

CRIMINAL CODE (INDICTABLE OFFENCES) BILL.

RETURN to an Order of the Honourable The House of Commons,
dated 10 July 1878:—for.

MEMORANDUM "showing the ALTERATIONS proposed to be made in the existing LAW by the CRIMINAL CODE (INDICTABLE OFFENCES) BILL, if Amended, as proposed by the Attorney General."

MEMORANDUM by Sir James Stephen, showing the ALTERATIONS proposed to be made in the existing LAW by the CRIMINAL CODE, if Amended, as proposed by the Attorney General.

THIS Memorandum shows all the known and intentional alterations made in the existing criminal law by the Criminal Code (Indictable Offences) Bill, though the great changes in the language of the law essential to its reduction to a short and systematic form may possibly involve unperceived alterations, either by the removal of obscurities or otherwise. Since the second reading of the Bill it has been carefully examined throughout, and a considerable number of observations upon it have been made by gentlemen by whom it has been examined with greater or less minuteness. The result of this process has been to discover the necessity for a certain number of amendments. The great majority of these introduce no substantial change into the Bill, but simply correct inaccuracies or obscurities of language, for the most part of an unimportant kind. The Memorandum states both the alterations made by the Bill as it stands, and the substantial alterations proposed to be made by the Attorney General's amendments.

All the alterations are arranged in the order of the Clauses of the Bill in which they occur, and without reference to their importance.

CLAUSE 4 (c) and (d).

Place of commission of certain Offences. Stolen Goods brought into England.

By 9 Geo. 4, c. 31, s. 8, a person accused of murder or manslaughter may be tried either where the blow was given or where the death happened. Clause 4 (c) extends and generalises this provision by enacting that all such offences shall be deemed to be committed both at the place where the act was done which caused injury, and at the place where the injury happened. The question of venue is treated separately.

By the present law, if a man steals goods in a foreign country and brings them into England, he commits no offence in England; though if he steals goods in Yorkshire and carries them to Cornwall he commits an offence in Cornwall. By Clause 4 (d) he would commit an offence in each case.

CLAUSE 5.

Common Law.

This Clause repeals the common law as far as it is co-extensive with the Act. But for such a provision there might possibly be a doubt whether the definitions of murder, treason, theft, &c., were not cumulative upon the common law definitions.

CLAUSE 8.

Executions Private in all Cases.

By the present law sentence of death is to be executed within the walls of a prison in cases of murder only. By Clause 8, the Capital Punishment Act, 1868, 31 Vict. c. 24, is extended to all executions.

MEMORANDUM RELATING TO THE

CLAUSES 9 and 12.

Alterations as to Imprisonment.

By the present law the infliction of three months' solitary confinement, as an aggravation of the sentence of imprisonment, is authorised in a great number of cases. By 28 & 29 Vict. c. 126, s. 17, it is enacted that all imprisonment is to be separate, and this, substantially, makes solitary confinement the rule. The power to order solitary confinement has thus become superfluous, and is abolished by Clause 9. A judge can at present order any prisoner imprisoned for misdemeanour to be treated as a misdemeanant of the first class. As the distinction between felony and misdemeanour is abolished, the expression "simple imprisonment" is by Clause 9 substituted for "imprisonment as a misdemeanant of the first class," and the power to inflict such imprisonment is confined to cases in which "imprisonment" generally may be inflicted under the Code. By Clause 12 it is provided that no one is to be sentenced to imprisonment for more than two years. The power of imprisonment at common law is at present theoretically unlimited, and a few obsolete statutes authorise very long terms of imprisonment, e. g., one who offends for the third time against certain provisions of one of the Acts of Uniformity must be imprisoned for life.

CLAUSE 10.

Whipping at Common Law Abolished.

At common law the Court can order whipping as part of the sentence on a conviction for a misdemeanour. Practically, the power is obsolete. It is abolished by Clause 10. It is also provided that no woman shall in any case be whipped. A woman assaulting the Queen might be whipped by 5 & 6 Vict. c. 51, s. 31-2, and it is possible that some other statute may authorise such a punishment. The rule as to flogging and whipping laid down for three particular offences by 26 & 27 Vict. c. 44, s. 1, is made general. This limits the number of strokes which is left indefinite in the case of boys under 16 by the Larceny Act, the Malicious Mischief Act, and the Offences against the Person Act of 1861. The verbal distinction between flogging and whipping is new.

CLAUSE 12.

Minimum Punishments Abolished.

By 9 & 10 Vict. c. 24, s. 1, *minimum* punishments were abolished in all cases in which the Court is authorised to pass a sentence of transportation for more than seven years. There may be a few cases not provided for in the Code in which the Court is required to pass a sentence of seven years' transportation, or a fixed term of imprisonment absolutely. Clause 12 extends 9 & 10 Vict. c. 24, to such cases. The only minimum punishment in the Code itself is in Clause 101, which re-enacts the 24 & 25 Vict. c. 100, s. 61.

CLAUSE 14.

Previous Convictions.

The law as to the consequences of a previous conviction is in a confused state (*see* Stephen's Digest of the Criminal Law, Article 19, Note 2). Clause 14 lays down a general rule on the subject not substantially different from the present rule.

CLAUSE 15.

Cumulative Punishment.

As the law now stands, if a man is convicted of more offences than one, he may in all cases be sentenced to any punishment to which he may be sentenced for any such offence, and each sentence may be made to begin at the expiration of the preceding one. Thus a man convicted of aiding three separate persons to escape from prison might be sentenced to three successive terms of two years' imprisonment and hard labour; in other words, to six years' imprisonment, with hard labour. By Clause 15 a scale is provided according to which a sentence of penal servitude might be passed in such cases.

CLAUSE 20.

Insanity.

The law as to insanity in relation to crime is at present somewhat uncertain. Clause 20 (b, c, d) is believed to represent it correctly, but it settles several moot points.

CLAUSE 22.

Marital Coercion.

By the existing law a married woman committing a crime in her husband's presence is presumed to have acted under his coercion, and is excused thereby. It is doubtful to what crimes this rule extends, and coercion is not held to be an excuse for crime in the case of persons other than married women. By Clause 22 one rule is laid down for all persons alike, whether married women or not. The rule is believed to express the existing law in all cases other than the case of married women.

CLAUSE 23.

Necessity.

The Clause relating to necessity as an excuse for crime is believed to represent the existing law, but the cases to which it refers are so rare and unlikely to happen that there is hardly any authority upon them. The second paragraph would protect the captain of a steamer who ran down a boat because it was the only practicable way of avoiding running down a larger vessel.

CLAUSE 26.

Trifling Offences.

By 24 & 25 Vict. c. 100, ss. 44 and 45, magistrates are authorised to dismiss charges of assault if they think them too trifling to be punished; and by 18 & 19 Vict. c. 126, s. 1, they may take the same course in cases of theft. By the Indian Penal Code, s. 95, a somewhat similar general provision is made. Clause 26 of the Bill is adapted from these enactments, and generalises the language of 18 & 19 Vict. c. 126, s. 1.

CLAUSE 28.

Principal and Accessory.

As the law now stands all are principals in treason and in misdemeanour, and since 24 & 25 Vict. c. 94, s. 2, there is no substantial distinction between principals and accessories in felony, though the name is still retained. By Clause 28, which defines parties to indictable offences, the language of the law is altered, though its substance is not changed. The change of language is rendered necessary by the abolition of the distinction between felony and misdemeanour.

CLAUSE 33.

Punishment of Attempts, &c.

As the law now stands, an attempt to commit an offence, incitement to commit an offence, and a conspiracy to commit an offence are common law misdemeanours, punishable as such with fine and imprisonment. Accessories after the fact to felony are felons, and are, for the most part, liable under the Consolidation Acts to two years' imprisonment and hard labour, and there are some further trifling and intricate distinctions in the punishment awarded to these offences. By Clause 33 they are all put on the same footing and rendered liable to the same punishment, which is made to vary according to the degree of punishment which can be inflicted for the principal offence.

MEMORANDUM RELATING TO THE

CLAUSE 34.

Constructive Treason.

By the present law, many acts which do not really in any way threaten the person of the Sovereign, are by a fiction of law treated as treason by imagining the Sovereign's death. And some acts which do not amount to an actual levying of war against the Sovereign are treated as if they did. By Clause 34 a definition of high treason is given by which these fictions are laid aside. The definition also omits treason by killing the Lord Chancellor or a judge on the bench. Such an offence would, under the Code, be a common murder. The punishment for treason is placed on the same footing as punishment for murder in all particulars, except that the statutory power to direct beheading in the case of a man is retained and generalised. A woman might probably be ordered to be beheaded at common law. The punishment of treason now depends on the common law modified by 30 Geo. 3, c. 48; 54 Geo. 4, c. 146; 33 & 34 Vict. c. 23, s. 31.

CLAUSE 35.

Misprision of Treason.

By the present law, the rare offence of misprision of treason is punishable by imprisonment for life. An accessory after the fact to treason is a principal traitor, and must be sentenced to death. By Clause 35, each of these offences is punishable by penal servitude for life as a maximum.

CLAUSE 38.

Burning Dockyards and Ships of War.

By the present law (12 Geo. 3, c. 24), the burning of ships of war, dockyards, &c., is punishable by death. By Clause 38, this is restricted to cases in which the offence is committed in time of war, and with intent to diminish the force of the Royal Navy.

CLAUSE 41.

Contempts against the Queen.

The Clause in the Bill is taken from a Clause drawn by the Criminal Law Commissioners. See their 7th Report, Chapter 2, Section 2, Article 2. The Attorney General proposes to amend the Clause so as to confine it to things said or done in public, and also so as to prevent fair comments on public affairs from being regarded as insults. He proposes also to omit the word "disparaging."

CLAUSE 55.

Seditious Offences.

The Attorney General proposes to amend this section by omitting certain words now contained in it, so as to confine seditious offences to words, libels, or conspiracies, intended to carry into execution a seditious intention.

CLAUSE 57.

Punishment for Violating Ambassadors' Privileges.

By 7 Anne, c. 12, ss. 3, 4, 6, a person who violates the privileges of an ambassador, is subject to "such pains, penalties, and corporal punishment" as the Lord Chancellor and the two Chief Justices, or any two of them, may appoint. For this, Clause 57 substitutes fine and imprisonment.

CLAUSE 59.

Definition of Piracy.

The offence of piracy by the law of nations is at present not defined in any authoritative way. It is believed that the definition given in Clause 59 is correct.

CLAUSE 60.

Punishment of Piracy.

The punishment for piracy was formerly death in all cases. By the present law the punishment of death is confined to piracy with actual violence dangerous to life. The punishment for other forms of the offence has to be inferred

inferred from a comparison of 28 Hen. 8, c. 15, ss. 2 and 3; 39 Geo. 3, c. 37, s. 1; 1 Geo. 4, c. 90, s. 1; 7 & 8 Geo. 4, c. 28, s. 12. Clause 60 (a) represents the existing law as to piracy with violence. Clause 60 (b) subjects all other forms of piracy to a maximum punishment of penal servitude for life. Clauses 61, 62, and 63 represent, with several small variations, 11 & 12 Will. 3, c. 7.

CLAUSE 72.

Breaches of Official Duty.

The law as it stands is so stated by text writers that it seems probable that every breach of official duty—*e. g.*, a breach of an office rule—might be treated as an indictable offence. By Clause 72, this rule is restricted to cases of neglect of official duty by which the public peace is broken or not restored, or by which the persons or property of Her Majesty's subjects are endangered.

CLAUSE 76 (b).

Bribery of Public Officers.

The bribery of public officers (now a misdemeanour at common law) is by Clause 76 made punishable by 14 years' penal servitude as a maximum, if it is done with intent to interfere with the administration of justice. The words of the Clause are adapted from the Indian Penal Code. The Attorney General proposes to amend the Clause as drawn, by inserting a few words in Clause 15, which seem to be required.

CLAUSE 83.

False Evidence and Perjury.

The offence of false evidence is substituted for perjury, and the offence is so defined as to do away with the rule that wilful perjury is not a crime, unless the matter sworn to is material to the issue. (Clause 83.)

CLAUSE 84.

The maximum punishment for false evidence, with intent to procure conviction for a crime, or to acquire valuable property, is raised to penal servitude for life. The maximum punishment for false evidence in other cases is raised to 14 years' penal servitude. The infliction of hard labour is authorised in cases of false declarations.

CLAUSE 87.

Conspiracies to bring False Accusations.

Conspiracies to bring false accusations of crimes are now punishable as misdemeanours at common law; with the addition, in some cases, of hard labour. By Clause 88, they are made liable to a maximum punishment of 14 years' penal servitude if the crime falsely imputed is punishable with death or penal servitude for life, and seven years' penal servitude in other cases.

CLAUSE 88.

Conspiracies to Prevent Justice.

The maximum punishment for conspiracies, and other attempts to pervert justice, is raised to seven years' penal servitude. These offences are at present common law misdemeanours, punishable in some cases with hard labour.

CLAUSE 92.

Breaking Prison.

The present maximum punishment for breaking prison, in the case of a person charged with felony, is extended to all cases of escaping from prison.

CLAUSE 95.

Negligent Escapes.

By the existing law an escape is complete as against a gaoler or other officer as soon as the prisoner gets out of his sight, and if this is due to the gaoler's neglect of duty he is guilty of a negligent escape, although he may afterwards retake his prisoner. By Clause 95, it is provided that a gaoler shall not be liable for a negligent escape if before he is prosecuted he retakes the prisoner.

MEMORANDUM RELATING TO THE

CLAUSE 96 (a).

Compounding Offences.

The present law as to compounding offences and agreements not to prosecute is obscure. It is reduced to certainty by Clause 96 (a).

CLAUSE 97.

Champerty, Maintenance, and Barratry.

The obsolete offences of champerty, maintenance, and barratry are abolished by Clause 97. All interferences with public justice, either by force or fraud, used to be included under the head of maintenance. Each of these is now separately provided for (*see, e. g.*, Clauses 83, 87, 88). The Attorney General proposes to amend this Clause, by adding a proviso that the Clause shall not affect the validity of any contract, &c.

CLAUSE 98.

Blasphemous Libel.

The law as to blasphemy and blasphemous libel is now partly obscure and partly obsolete. Clause 98 is intended to bring it into harmony with the practice and sentiment of the present day.

CLAUSE 101.

Obscene Libel.

Clause 104 is so drawn as to make it quite clear that on a prosecution for any obscene publication or exhibition the questions for the jury are the character of the publication itself, and (if it is considered obscene) the possibility of excusing it on the ground of public advantage, and that the motives of the publisher are in every case immaterial (except, of course, as they may affect the amount of punishment).

CLAUSE 102.

Unnatural Practices.

By the present law an attempt to commit sodomy, an assault with intent to commit sodomy, and an indecent assault upon a male person, is punishable by 10 years' penal servitude as a maximum. There is some authority for the doctrine that a person cannot consent to unnatural practices of this kind, and that such unnatural practices accordingly constitute in all cases an indecent assault at least. They would thus be subject to a maximum punishment of ten years' penal servitude, and this is enacted by Clause 102 in express words. The Attorney General proposes to amend the Clause by providing expressly and separately for such cases, and limiting the maximum punishment to two years' imprisonment and hard labour.

CLAUSE 117.

Execution of Superior Orders.

The Attorney General proposes to modify the Clause as it stands, by providing that a person (a soldier, for instance) acting in the execution of superior orders shall be presumed to have acted in good faith and on reasonable grounds, unless the contrary appears either from the nature of the orders or from other circumstances. This probably does not go beyond the present law.

CLAUSE 119-120.

Killing in Self-defence.

It is possible that the law as to self-defence may be slightly altered by Clauses 119 and 120, as the present law on the subject is intricate and confused. (*See* Stephen's "Digest," 199, 200.) But the alteration, if any, is very slight.

165

CRIMINAL CODE (INDICTABLE OFFENCES) BILL

CLAUSE 129.

Duty of Persons doing acts requiring special Skill or Care.

The Attorney General proposes to add to this Clause a statement that it is the legal duty of the person in charge of them to take proper precautions as to animals or things dangerous to human life.

CLAUSE 134.

Constructive Malice in Murder.

By the present law any person who causes the death of another by any act done in the commission of a felony or in resistance to a lawful apprehension is guilty of murder, however unlikely it may have been that the act would cause death. That at least is the opinion commonly entertained on the subject. By Clause 134, murder is restricted to cases in which death is caused either intentionally or by acts of reckless cruelty or lawlessness.

Clause 134 (b) was intended to apply to intentional acts and omissions only. The Attorney General proposes to make this clear by a proviso added at the end of the sub-Clause.

CLAUSE 136.

Provocation.

By the present law hardly any provocation seems to be sufficient to reduce murder to manslaughter, except a blow, or the sight of adultery committed with the offender's wife, though the matter is not absolutely clear. By Clause 136 the jury would in all cases have to consider whether the provocation given was such as to deprive the offender of the power of self-control.

CLAUSE 138.

Infanticide.

By the existing law a woman who kills her new-born child by intentional violence is guilty of murder, whatever may be the state of mind (short of actual madness) produced in her by child-birth. By Clause 138 the jury may in such cases find the woman guilty of manslaughter if they think that her power of self-control was greatly diminished by her bodily or mental sufferings. The Attorney General proposes an amendment in the language of this Clause, which will make its meaning clearer.

CLAUSE 141 (c).

Attempts to Commit Murder.

This Sub-clause somewhat extends the law. It ought to have been confined to cases in which bodily injury is actually caused.

CLAUSE 144.

Abetment of Suicide.

By the present law a person who abets suicide is an accessory before the fact to murder, and liable to capital punishment. By Clause 144 this offence is punishable by penal servitude for life as a maximum.

CLAUSE 146.

Concealment of Birth.

By the present law it is an offence to "endeavour to conceal the birth" of a child "by any secret disposition of the dead body." It has been doubted whether this would meet the case of a disposition of the dead body which, though not secret, would conceal the child's parentage, e.g., dropping the body in a crowded street. Clause 146 punishes "disposing of the dead body in any manner with intent to conceal the fact that its mother was delivered of it."

CLAUSE 147.

"Voluntarily"—"Dangerous Instrument."

24 & 25 Vict. c. 100, s. 18, and some other clauses create the offence of causing grievous bodily harm, with intent to cause grievous bodily harm, or with a variety of other intents specified. The enumeration of these intents

MEMORANDUM RELATING TO THE

makes the law exceedingly sumbrous, and this defect is aggravated by the manner in which the Act provides specifically for the infliction of injuries and for attempts to inflict injuries by shooting, stabbing, &c. To simplify this matter, the expressions "voluntarily causing," and "dangerous instrument," are defined in Clause 147. They are employed in Clauses 149, 150 (a, b), 151, 157, 161, and this may to some slight degree extend the present law.

CLAUSE 165.

Rape.

Rape is so defined in Clause 165 as to make it clear that obtaining a woman's person by the personation of a husband, and false pretences of a medical kind, amount to rape. This is in accordance with the last decision on the subject, but the cases are not altogether consistent. The Clause also abolishes the presumption of law that a boy under 14 is incompetent, which has been shown by experience to be false in fact. By one of the Attorney General's amendments it is proposed to remove a slight obscurity in the concluding words of the Clause as it stands.

CLAUSE 166.

Abusing Children.

By 38 & 39 Vict. c. 94, s. 3, it is a misdemeanour to carnally know and abuse any girl between 12 and 13, "*whether with or without her consent.*" The words italicised make it doubtful whether such a girl can be ravished. They are obviously a mistake for "even if she consents," which is the language of Clause 166.

CLAUSE 168 (a. iii.).

Killing Unborn Children.

By the existing law it is murder to cause a child to die after it is born by injuries inflicted on it before or during birth, but it is no offence to kill a living child while it is being born unless miscarriage is caused. By Clause 168 (c) causing a living child to die before it is fully born is made punishable by penal servitude for life as a maximum punishment if the act would have amounted to murder if the child had been born.

CLAUSE 178.

Punishment for Libel.

By 6 & 7 Vict. c. 96, ss. 4 and 5, two years' imprisonment is the maximum punishment for a libel known to be false, and one year for a libel "maliciously published." The opposition between the two provisions seems to show that the latter is confined to cases in which the libel is not known to be false. Clause 178 makes the maximum punishment two years' imprisonment in all cases, and authorises the addition of hard labour.

CLAUSE 186.

"Valuable Security."

Several Clauses of the Forgery Act, and one or two Clauses of the Larceny Act, are rendered long and intricate by a minute specification of the classes of documents in respect of which certain offences can be committed. In order to avoid this, Clause 186 defines "valuable security," and the expression is used in Clauses 210, 220, 233 (a. iii.) 249. This somewhat extends the law, but, if the definition is examined it will be found to put every Clause in which it is used on an intelligible basis. As the law now stands the punishment for forging a receipt for 5 l. is heavier than the punishment for fraudulently altering a contract so as to deprive a man of thousands. On the other hand, a person who compels another to execute a promissory note for 5 l. is liable to ten years' penal servitude, whereas if he compels him to give a receipt for 5,000 l. he commits only a misdemeanour at common law.

167

CLAUSES 187—199.

Theft and Criminal Breach of Trust.

The law of theft is at present extremely complicated and technical, and breach of trust as a general rule is not a criminal offence, though a great number of exceptions to the rule have been made by legislation. In the Bill criminal breach of trust is made an offence in general terms, and the whole law is recast in a simpler form (Clauses 187, 190, 191, 193, 195, 199). Several minor alterations are made in the law of theft. The offence is so defined as to abolish the present law of asportation, which involves several technicalities (Clause 189), and to make it clear that to pawn another's goods is theft though the pawner may mean to redeem them (Clause 188). The punishment for theft is made to depend (except in a few particular cases) upon the value of the thing stolen, which is a return to the principle of the common law distinction between grand and petty larceny. The three offences of theft, criminal breach of trust, and obtaining property by false pretences, are treated as three forms of one offence (fraudulent misappropriation), and are rendered liable to the same punishments. This has (amongst other things) the effect of altering in some particulars the jurisdiction of the courts of quarter session. On the one hand it takes out of their jurisdiction thefts of property worth 500 l. or upwards. On the other it brings within their jurisdiction the criminal breaches of trust by bankers, agents, and others, now punishable under 24 & 25 Vict. c. 96, ss. 75-80. This consequence is to some extent obviated by Clause 289. As the Bill stands the maximum punishments of the three classes of fraudulent misappropriation are penal servitude for life, for 14 years, and for seven years, and imprisonment with hard labour for two years, in the case of things worth less than 5 l. One of the Attorney General's amendments proposes to omit the last of these classes of punishments, and to retain three maxima only.

CLAUSE 208.

Conspiracies to Defraud and Extort.

The maximum punishment for these offences is raised to five years' penal servitude.

CLAUSES 209.

Cheating at Cards.

It has been doubted whether cheating at cards is complete when the game is won by fraud, or when the stake is paid. Clause 209 enacts that the offence shall be complete when the game is won.

CLAUSE 213.

Protection of Involuntary Disclosures.

By 24 & 25 Vict. c. 96, ss. 27 and 85, persons are protected from prosecution who, under legal compulsion, disclose thefts of wills or title deeds, or frauds by agents. By Clause 213 this provision is applied to all thefts and frauds.

CLAUSE 215

Punishment of Robbery.

By the present law simple robbery is punishable with 14 years' penal servitude as a maximum. If certain aggravations occur the maximum is penal servitude for life with flogging. By Clause 215 the maximum is raised in all cases of robbery to penal servitude for life, and if the specified aggravations exist, flogging may be added. The chief importance of this alteration is that it simplifies and abridges the law. It would take simple robbery from the jurisdiction of courts of quarter session, but this consequence is avoided by the Attorney General's amendment to Clause 289. By Clause 216, the offence of stopping a mail with intent to rob it is made punishable with penal servitude for 14 years instead of penal servitude for life.

MEMORANDUM RELATING TO THE

CLAUSE 217.

Punishment of Assaults with Intent to Rob.

By the present law, if a person assaults another with intent to rob him, being together with any other person, he is liable to penal servitude for life and flogging. But if he assaults another with intent to rob him and at the time of or after such offence beats or strikes him he is liable only to five years' penal servitude. A holds B down while C takes B's purse out of his pocket. A and C are each liable to penal servitude for life and flogging. Z knocks D down with a bludgeon, and tries to take his purse, but before he succeeds in doing so he is arrested. Z is liable to five years' penal servitude only. Clause 217 puts both A and Z on the same footing.

CLAUSE 218.

Accusations with Intent to Extort.

By the present law persons attempting to extort by threatening to accuse others of certain specified infamous crimes are liable to a maximum punishment of penal servitude for life. By Clause 218 this is extended to all attempts to extort by accusing of any crime.

CLAUSE 219.

Punishment of Libelling with Intent to Extort.

The maximum punishment for publishing a libel with intent to extort is three years' imprisonment and hard labour. Such sentences are now never passed, two years being practically the maximum term of imprisonment with hard labour ever inflicted. Clause 219 raises the maximum punishment for this offence to five years' penal servitude.

CLAUSE 224.

Burglary by Breaking Out.

By the present law a man who breaks out of a dwelling-house at night after committing a felony in it is guilty of burglary. As every one who enters a dwelling-house with intent to commit an indictable offence is liable to penal servitude for seven years, this form of burglary is no longer punishable as such.

CLAUSE 227.

Receiving.

By the present law the receiving of property stolen or obtained by various misdemeanours is subjected to a variety of punishments (see Stephen's "Digest," Art. 354). By Clause 227 this is extended to the receiving of property obtained by forgery, and the punishment of the receiver is in all cases made the same as that of the original offender. The Attorney General proposes an amendment to this clause, by which receivers will, in all cases, be made liable to seven years' penal servitude, and to a higher punishment if the principal offence is punishable more severely.

CLAUSE 229.

Corrupt Taking of Rewards.

By the present law the corrupt taking of a reward for helping a person to recover property illegally obtained, is punishable by a maximum of seven years' penal servitude. By Clause 229 this is qualified by a proviso that the punishment is not to exceed that which might have been inflicted on the original offender. As the law stands, a man who steals a dog is liable to six months' imprisonment; a man who takes a reward for restoring it to seven years' penal servitude.

CRIMINAL CODE (INDICTABLE OFFENCES) BILL.

169

CLAUSE 233.

Forgery.

The law of forgery has been recast and greatly simplified (Clause 233). By the existing law, the forgery of a great number of specified documents is felony, punishable by various maximum terms of penal servitude. The forgery of other documents is a misdemeanour at common law, and is punishable only by fine and imprisonment. By c. 32, ss. 230-236 of the Bill, forgery is in all cases punishable by seven years' penal servitude, and in the case of certain specified documents, by penal servitude for 14 years or life. The forgery of documents under the public seal of a foreign state or colony is put on the same footing as forgery of a document under English public seals.

CLAUSE 259.

Counterfeit Copper Coin.

By the present law the making of counterfeit copper foreign coin is punishable by a year's imprisonment without hard labour for the first offence, and seven years' penal servitude for a second. By Clause 259 the maximum punishment is increased for the sake of uniformity to two years' hard labour. No special provision is made as to a second conviction.

CLAUSES 261-262.

Uttering.

By the present law offences relating to the uttering of bad money are defined in a very complicated way, and are liable to maximum punishments which vary in an apparently arbitrary manner. One reason of this, probably, was that the rule of evidence by which previous utterings or the possession of other counterfeit coins may be given in evidence to show guilty knowledge in any particular case, is comparatively modern. The doctrine used to be that one crime cannot be given in evidence in proof of another (*see* Stephen's Digest of the Law of Evidence, Art. 11, and *Reg. v. Forster, Dearsley*, 456). Clauses 261 and 262 simplify the law upon this point.

Light Coin.

By the present law no provision is made for the punishment of a person who is in possession of coin unfairly diminished in weight, knowing it to have been so diminished, and with intent to utter it. This is made an offence by Clause 262 (g).

CLAUSE 266.

Arson.

By the present law the maximum punishment varies in different kinds of arson. Thus for setting fire to an unfinished ship the maximum punishment is penal servitude for life. For setting fire to certain kinds of unfinished buildings the maximum punishment is penal servitude for 14 years. The distinction is of no practical importance, and it makes the Malicious Mischief Act extremely intricate. Accordingly, by Clause 266, penal servitude for life is made the maximum punishment of all kinds of arson, and penal servitude for 14 years the maximum punishment for all attempts to commit arson.

CLAUSE 273.

Malicious Mischief.

By the Malicious Mischief Act, a great number of special offences are rendered liable to maximum punishments which vary in an arbitrary way. These are followed by a general provision that all forms of mischief not specially defined shall be liable, if the amount of the damage done exceeds 5 l., to two years' hard labour, or, if the offence is committed at night, to five years' penal servitude.

MEMORANDUM RELATING TO THE

All other mischief is made punishable on summary conviction by a maximum of two months' imprisonment. By Clause 273, all malicious mischief not otherwise provided for is punishable by five years' penal servitude if the amount of the injury exceeds 20 *l.*, and by two years' hard labour if it exceeds 1 *l.* and does not exceed 20 *l.* An amendment is made in the unrepealed section (Section 52) of the Malicious Mischief Act, which gives summary jurisdiction to magistrates, the effect of which will be to keep the law as to summary offences unaltered. The effect of this change is to substitute one general clause for 18 sections of the Malicious Mischief Act. Arson, mischief by gunpowder, injuries to railway trains, injuries to ships, to sea walls and waterworks, to cattle, to machinery, mines, and electric telegraphs, are specially provided for, as they are under the present law. As there seems to be no special reason for providing specially for the case of injuring hop binds, it is proposed by one of the Attorney General's amendments to omit Clause 272, Sub-section (e), which re-enacts 24 & 25 Vict. c. 97, s. 19, though with a diminution of the maximum punishment from 14 years to seven years' penal servitude. It is proposed to raise the maximum punishment for injuring electric telegraphs from two years' imprisonment and hard labour to seven years' penal servitude Clause 272 (f), and to extend the provision as to poisoning salmon rivers contained in 36 & 37 Vict. c. 71, s. 13, to all rivers.

CLAUSE 283.

Judges' Power to make Rules.

By Clause 283, power is given to the judges to make subsidiary rules of procedure. This clause is taken from the Judicature Act of 1873, Section 68.

CLAUSE 284.

Civil Remedy for Crime.

By Clause 284, it is enacted that the civil remedy for a crime is not to be suspended by reason of the criminal character of the act. This is believed to express the existing law. See *Wells v. Abraham* (L. R., 7 Q.B., 854), *Osborn v. Gillett* (L. R., 8 Ex. 88).

CLAUSE 286.

Felony and Misdemeanour.

The classification of offences as felonies and misdemeanours is abolished by Clause 286. This makes it necessary to provide in different parts of the Bill for the removal of 17 distinctions, the nature and extent of which, as well as the manner in which the Bill deals with each subject, appear from the following Table:—

Felony.	Misdemeanour.	How provided for in the Bill.
1. Previous conviction for felony involves certain consequences.	1. Previous conviction for many misdemeanours involves similar consequences. No general rule.	Clause 14 gives a general rule for all cases according to the severity of the punishment appointed for the previous and subsequent offences.
2. The law of principal and accessory before the fact (now practically obsolete) applies only to felony.	2. In misdemeanours all are principals. Also in treason.	Clause 26. All parties to any indictable offence actually committed are responsible for it.
3. A commoner cannot be impeached for treason or felony.	3. He can be impeached for misdemeanour.	Clause 3. Nothing in the Act to apply to impeachments.
4. Peers have a right to be tried for felony by their peers	4. Peers are tried for misdemeanours like commoners.	Clause 283. Privilege of peers confined to cases where sentence may be death or penal servitude.
5. Persons convicted of felony are disqualified from retelling wine, spirits, &c.	5. No such disqualification.	Clause 286. All general disqualifications for felony to attach to a conviction of an offence punishable with penal servitude or death.

CRIMINAL CODE (INDICTABLE OFFENCES) BILL.

17

Felony.	Misdemeanour.	How provided for in the Bill.
6. A felon, or (if a felony has been committed) a person reasonably suspected of being a felon, may be arrested by any one without warrant, and a peace officer may arrest any one without warrant if he suspects him of felony on reasonable grounds, whether a felony has been committed or not.	6. Any one may arrest without warrant a person committing a misdemeanour at night, or any misdemeanour against 24 & 25 Vict. ca. 66 and 97, or any one of many other misdemeanours, but there is no general power as to suspected persons.	Clauses 307, 308. Any one may arrest a person found committing an indictable offence if he has reasonable grounds to suppose the offender may otherwise escape or complete his offence. Peace officers may arrest a person on suspicion of his having committed an offence punishable with two years' hard labour. Private persons may do so if such an offence has actually been committed. The last paragraph of Clause 308 contains a slight addition to the existing clause.
7. Justices have a discretion as to bailing felons.	7. Justices must bail misdemeanants, except in a great number of specified cases (11 & 12 Vict. c. 42, s. 3), including all cases in which costs may be allowed, i.e., all the common cases.	Clauses 337, 338. A person is entitled to be bailed if he can be sentenced to simple imprisonment for the offence charged, and if he cannot be sentenced to penal servitude or death. These are, generally speaking, cases not necessarily disgraceful.
8. A criminal information cannot be filed for felony.	8. A criminal information may be filed for some misdemeanours, but it is not perfectly clear how far the power extends.	Clause 354. A criminal information may be filed for any offence for which the offender cannot be sentenced to death or penal servitude.
9. A person charged with felony has 20 peremptory challenges.	9. A misdemeanant has no peremptory challenges.	Clause 365. For treason 35 peremptory challenges, in capital cases 20, in other cases 6.
10. In felony the prisoner has no right to a copy of the indictment.	10. In misdemeanour he has such a right, but it is difficult to say how it is to be enforced.	Clauses 361, 362. The defendant is to have a copy of the indictment in all cases whatever.
11. The officer of the court charges the jury with a felony.	11. No such charge is given as to misdemeanants.	Clause 368. The officer may give the defendant in charge if he pleases, but if he does not it is to be of no consequence. In serious cases the old form would probably be observed.
12. In trials for felony admissions cannot be received.	12. In trials for misdemeanour it is not quite clear whether they can or not.	Clause 373. They are not to be received in any case.
13. The jury are not allowed to separate in cases of felony.	13. The jury never are, and it is doubtful whether they can be prevented from separating during adjournments in cases of misdemeanour.	Clause 381. The court is to have a discretion as to permitting the jury to separate or not in all cases.
14. In felony the prisoner is called upon to move in arrest of judgment when the verdict of "Guilty" is given, and if he does not, sentence is passed at once.	14. In misdemeanour the defendant is not called upon at all in common cases, and if he is tried on a Queen's Bench record there are special rules. (11 Geo. 4; 1 Will. 4, c. 70, s. 9.)	Clause 379. All courts in all cases are to have power to pass judgment or adjourn it, and the defendant is in all cases to be called upon to move in arrest of judgment.
15. No new trial is ever allowed in felony.	15. New trials can be obtained in the case of certain misdemeanours.	Chapter 47 of the Bill puts all offences on a new footing as to this.
16. In an indictment for felony only one offence can be charged, except in a few excepted cases.	16. Any number of offences may be charged in an indictment for misdemeanour.	Clause 403. The rule of the existing law as to misdemeanour is made general, subject to some modifications.
17. The prosecutor's costs may be allowed in all cases of felony, except offences against 11 Vict. c. 13 (treason-felony). Costs may be awarded against the defendant in all cases of treason and felony on conviction.	17. The prosecutor's costs may be allowed in a very large number of misdemeanours, including nearly all that generally occur. But costs cannot in general be awarded against the defendant on conviction.	Clause 415. Costs may be allowed in all cases to the prosecutor, and in case of conviction against the defendant.

MEMORANDUM RELATING TO THE

CLAUSE 289.

Jurisdiction of Quarter Sessions.

This clause was intended to represent 5 & 6 Vict. c. 38, but was inaccurate in several particulars. The Attorney General proposes to substitute for the clause, as it stands, the following, which, in the main, represents the existing law, but enlarges the jurisdiction of the courts of quarter session by enabling them to try burglaries and robberies with violence, restricting them, however, in such cases to sentences of 14 years' penal servitude. It also prevents their jurisdiction from being narrowed by the new definition of fraudulent misappropriation. The net result of the proposed clause thus is to give the courts of quarter sessions jurisdiction in cases of criminal breach of trust, and to a certain extent in cases of burglary and robbery.

The courts of quarter session shall have jurisdiction to try all offences against this Act, with the following exceptions (that is to say):—

(a.) Offences against any of the provisions of Part II. of this Act other than the provisions of sect. 45 and sect. 46;

(b.) Offences against any of the provisions of Part III. of this Act;

(c.) Offences against any provision contained in any of the following chapters of this Act (that is to say): chapter 24, chapter 26, chapter 32, chapter 33, chapter 34;

(d.) Offences against any of the following sections of this Act (that is to say): sect. 98, sect. 104, sect. 142, sect. 146, sect. 219.

(e.) Any offence upon conviction of which a person not previously convicted, may be sentenced to death or penal servitude for life: Provided, That courts of quarter session shall have jurisdiction to try any person on a charge of fraudulently misappropriating property of the value of 500 *l.* or upwards, or on a charge of robbery, or on a charge of breaking into a dwelling house by night, with intent to commit an indictable offence therein; but no such court shall have power to pass a sentence of more than 14 years' penal servitude for any such offence upon any person who has not been previously convicted, nor in any case to sentence any such person to be flogged or whipped;

(f.) Any conspiracy to commit any of the offences aforesaid.

CHAPTER 40.

Venue.

The law of venue is abolished by Clause 290. This makes new provisions necessary as to the local jurisdiction of criminal courts. They are contained in chapter 40, which, however, contains nothing substantially new except Clause 304, which gives power to the High Court to change the place and mode of trial. This extends the principle of Palmer's Act, and replaces the existing law as to *certiorari*. The Attorney General proposes to make a slight amendment in the clause as drawn, confining the exercise of these powers to the High Court in London. Clause 291 authorises the execution of a warrant within seven miles of the place where it is issued, although the Justice issuing it may not have jurisdiction there. The present law is subject to the qualification that the place where the warrant is executed must be in the next adjoining district, so that a warrant issued in Middlesex cannot be executed in a part of Kent within seven miles of the place of issue, because London intervenes.

The Attorney General proposes to amend Section 306, so as to make it correspond with 38 Geo. 3, c. 52, s. 3, from which it is taken. As the Bill stands, it confers a power upon the courts of quarter session, which ought to have been confined to courts of assize. A similar amendment is proposed in Clause 292.

CLAUSE 311.

Refusal to Grant Process.

Clause 311, last paragraph, is new. It enables a prosecutor to appeal to a Judge-at Chambers if a Justice refuses to grant a summons or warrant.

173

CLAUSE 320.

Defendant's Evidence.

By the present law (30 & 31 Vict. c. 35, s. 3, Mr. Russell Gurney's Act) a defendant is entitled in all cases to call witnesses before a magistrate. By Clause 320 it is provided that he shall not be entitled to call witnesses before the magistrate to prove matter of excuse (madness, &c.), or to justify the publication of a defamatory libel.

CLAUSE 330 (c).

Copy of Exhibits.

By the present law the defendant is entitled to a copy of the depositions. By Clause 330 (c) he will also be entitled to a copy of exhibits at the same rate. By Clause 355 he is also entitled to a copy of the coroner's depositions.

CLAUSE 335.

Evidence by Commission.

Power is given to the court to order evidence to be taken by commission. The clause is copied from Order 37, 4, of the Judicature Act of 1875. The Attorney General proposes to amend this clause by adding a provision restricting its exercise to cases in which the witness is physically unable to attend, or is out of the jurisdiction of the court, or is to give formal proof only, or in which the defendant consents.

CLAUSES 348-352, 359.

Notice to Defendant of Indictment.

The provisions for notice to the defendant in the case of indictments, where a defendant has not been taken before a magistrate are new (*see* Chapter 45, Sections 348-352, 359). Some new provisions connected with these are introduced in the chapter on Costs (*see* especially Section 419), and in other places. The Attorney General proposes an amendment by which a private prosecutor would be prevented from indicting a man more than once. This involves an amendment in Clause 359.

CLAUSE 354.

Criminal Informations.

By Clause 354 a rule is laid down as to the cases in which a criminal information may be filed. The matter is at present uncertain.

CLAUSE 357.

Outlawry.

By Clause 357 proceedings in outlawry are abolished, and absconding from justice is declared to be an act of bankruptcy. A man who permits himself to be made an outlaw may now be made a bankrupt.

CLAUSE 368.

Examination of Defendants.

By Clause 368 the defendant may be examined. This is new.

CLAUSE 371.

Notice of Witnesses to Defendant.

By Clause 371 the prosecutor is bound to give the prisoner notice of any witness whom he proposes to call, and of the substance of his evidence. This is new, though it only gives the force of law to a practice usually followed at present.

MEMORANDUM RELATING TO THE

CLAUSE 372.

Power to Court to call Witnesses.

By Clause 372 the Court is empowered to direct the attendance of witnesses called by neither party. This is new. The Attorney General proposes an amendment giving the court power to procure the attendance of witnesses.

CLAUSE 381.

Jury of Matrons.

In the case of a defendant pleading pregnancy in arrest of execution, Clause 381 substitutes an examination by three medical men for the present jury of matrons.

CLAUSE 382.

Discharge of Jury.

Power is given to discharge jurors becoming incapacitated to the number of three. As the clause stands the judge is authorized to discharge jurors incapacitated or misconducting themselves. The Attorney General proposes to amend the clause by omitting reference to misconduct. He also proposes to amend Clause 383 by omitting the part of it which authorises the removal of a defendant who misconducts himself. Clause 385 authorises the taking of a verdict and passing of sentence on a Sunday.

CHAPTER 47.

Appeals.

Chapter 47, as to appeals and new trials, alters the law to some extent. By Clauses 389 to 391 the form of the record is simplified, and proceedings in error are abolished. By Clause 392 appeals are permitted in cases in which, as the law stands, a writ of error might be brought or a case might be reserved under 11 & 12 Vict. c. 78, and power is given to the court in such cases to order a new trial.

Clause 393, by which applications may be heard for a new trial, is entirely new.

CHAPTER 48.

The whole of this chapter, which recasts the law as to indictments, &c., is new. An amendment in Clause 396 is proposed by the Attorney General, which preserves part of the present rules as to indictments in the case of such indictments at common law as may be presented after the Bill passes.

CHAPTER 49.

Costs.

Several alterations are made in the law as to costs, besides those already referred to. By Section 419 the prosecutor may be ordered to pay costs if the court considers the prosecution frivolous or vexatious. By an amendment which the Attorney General proposes to make in Section 414, the county or borough treasurer will in all cases pay the costs in the first instance, recovering the costs, when paid, from any other person liable to pay them. By the same clause (as proposed to be amended by the Attorney General) no fee will be payable for making out orders for costs, and by Section 420 (as proposed to be amended by the Attorney General) the power which magistrates now possess of taking the money of a person committed for trial to pay the expenses of his removal, will be taken away.

CLAUSE 421 & 423.

Compensation and Rewards.

By Clause 421, the power to give rewards is very slightly increased. Provision is made for payments to the surviving relations of a woman killed in trying to apprehend an offender. The law at present applies to men only.

By

CRIMINAL CODE (INDICTABLE OFFENCES) BILL.

17

175

By 33 & 34 Vict. c. 23, s. 4, a court can order compensation not exceeding 100 l. to any person whose property has been injured by any felony. By Clause 423 this power is extended to all injuries inflicted either upon person or property by any indictable offence.

CLAUSE 425.

Repeal not to be Retrospective.

The Attorney General proposes to add to the repealing clause (Clause 425) words restricting its operation to offences committed, and acts done, after the Act comes into force.
