed (2).

The generally territorial character of the Indian law however, in its active and punitive character cannot be questioned (3). An Indian Court cannot punish a foreigner for an act committed wholly abroad. This was the ground of the decision in *Reg.* v. *Pirtai* (4) in which the prisoner may not have contemplated that anything would be done in British territory. But when going beyond this it is urged that an act of a criminal nature itself committed in British India is not justiciable here because a preliminary act, on the criminal character of which the one in question depends, may not itself have been justiciable here, I cannot see that the argument is **[358]** founded on reason. An act having been done here which in itself our law condemns, I cannot see that it is less criminal or less within the condemnation, because a particular preparatory act, which also our law condemns, may have been done in a place to which our law does not extend. We could not deal with that preparatory act because it was done beyond the jurisdiction, but we may test its character by our own law when that becomes essential for determining by our own law the character of the subsequent act which was committed within the legal jurisdiction. It may be that an act is quite justifiable where it is begun, but being continuous or connected with one which is an offence, the whole transaction has to be looked at together. In *Reg* v. *Lesley* (5) if the prosecutors had gone on board the British ship voluntarily it would have been no crime to keep them there throughout the voyage. The Chilian Government put them on board, and so far its will was as good a justification as their own assent; yet as that assent failed, the taking of them on board, though no offence locally, was connected with the subsequent keeping them on board so as to subject the captain to punishment by the English law. The constituents of a crime are its physical nature and the intention of its perpetrator, and neither of these is varied by the circumstance that some preliminary step was taken without, not within a particular jurisdiction. Applying this principle to the construction of s. 410 of the Code, I think the words "property in respect of which the offence of breach of trust has been committed" ought to be construed "property...in respect of which an act defined as breach of trust, and, therefore, belonging to the punishable class, has been committed," rather than "property in respect of which a particular act of criminal breach of trust punishable on account of its locality in India has been committed." It is the character of the act by which the property was obtained that is morally important, not the particular place where it was done. The place of the receipt or retention of the property is essential, not to its moral character, but to its justiciability in the particular jurisdiction.

Whoever "fabricates false evidence" commits an offence designated accordingly, and punishable, if committed in British India, **[359]** under s. 193 of the Penal Code. Now by s. 196 whoever uses as genuine evidence

(1) Art. IV, sec. 3, of North German Penal Code, 1870,
(2) *Per* Cockburn, C.J., in *Phillips* v. *Eyre*, L.R. 4 Q.B. at p. 234.
(3) Story's Confl. of Laws, sec. 23.
(4) 10 B. H. C. R. 356; so in Bulwer's Case, 7 Rep, 50 (Thomas and Fraser's ed., Vol. IV, p. 49)
(5) 29 L.J. M.C. 97.

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which he knows to be fabricated, is punishable as if he had fabricated it. But the fabrication out of British India is not punishable under the Code. It is not then an offence. But "fabricated" means so fabricated as to constitute an offence. Evidence fabricated out of British India, consequently, is not "fabricated" in the sense of s. 196, and a person who uses such evidence, however corruptly, is not subject to punishment for it. He, in fact, commits no offence. In ordinary cases he would be liable to transportation for using such fabricated evidence to procure a capital conviction, but if the evidence has been fabricated on the other side of the frontier, he goes scot free. So, too, in the case of false evidence taken on commission in a Native State. It may be knowingly and corruptly used with impunity, because the giving of it not being punishable in British India it is not an offence, and "false evidence" means only that which is locally as well as morally and intellectually an offence under the Indian Penal Code. Such are the consequences to which the judgments just delivered seem to me to lead. In other instances the consequences would be almost too dangerous to mention. I cannot think that such results were intended by the Legislature, or that it intended anything from which such results logically follow(1). It meant, I think, that when a crime had been committed in British India, those preliminary facts which went to make it a crime were to be tested by the Indian Penal Code, though not themselves within the scope of its direct operation.

These views prevailed in the case of the Velanpur dacoity case(2), and of the case at Calcutta in which it was recently followed (3). They are, I think, sufficiently founded on reason to warrant our adhering to them. From the point of view of the public interest I think it highly desirable that Bombay should not become an Alsatia of swindlers, making it a rogues' exchange for mercantile documents obtained by theft or fraud in all parts of the East. If the receipt or retention, in our territory, of property stolen on the other side of our frontier is not an offence, neither can we call it [360] an offence in any sense when robbers from our side find free reception for themselves and their plunder on the other side of the frontier. With such encouragements, dacoity is likely to flourish, and the frontier districts to become uninhabitable.

It has been said that the Legislature might and ought to interfere. It would seem that it must interfere, but I have not from experience learned any great confidence in occasional legislation. It is apt to create as grave difficulties as it removes. And as the proposed legislation would, it is admitted, be wise and beneficent, I am disposed to think that there possibly were wisdom and beneficence in the legislation we have to deal with, and to construe its creations so as to make them the best embodiment we can of these high qualities. Such cases as the one now before us could hardly have been quite overlooked even had the Penal Code been framed from the materials afforded by the English law. They were advisedly left, I think, to the operation of general principles, because the cases available afforded an insufficient ground for detailed legislation.

One of the general principles governing criminal jurisdiction is, that when a criminal transaction consists of a series of acts committed in different countries, each of these countries has jurisdiction of the acts committed within its own borders, which, taken in connexion with the rest,

(1) Comp. Abbot, C.J. *R.* v. *Burdett*, 4 B. & Ald. at p. 171. (2) 1 B. 50.
(3) 6 C. 307. Comp. Bulwer's Case, 7 Rep. 2a (Thomas & Fraser's ed., Vol. IV: p. 52.)

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amount to an offence according to its own law (1). If this were not the case, a set of confederates by dispersing their operations over several countries might escape punishment altogether. Another general principle is that an infraction of the criminal law of a state intra-territorially effected, but directed *ab extra*, makes the director, the moral author of the crime, amenable to the tribunals of the country whose law has been violated whenever he comes within the jurisdiction(2). This is the principle involved in the *dictum* of Lord Campbell in *R.* v. *Garrett*(3); and in *R.* v. *Brisac*(4)and *R.* v. *Johnson*(5) as in many other cases it was recognized that mere bodily absence does not free a man, according to the English law, from criminal responsibility for [361] acts which are done on his prompting within the jurisdiction(6). Now in the present case the mere misappropriation of the bills of exchange at Port Louis would of itself have been a trivial and ineffectual act had nothing more been done. Had they been passively retained they could have been replaced by the second or third of exchange, and the loss to the owner would have been immaterial. They were bills at thirty and sixty days' sight. It was the presentation and realization of them in Bombay which made the chief part of the prisoner's guilt(7). Is it to be said that he could thus carry out his crime with impunity, because the initial step had been taken elsewhere? According to the English doctrine of larceny, since the legal, as distinguished from the physical, possession(8) would not be destroyed by a theft, that possession continuing and continually violated by the prisoner, would make him punishable for the principal offence in his jurisdiction(9), and also for the abetment of a dishonest receipt as for such receipt itself. He employed a perfectly innocent agent. Even had the agent been a guilty one that would not have freed the prisoner from penal culpability; but the agent having been innocent, the employer is, on general principles, responsible as if he had done the act himself(10). According to the Penal Code, he is responsible as for the principal offence in his character of an abettor; just as if the agent had been guilty. I mean he is responsible if any responsibility is to be recognized at all. If not, then any unprincipled sharper may set himself up in Bombay as an agent for negotiating and realizing bills of exchange stolen anywhere else but in British India.

A possible objection to the application of such general principles as I have pointed to as necessary to a truly remedial working of the Penal Code, is answered, as I think, by the fact that both India and the Mauritius are dependencies of the same empire. The exercise of international penal jurisdiction rests on principles which stand behind the ordinary municipal law. These principles have been touched on by Grotius(11) and Locke(12), who find general [362] authority to suppress crimes as an injury to human society at large, checked only by the necessities of separate national existence. Barbeyrac adopts the views of Locke(13). On the Continent of Europe the right of a state to punish crimes directed from without its

(1) See Wharton's Conflict of Laws, 922, 924 sec. 930 and the authorities.
(2) Op. Cit. secs. 876, 877. (3) Dearsley's C. C. 232.
(4) 4 East 164. (5) 7 East 65.
(6) 1 Hale P.C. 514, 516. Fort. C.L. 349. Story's Confl. of Laws, sec. 625 B & 625 C.
(7) Comp. *Reg.* v. *Taylor*, B. & P. 596. (8) See 16 Vin. Abr. 454, 459.
(9) See Hawkins P. C. ch. 33, sec. 9.
(10) See *Reg.* v. *Butcher*, Bell. C.C.6. (11) See De Jure B. et P. Lib II, ch. xx. 5.
(12) Civil Gov., Bk, II, Sec. 7.
(13) Note to Puff. Bk. VIII, c. iii. Wharton Op. Cit., sec. 87.

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borders seems to be now universally recognized(1). Where the crime has been wholly perpetrated abroad, there is great reserve in dealing with it, and only serious offences are noticed. This, however, arises, not from a lack of moral right, but from fear of stirring up jealousies. Amongst subjects of the same crown these should not exist. There should be no fear of wounding provincial susceptibilities by the exercise of a jurisdiction really wholesome and protective to the colony where the original offence was committed; and the dominant country is ready to correct any aberration should we give a too extended operation to our Indian Codes. I think that in taking cognizance of cases like the present we are doing only what would long ago have been done in England itself, but for the peculiar history of the criminal law there. The European Codes, to the number of twenty and upwards, framed in accordance with modern ideas, reject the notion of the strictly territorial character of crimes. In America one state recognizes or may recognize a theft committed in another, or even in Canada(2), for the purpose of dealing with a case of receiving stolen property. It is clear, then, I think, that no complaint would be made—gratitude rather would be felt—by the community of the Mauritius if in construing our Penal Code we were so daring as to hold that property stolen at Port Louis may be designated "stolen property."

Several English cases have been cited in argument which show very well the embarrassments from time to time occasioned by the remnants of the old jurisprudence which still cling to the new. The framers of the Indian Penal Code regarding the English system as "artificial," "complicated," "framed without the slightest reference to India," and very "defective," declined to make it more than any local system the ground-work of the Code. Cases decided in England, therefore, must be received in India [363] with a careful allowance for the great difference of the law in the two countries. By the common law a felony could be tried only in the county where the act had been done. The different counties stood to each other like different countries. This was carried so far that if a felony begun in one county, was completed in another, the felon could not be tried in either(3). This, of course, could not last, though the expedients resorted to, showed the reluctance with which any old rule was departed from (4). Larceny could be tried wherever the goods had been conveyed, because the legal possession of the owner continuing, there was a continuing offence, though robbery being momentary could be tried only where the violence had occurred (5). Offences on the sea were next made triable on land according to the common law(6), though by a special Court. In the reign of George III, thefts in Scotland were made cognizable in England if the property was brought there. Finally, under statutes of George IV (7) and Her present Majesty a thief in any part of the kingdom may be tried in any other where he has the property, and any person having such property feloniously taken may be tried as if it had been stolen where he has it (8). The question of felonious or not, has to be determined by English law, though the taking was in Scotland.

(1) Ortolan's Elements du Droit Penal, S. 884, Secs. 900—917.
(2) Wharton Op. Cit., s. 932.
(3) Com. Dig. Action (N. 9), Lord Hale cited by Abbott, C.J., in *R.* v. *Burdett*, 4 B. & Ald., p. 177.
(4) See Stat. 25 Hen. VIII, c. 3; 2 & 3 Ed. VI, c. 24, 5 & 6 Ed. VI, c. 10; 2 East's Pleas of Cr. 773; *R.* v. *Burdett*, 4 B. & Ald. at p. 172.
(5) Bulwer's Case, 7 Rep. (Thomas & Fraser's ed. Vol. IV, p. 49).
(6) 28 Hen. VIII, c. 15; 39 Geo. III, c. 37. (7) 13 Geo. III, c. 31, s. 4.
(8) 7 & 8 Geo. IV, c. 29, s. 76; 24 & 25 Vic., c. 96, s. 114.

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But, again, cases had to be provided for of offences partly within and partly without the kingdom. On the Statute 3, Jac. I, c, 4, it was held that the words "wherein such offence shall be committed" ought in such cases to be construed "where part of the offence is committed(1). For *sic interpretandum est ut verba accipiantur cum effectu.*" This is the principle of the statutes as to homicide committed partly within and partly without the kingdom (2), The English law is made the standard of guilt, though the act was **[364]** committed abroad. So also in 24 and 25 Vic, c. 94, ss. 1, 7, 9, an accessory to a felony committed out of the kingdom is subjected as to all the elements of his offence, to the law that prevails within it.

Formerly the receiving of stolen property was in England a bare misdemeanour. A misdemeanour was triable where any one of several acts constituting it had been done (3), land thus receiving could be dealt with wherever the accused had had the goods and was in custody(4). But receivers having in the time of William and Mary(5) been made accessories after the fact, the misdemeanour was held to be merged in the felony (6). The accessory could not be tried except with or after the principal felony. This necessitated fresh legislation ; and in the reign of Queen Anne it was enacted that as for a misdemeanour the receivers might be prosecuted apart from the thief, but only, as Mr. Justice Foster says(7), when the thief was not amenable to justice. Difficulties still arose through this limitation, and it was removed by Statute 22 Geo.III, c. 55 (8).

An accessory could be tried for felony under the common law only where the act of abetment, &c., had occurred (9). By modern legislation he has been made triable, as we have seen, where the principal offender could be tried; but the character of the offence of receiving having till quite recently been regarded as simply accessory to the principal offence, the doctrine naturally prevailed that when the principal offence was not cognizable, neither was the accessory offence(10). This, indeed, followed from the wording of the commission of oyer and terminer. A receiver may now be indicted either as an accessory after the fact, or for a substantive felony if the stealing amounts to a felony(11). Felony, it was said **[365]** in argument, being a term defined only by English law, and applicable, therefore, only to acts committed in the United Kingdom, implied necessarily a stealing, &c., within the kingdom. Hence a receiving of property stolen abroad could not be punishable under the section, because such stealing could not be felony. This would account for the decisions under the statutes of George IV almost identical in language with the more recent ones. This may be so ; but the continuity of doctrine in the English Courts would cause the old ideas, to which I have referred, to operate long after the state of things in which they originated had materially changed. Felony no doubt denotes something peculiar to England and Ireland, implying a penalty common to a variable group of acts like "offence" under the Indian Penal Code. It is a thing which, if done in

(1) 3 Inst. 80. (2) 2 Geo. II, c. 21 ; 24 & 25, Vic., c. 100 and ss. 9 & 10.
(3) *Per* Abbott, C.J. in *R.* v. *Burdett*, 4 B & Ald. at p. 175.
(4) Dig. Action (N.9.) (5) 3 & 4 Wm., c. 4, s. 4.
(6) 12 East's Pleas of Cr., 744. (7) Foster's Crown Law, 374.
(8) 2 East's Pleas of Cr., 746.
(9) 2 H. Bl. 163. 2 East. 775. Bulwer's Case, 7 Rep. (Thomas & Fraser's ed. Vol. IV, 52, 53).
(10) Admiralty Case, 13 Rep. 52 (Thomas & Fraser's ed. Vol., V1 462). Vin. Abr. I 118.
(11) 24 & 25 Vic. c. 96, s. 91 ; *Reg* v. *Smith*, L.R. 1 Cr. Ca. 266.

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England or Ireland, and only if done there, saving particular exceptions, is made punishable by the English law in such and such ways, just as "offence" under the Code is a thing which if done in India is made punishable by the Penal Code. Yet the thing in the minds of English lawyers and of the Legislature is distinguishable, and distinguished from the place where it is done. In s. 7 of 24 and 25 Vic., c. 94, a penalty is prescribed for being an accessory to a felony committed on sea or land, "whether within Her Majesty's dominions or without." Now felony being a thing punishable by the English law whenever it has been in England, and its punishableness being essential, could not, according to the view which prevails on this occasion, be committed out of England. The title of felony could not be applied to an act done abroad, except under a special law. The Legislature, however, thought that that might be called a felony which as a physical and moral act fell within the class so denominated, as being generally of a particular punishable character in England. It regarded the place as a separable accident, not of the essence of the crime, though essential to its penality, and this principle was applied, where it could be applied, by the Courts at a far earlier time. When a single felony, committed partly in each of two counties, was absolutely incognizable in either, still the misprision of that felony as a substantive offence was cognizable and punishable in either county where but part of the felony was committed; and yet the jury in that case must have taken [366] notice of the entire felony, part whereof was committed in another county (1). To determine the character of an act within their cognizance they examined another in itself lying beyond their cognizance just as much as if it had been done in a foreign country (2). And as a receiver may now be indicted under the Larceny Act, s. 98, as an accessory to the principal felony, and his liability subsists though that felony was committed abroad, I do not see why he may not be punished for receiving goods stolen abroad. This would be an extension of the law, analogous to that made under George III, to the cases of Scotland and Ireland, and would make the law in England substantially identical with the law of India on the same point as I understand that law. Whatever in this instance the English law may be, its doctrine of accessory offences has not been received into the Indian Penal Code, and by the English law a substantive offence is generally cognizable, though that out of which it arises may escape the local jurisdiction.

Another point in the English law is instructive. In the case of *Reg.* v. *Garrett* it was recognized that he who being abroad procures the doing of a criminal act in England, is penally answerable for it; but it was held that the prisoner in getting his circular note payable in London cashed at St. Petersburg had not obtained or tried to obtain payment in London. The former principle was left untouched; but the latter appearing too narrow, s. 89 of Stat. 24 and 25 Vic., c. 96, was passed, by which it is declared that any one who by false pretences procures the payment of money to another, shall be deemed to have obtained it himself. In *R.* v. *Taylor* (3) the prisoner, who had obtained money for a forged cheque abroad, was held subject to punishment for the offence in England, because the cheque was afterwards presented there. Here the prisoner, according to the finding of the jury, procured by fraud the payment of money to the Comptoir d'Escompte. For this the English law would punish

(1) 1 Hale P.C. F. 652.
(2) See *R.* v. *Burdett*, 4 B. & Ald. at pp. 179—180. 2 Hale P.C. 163.
(3) 4 F. & F. 511.

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the prisoner, though at the time of the fraud he had not set foot in England. [367] The construction of the Penal Code, which I think the right one, would punish him in India. In *R.* v. *Munton* (1) money had been misappropriated abroad; but as false accounts intended to conceal the offence had been sent to England, Lord Kenyon held that the offence was cognizable by the English Courts.

According to the present English law, bigamy is bigamy, and punishable, though the criminal act—the second marriage—has been committed abroad. How is this? A marriage in Saxony or Roumania is not regulated as to its conditions, ceremonies or consequences by the English law; yet the English law determines that it shall under circumstances be criminal. The reason is this, that where an aggregate of acts constitutes a violation of the legislative will and an injury to society, the country of birth or the country of arrest in which any material portion of those acts has been done, may properly take cognizance of the whole series for the purpose of determining the character of those committed within its own local jurisdiction as constituting, when combined with the others, an offence against its laws. But even when bigamy could be tried only in the country of the second marriage, the jury had "jurisdiction to inquire into the other facts of the case" when the first marriage had taken place elsewhere. It was the existence and nature of that first transaction which determined the legal character of the second, and the second being under inquiry had to be investigated as a whole. Here, if I am wrong, the first transaction of two that were connected could still be looked into if it was admittedly legal, but not if it was illegal, and, according to the views of my learned colleagues, an Indian bigamist would be exempt from punishment if he stepped across the frontier to perform the second ceremony. Nor would this mischief be corrected even by the sweeping provisions of Act XX, s. 8, of 1879. That Act says that the law relating to offences shall extend to Europeans in allied states and to natives in any place; but, then, "the law relating to offences" is the Penal Code. If, therefore, by the terms of that Code itself an "offence" is necessarily something done in British India, there is no offence under it in any act done out of British India. This, of course, was not the intention of the [368] Legislature, and hence a strong argument against the narrow construction of "offence," which seems to me the wrong one.

Libel is an offence in England. Suppose, then, a libel is sent by post from England, and is published abroad. Such publication, in the ordinary sense, is necessary to complete the libel (2). It would be itself an offence if committed in England, and in a foreign country it may be an offence of a different description. Yet the Courts will take cognizance of such publication in order to establish the completion of the aggregate act in order to affix its proper character to the initial act of inchoate publication, which is directly cognizable because done within the United Kingdom. They would take cognizance of the foreign publication according to the law of England, not to punish that act itself, but to determine by the same law all the elements of another offence itself locally subject to the law. It seems that whether the connected act was prior, simultaneous, or subsequent to the one impugned, and whether it was done within or without the jurisdiction, it may, in general, for the purpose of judging of the act

(1) 1 Esp. 61.
(2) See *per* Best, J., *R.* v. *Burdett*, 4 B. & Ald. at p. 127; and *per* Holroyd, J., *ib.* 136, 137, 138.

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impugned, be examined and appreciated according to the English law, and equally whether it be criminal or not.

We may gather from this review that the construction I propose is not opposed certainly to any principle of the English law or English legislation. "The common law.....has been expounded to meet the exigencies of the times as they have arisen" (1), and has, so far as traditional impediments allowed, improved the defences of society, as the weapons of its enemies have been improved. Had my learned brothers seen their way to the adoption of the views held by me and by others on the subject in controversy, we should have met at a point to which opinion and legislation in England, as elsewhere, are rapidly converging. The needs of modern society call for an enlarged jurisprudence, corresponding in a measure to that which was necessitated by the relations amongst the different components of the United Kingdom. Our Penal Code knows nothing of [369] offences as accessory in the sense which has governed the English decisions as to the receiving of stolen property. The jurisdiction of the Judges of the High Courts in India is not confined by the restrictive terms of the ancient commission to the Circuit Judges in England. Our jury of nine men in criminal cases is not limited in its capacity by an historical connection with the inquisitors and recognitors of the twelfth century summoned from the neighbourhood on account of their supposed personal acquaintance with the facts on which they had to pronounce. The anomalies of the English law arising from its peculiar history have no place here. It is, no doubt, an *exemplum ritiis imitable*, but we should look rather to its general and regular development than to the abnormal growths which here and there disfigure its venerable form, and which, perhaps, most strike the eye of a careless observer. The comprehensive views of Macaulay and his colleagues are manifested in their report presenting the Penal Code; and they ought, I think, to be seconded by a corresponding method of interpretation. The suppression of ordinary crimes is the common duty and interest of every civilized community, especially amongst portions of the same empire; and in these days, when commerce and the parasites of commerce spread everywhere, the common duty cannot be effectually performed on the old and narrow basis of the strict territoriality of crimes. The Penal Code, then, having left us a free field for the application of the most advanced and beneficial principles, I regret that in the present case we go, as it seems to me, out of our way to borrow from the English law a doctrine of limited, dwindling and capricious operation which in England itself is superannuated, and in almost every other civilized country is clean dead and buried (2).

In the individual instance I cannot but feel much relieved by the decision at which my learned brothers have arrived. I should have felt pain and misgiving in sentencing a man to whom I had been forced to refuse the aid which might be absolutely necessary to procure the evidence he needed. It is to be hoped that the deficiency of our law in this respect will soon be supplied by a [370] provision enabling the Indian Courts to ask the assistance which under s. 19 of Act XXI of 1879 they are bound to give. If I have rightly interpreted the spirit and purpose of our penal legislation, some measure, too, may be thought desirable to remedy what now must be thought a serious defect in the Penal Code itself. In the meantime the local Government may, perhaps, feel called

(1) Story's Confl. of Laws, s. 24. (2) See Wheaton Inter. Law, Pt. II, ch. ii.

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on to release those who, in the Velanpur dacoity case and others like it, have been wrongly thought to have had stolen property in their possession, because in a popular sense it had been stolen. Even within a month I believe some residents in British India have been imprisoned for receiving property which could not properly be deemed "stolen," because it was taken in foreign territory. The restoration of these victims of misconstruction to what must now be pronounced their legitimate calling, will be of essential service to the other enterprising persons across the frontier (not now to be called dacoits) who, without the aid of friends on our side, must soon have been hampered by the cumbrous gains of their activity and daring.

Conviction quashed.

Attorney for the prosecution: Mr. *R. V. Hearn* (Government Solicitor).

Attorneys for the prisoner: Messrs. *Payne and Gilbert.*

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5 B. 371=5 Ind. Jur. 646.

[371] ORIGINAL CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice M. Melvill.

THE GREAT INDIAN PENINSULA RAILWAY COMPANY (*Original Defendants*), *Appellants v.* RADHAKISAN KHUSHALDAS (*Original Plaintiff*), *Respondent.** [4th May, 1881.]

Railway companies—Agreement for interchange of traffic—Principal and agent—Loss of goods—Liability.

The plaintiff delivered to the Madras Railway Company a bale of cloth for carriage from B, a station belonging to that company, to S, a station belonging to the defendants, the G.I.P. Railway Company, and obtained from the Madras Company a receipt, which recited that it was granted "subject to the rules and regulations and charges in force on that or any other railway over which the goods might pass." The goods were lost while on the line and in the charge of the defendants, the G. I. P. Railway Company, and the plaintiff sued them for damages for breach of the contract of carriage. Between the two railway companies there existed an agreement arranging for the interchange of traffic, which provided, *inter alia* that goods should be booked through to and from all stations on both lines at certain stated rates; that in such cases one company should receive payment and should account to the other; that any claim for loss or damage should be paid by the company in whose custody the goods were then lost or damaged, or if that could not be ascertained, then by both companies rateably; and that no alteration affecting the through traffic should be made by either company without previous notice to the other. The defendants pleaded that the suit was wrongly brought against them, as there was no contract between themselves and the plaintiff.

Held, that the suit, whether or not it might also have been brought against the Madras Railway Company, was rightly brought against the defendants, inasmuch as the agreement between the two companies, if it did not actually constitute a partnership between them, showed, at least, that the Madras Railway Company became the agent of the defendants to make the contract for carriage with the pliantiffs.

Gill v. *Manchester, Sheffield and Lincolnshire Railway Company* (1) followed.

[R., 3 Bom. L.R. 260.]

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* Suit No. 400 of 1878. Appeal No. 395.

(1) L.R. 8 Q.B. 186.