CHAPTER XIII

OF OFFENCES RELATING TO WEIGHTS OR MEASURES

The offences relating to weights and measures are four in number. They may be summarised thus :

(1) Fraudulently using false instruments for weighing. Punishment.—Imprisonment of either description for 1 year or fine or both. (S. 264).

(2) Fraudulently using any false weight or false measure of length or capacity, or fraudulently using any weight or any measure of length or capacity, as a different weight or measure from what it is. Punishment.—Same as under section 264. (S. 265).

(3) Having in possession any instrument for weighing or any weight or measure of length or capacity, knowing the same to be false and intending that the same may be fraudulently used. Punishment.—Same as under section 264. (S. 266).

(4) Making, or selling or disposing of, any false instrument for weighing, or a false weight or measure of length or capacity, known to be false, in order that the same may be used as true, or knowing that the same is likely to be used as true. Punishment.—Same as under section 264. (S. 267).

CHAPTER XIV

OF OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY AND MORALS.

Chapter XIV may be divided into 3 parts :

1. Offences affecting the public health.
2. Offences affecting public safety and convenience.
3. Offences affecting decency and morals.

1. Offences affecting public health.—There are 10 offences against public health which may be arranged in 5 groups :

(1) Public nuisance (s. 268).

(2) Acts likely to spread infection (ss. 269-271).

(3) Adulteration of food or drink (ss. 272-273).

(4) Adulteration of drugs (ss. 274–276).

(5) Foulin gwater and vitiating atmosphere (ss. 277-278).

(1) Public nuisance.—Section 268 of the Pakistan Penal Code provides that a person is guilty of public nuisance, who does any act or is guilty of an illegal omission, which causes any common injury, danger or annoyance to the public, or to the people in general, who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

A common nuisance is not excused on the ground that it causes some convenience or advantage.

The ingredients of public nuisance are :

(1) Doing of any act or illegal omission to do an act.

(2) The act or omission (*i*) must cause any common injury, danger, or annoyance (*a*) to the public, or (*b*) to the people in general who dwell or occupy property in the vicinity, or (*ii*) must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

Kinds of nuisance.—Nuisance is of two kinds : Public and Private.

Public nuisance.—A public nuisance or common nuisance is an offence against the public, either by doing a thing which tends to the annoyance of the whole community in general or by neglecting to do anything which the common good requires. Acts which seriously interfere with the health, safety, comfort, or convenience of the public generally, or which tend to degrade public morals, have always been considered to be public nuisance.

Public nuisance connot be committed with respect to a particular individual or individuals. When the nuisance affects the public or a section of the public residing in the neighbourhood, or persons exercising public right, it is indictable and it is no excuse to say that it causes some convenience or advantage. Acts which seriously interfere with the health, safety, comfort or convenience of the public generally, or which tend to degrade public morals, are always taken as public nuisance. Thus blasting stones near a public road or working a printing press at night in a residential quarter of a city, keeping gaming houses or slaughtering animals in a public place, are instances of public nuisance for remedying which, both a civil suit as well as a criminal prosecution will lie.

Private nuisance.—A private nuisance is some unauthorised use of a man's own property causing damage to the property of another or some unauthorised interference with the property or proprietory rights of another, causing damage, but not amounting to trespass. Private nuisance includes obstruction to light and air, wrongful escape of foul gas, or noise, water, filth, germs, etc. Thus, if my neighbour plays radio or gramophone or piano, whole day and night, I may be considerably annoyed, troubled, etc. Here I myself or my family may have a civil cause of action. I may sue my neighbour for injunction, damage, etc. But I cannot prosecute him—the law being that only a public nuisance is an offence, not a private one.

Distinction between Public and Private nuisance.—(1) As to the nature of the right involved.—A public or common nuisance affects the public at large or some considerable portion thereof while a private nuisance affects only one person or a determinate body of persons. In other words, while a public nuisance is an

offence against public rights, safety or convenience, a private nuisance is a violation of a private right of a person to the comfortable occupation of property.

(2) As to who can sue.—Public nuisance does not create a civil cause of action for any person. An action cannot be maintained by a private individual in his own name in respect of public nuisance except abatement of nuisance, damages, and injunction. Private nuisance, on the other hand, is actionable at the suit of any person in possession of land who is injured by reason thereof.

(3) As to the acquisition of right of nuisance.— While no length of time can legalise a public nuisance, a right to create or continue private nuisance may be acquired by prescription.

(4) Abatement.—While a private nuisance may be abated by the person injuriously affected thereby, a public nuisance cannot be so abated by him.

(5) Remedies available.—An action for damages lies in respect of a private nuisance, but not in respect of public nuisance unless the plaintiff has sustained special damage. In case of a public nuisance, the action generally is for declaration and injunction.

(2) **Acts likely to spread infection.**—There are two acts likely to spread infection :

(*a*) Negligent or malignant act likely to spread infection of any disease dangerous to life. (Ss. 269-270).

(*b*) Wilful disobedience to a quarantine rule. (S. 271).

(3) **Adulteration of food or drink.**—There are two important offences under this head. They are :

(1) Adulteration of food or drink intended for sale as to make it noxious. (S. 272).

The mixing of noxious ingredients in food or drink, or otherwise rendering it unwholesome by adulteration, is punishable under this section. Mere adulteration with harmless ingredients for the purpose of getting more profit is not punishable under it, *i. e.* mixing water with milk or ghee with vegetable oil.[1]

1. *Chokraj Marwori* (1908) 12 C. W. N. 608.

The expression 'noxious as food' means unwholesome as food or injurious to health and not repugnant to one's feelings. A person who mixes pig's fat with ghee, intending to sell the mixture as food or knowing it to be likely that it will be sold as such cannot be convicted for so doing.[1]

(2) Selling, offering or exposing for sale, as food or drink, any article which has been rendered or has become noxious or unfit for food or drink. (S. 273).

Section 272 punishes adulteration of food or drink. Section 273 punishes the sale of adulterated articles, *e. g.* selling toddy in which germs are germinated. It is not an offence to sell inferior food cheap if it is not noxious.

Ingredients of section 273.—This section requires three things :

(1) Selling or offering for sale as food or drink some article.

(2) Such article must have become noxious or must be in a state unfit for food or drink.

(3) The sale or exposure must have been made with a knowledge or reasonable belief that the article is noxious as food or drink.

What is punishable under section 273 is the sale of noxious articles as food or drink and not the mere sale of noxious articles. Where the owner of a grain pit sold the contents of it before it was opened at a certain sum per maund whether the grain was good or bad, and on the pit being opened it was found that a large proportion of the grain was unfit for human consumption, it was held[2] that the vendor could not be convicted under this section. Similarly, a person cannot be convicted of an offence under this section for selling wheat containing a large admixture of extraneous matter, such as dirt, wood, matches, charcoal, black-seeds and other matters.[3] In the instant case the accused was held to have committed no offence inasmuch as the extraneous matter can be separated from the wheat.

(4) **Adulteration of Drugs.**—There are 3 offences falling under this head :

1. *Ram Dayal* (1923) I. L. R. 46 All. 94.
2. *Emperor v. Salig Ram*, (1906) I. L. R. 28 All. 312.
3. *Emperor v. Narumal*, (1904) 6 Bom. L. R. 520 : (1904) Cr. L. J. 613.

(1) Adulteration of drug so as to lessen its efficacy, change its operation or render it noxious. (S. 274).

(2) Knowingly selling or causing to be used for medicinal purposes any adulterated drug. (S. 275).

(3) Selling or offering or exposing for sale or issuing from a dispensary for medicinal purposes any drug or medical preparation as a different drug or medical preparation. (S. 276).

(5) Fouling water, and vitiating atmosphere.—(1) Voluntarily corrupting or fouling the water of a public spring or reservoir so as to render it less fit for the purpose for which it is ordinarily used. (S. 277).

Ingredients.—To prove a person guilty of fouling the water of a public spring or reservoir, the following evidence is necessary :

(*a*) that the spring or reservoir is public,

(*b*) that he caused the water thereof to become corrupt or foul,

(*c*) that he did so voluntarily, and

(*d*) that such a corrupting or fouling of water rendered the same less fit for use than it ordinarily was before.

(2) Voluntarily vitiating the atmosphere so as to make it noxious to public health. (S. 278).

Ingredients of section 278.—To prove a person guilty of making the atmosphere noxious to health, the following evidence is necessary :

(*a*) that he caused the atmosphere to be vitiated ;

(*b*) that he did so voluntarily ;

(*c*) that such vitiation was, in its nature, noxious to health, and

(*d*) that it was noxious to the health of persons dwelling or carrying on business in the neighbourhood of the place, or passing along a public way.

2. Offences affecting public safety and convenience.—The following offences relate to public safety :—

(1) Rash driving or riding on a public way. Section 279 punishes rash or negligent driving or riding on a public way so as to endanger human life, or to cause hurt or injury to any other person. Punishment.—Imprisonment of either description for 6 months or fine of Rs. 1000 or both. (S. 279).

Section 279 penalises rash or negligent driving or riding on the public way so as to endanger human life, or to cause hurt or injury to other person. This section requires two things—(a) Driving of a vehicle or riding on a public way. (b) Such driving or riding must be so rash or negligent as to endanger human life or to be likely to cause hurt or injury to any other person.

For a conviction under this section it is not necessary that the rash or negligent act should result in injury to life or limb. Even the presence of a person on the road is not essential. The probability of persons using the road being placed in danger is alone taken into consideration. Hence bare negligence involving the risk of injury is punishable under this section.[1]

(2) Rash or negligent navigation of a vessel. (S. 280). Punishment.—Same as under section 279. (S. 280).

(3) Exposing any false light, mark or buoy, intending or knowing to be likely to mislead any navigator. (S. 281). Punishment.—Imprisonment of either description for 7 years or fine or both. (S. 281).

(4) Conveying a person by water for hire in a vessel overloaded or unsafe. (S. 282). Punishment.—Same as under section 279. (S. 282).

(5) Causing danger, obstruction or injury to any person in any public way or public line of navigation by doing any act or by omitting to take order with any property in possession or under charge. (S. 283). Punishment.—Fine of Rs. 200. (S. 283).

(6) Rash or negligent conduct with respect to any poisonous substance so as to endanger human life, or to be likely to cause hurt, or injury to any person. (S. 284). Punishment.—Same as under section 279. (S. 284).

(7) Rash or negligent conduct with respect to any fire or combustible matter so as to endanger human life or to be likely to cause hurt or injury to any person. (S. 285). Punishment.—Same as under section 279. (S. 285).

(8) Rash or negligent conduct with respect to any explosive substance so as to endanger life or to be likely to cause hurt or

1. *Sivarama v. State*, 1953, Cr. L. J. 913.

injury to any other person. (S. 286). Punishment.—Same as under section 279. (S. 286).

(9) Rash or negligent conduct with respect to any machinery so as to endanger human life or to be likely to cause hurt or injury to any other person. (S. 287). Punishment.—Same as under section 279. (S. 287).

(10) Knowingly or negligently omitting to take such order with respect to a building in pulling down or repairing it, as is sufficient to guard against any probable danger to human life from the fall of that building or of any part thereof. Punishment.—Same as under section 279. (S. 288).

(11) Knowingly or negligently omitting to take such order with any animal in possession, as is sufficient to guard against any probable danger to human life or any probable danger of grievous hurt from such animal. Punishment.—Same as under section 279. (S. 289).

Section 290 penalises public nuisance in cases not otherwise provided for. This section provides for the punishment of Public nuisance generally, when the act falls within the four corners of the definition given in section 268, but is not punishable under any other section. The fact that the act of the accused is an offence under some Special or Local Act is no bar to his prosecution under the Penal Code. Punishment.— Fine of Rs. 200. (S. 290).

Section 291 punishes a person repeating or continuing a nuisance after he is enjoined by a public servant not to repeat or continue it. Section 143 of the Criminal Procedure Code empowers a Magistrate to order any person not to repeat or continue a public nuisance. A breach of such an order is punishable under section 291 P. P. C. Punishment.—Simple imprisonment for 6 months or fine or both. (S. 291).

3. Offences affecting decency and morals.—The third division of Chapter XIV deals with offences against public morals and decency. It may be studied under two heads :

(1) Prevention of obscenity,
(2) Keeping lottery office.

(1) **Prevention of obscenity.**—The provisions for the prevention of obscenity are contained in sections 292-294. Section 292 deals with sale etc. of obscene books etc. This section may be summarised as follows :

(*i*) Selling, letting to hire, distributing, publicly exhibiting or circulating, or for purposes of sale, hire, distribution, public exhibition or circulation, making, producing or having in possession, any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever ; or

(*ii*) importing, exporting, or conveying any obscene object for any of the above purposes, or knowing or having reason to believe that such object will be put to such purposes ; or

(*iii*) taking part in or receiving profits from any business carried on or believed to be carried on for the purposes mentioned above ; or

(*iv*) advertising that any person is engaged or is ready to engage in any act which is an offence under this section or that any obscene object can be procured from or through any person ; or

(*v*) offering or attempting to do any act which is an offence under this section. Punishment.--Imprisonment of either description for 3 months or fine or both. (S. 292).

Exception.--This section does not extend to any book, pamphlet, writing, drawing or painting kept or used *bona fide* for religious purposes or any representation sculptured, engraved, painted or otherwise represented on or in any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

In the case of *Yaqub Beg v. State*,[1] the petitioner sold nude photographs of women. He contended that photographs were not obscene. Artists, professors, physicians and surgeons of some repute who appeared as witnesses deposed that the photographs were not obscene but made artistic exposition of the beauty of human-body. It was held that 'obscenity' consists of publishing or exhibiting such matter or object which has the tendency to corrupt the minds of those who are open to immoral influence by exciting in them sexuality and carnal desire.

1. (1960) 12 D. L. R. (W.P) 45.

In determining whether a certain picture or writing is or is not obscene, it would not do to apply the test of an artist; the mere fact that a picture is perfect in its technique and depicts the beauty of human body does not exclude it from the definition of obscenity.

A mind open to immoral influence does not mean an abnormal case of a person who is easily excited sexually or whose mind is perverse but means the case of a normal person, particularly a youth whose mind has not reached such a stage of artistic maturity that he would be completely impervious to such exposition so long as it has certain artistic value.

In order to determine whether a picture or writing is obscene or not, it would also be necessary to see the prevailing normal standards and conditions of the society in which such an object is circulated or is likely to be seen or read.

Even in a so-called liberal society the exposing of the female form with all the nakedness of the flesh would not fail to have an immoral influence in some measure upon the normal members of such a society.

Section 293 deals with sale, etc., of obscene objects to young person. It states "Whoever sells, lets to hire, distributes, exhibits or circulates to any person under the age of twenty years any such obscene object as is referred to in the last preceding section, or offers or attempts so to do, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both."

Section 294 deals with obscene acts and songs. It provides "Whoever, to the annoyance of others, (a) does any obscene act in any public place, or (b) sings, recites or utters any obscene songs, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both."

Test of obscenity.—The test of obscenity is to judge whether the tendency of the matter charged as obscene is to deprave and corrupt those where minds are open to such immoral influences, and into whose hands a publication of this sort may fall.

If a publication is detrimental to public morals and calculated to produce a pernicious effect in depraving and debauching the minds of the persons into whose hands it may come, it will be an obscene publication, which it is the intention of the law to suppress.

The above provisions, however, do not extend to any book, pamphlet, writing, drawing or painting kept for religious purposes or any representation sculptured, engraved, painted in any temple, or kept for any religious purpose.

(2) **Keeping lottery office.**—It is an offence to keep unauthorised lottery office and to publish a proposal to pay any sum or to deliver any goods or to do or forbear doing anything on any cotingency applicable to the drawing of any ticket, lot or number in a lottery. (S.294A).

A lottery is a game of chance in which the prizes are distributed by lot or chance. If the result does not depend entirely on chance, or if there is any element of skill it is not lottery. An agreement for contribution to be paid by lot, or a transaction requiring skill for winning prizes is not a lottery. Transactions in which prizes are decided by chance amount to lottery.

The section does not touch authorised lotteries ; but it intends to save people from the effects of those not authorized, by prohibiting (*i*) the keeping of lottery offices, and (*ii*) the publication of advertisement on them. If the business or an association of persons is registered as Company, the fact does not constitute authorization by the Government. Punishment.—For keeping lottery office—Imprisonment of either description for six months or fine or both. In other cases—Fine of Rs. 1000. (S.294A).

CHAPTER XV

OF OFFENCES RELATING TO RELIGION

Chapter XV is based on the principle that every man should be suffered to profess his religion and that no man should be suffered to insult the religion of another.

The offences relating to religion are provided in sections 295 to 298, which are as follows :

(1) Injuring or defiling a place of worship, or any object held sacred by any class of persons, with intent to insult the religion of any class of persons. (S.295). Punishment. – Imprisonment of either description for 2 years or fine or both. (S. 295).

(2) Deliberate and malicious act intended to outrage religious feelings of any class by insulting its religion or religious beliefs (S.295A). Punishment.—Same as under section 295.(S. 295A).

(3) Voluntarily disturbing a religious assembly lawfully engaged in the performance of religious worship, or religious ceremonies. (S.296). Punishment. – Imprisonment of either description for one year or fine or both. (S. 296).

(4) Trespassing in any place of worship, or burial place, offering any indignity to human corpse, with intent to wound the feelings or religion of any person. (S. 297). Punishment.— Same as under section 296. (S. 297).

(5) Uttering words or making signs with the intention of wounding the religious feelings of any person. (S. 298). Punishment. – Same as under section 296. (S. 298).

CHAPTER XVI

OF OFFENCES AFFECTING HUMAN BODY.

Chapter XVI may be studied under the following two main heads, *viz* :

1. Offences against human life (ss. 299-318), and
2. Offences against human body (ss. 319-377).

1. Offences against human life may be divided into the following heads :—

(*a*) Culpable homicide and murder (ss. 299-304) ;
(*b*) Causing death by negligence (s. 304A) ;
(*c*) Abetment of suicide (ss. 305-306) ;
(*d*) Attempt to commit culpable homicide, or murder, or suicide (ss. 307-309) ;
(*e*) Thug (ss. 310-311) ; and
(*f*) Offences relating to birth of children (ss. 312-318).

(a) **Homicide.**—Homicide is the killing of a human being by a human being and culpable means criminal. Homicide may be lawful or unlawful.

Lawful homicide.—Lawful homicide may be either (*i*) excusable or (*ii*) justifiable.

Excusable homicide.—Instances of excusable homicide are as follows :

(*i*) Death caused by accident or misfortune without any criminal intention. (S. 80).

(*ii*) Death caused by a child, or by an insane or intoxicated person. (Ss. 82-85).

(*iii*) Death caused unintentionally by an act done in good faith for the benefit of the person killed, when (*a*) he or, if a minor or lunatic, his guardian has expressly or impliedly consented to such an act (ss. 87,88) ; or (*b*) it is impossible for the person killed to signify his consent or such person is incapable of giving consent and has no guardian from whom it is possible to obtain consent in time for the thing to be done with benefit. (S. 92).

Justifiable homicide.—Instances of justifiable homicide are as follows :—

(*i*) Death caused by a person who by reason of a mistake of fact in good faith believes himself to be bound by law to do it. (S. 76).

(*ii*) Death caused by a Judge when acting judicially in the exercise of any power which in good faith he believes to be given to him by law. (S. 77).

(*iii*) Death caused by a person acting in pursuance of the judgment or order of a Court of Justice. (S. 78).

(*iv*) Death caused by a person who is justified or who by mistake of fact believes himself to be justified by law in doing it. (S.79).

(*v*) Death caused by a person without any criminal intention to cause harm, and in good faith for the purpose of preventing, or avoiding other harm to person or property. (S. 81).

(*vi*) Death caused by a person in exercise of the right of private defence of person or property. (Ss. 100-103).

Unlawful homicide.—Unlawful homicide includes culpable homicide not amounting to murder, murder, rash or negligent homicide.

Culpable homicide.—Section 299 of the Pakistan Penal Code lays down that whoever causes death by doing an act (1) with the intention of causing death, or (2) with the intention of causing such bodily injury as is likely to cause death, or (3) with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

There are three explanations to this section :

Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3.—The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

The ingredients of culpable homicide consist of the following :

(1) Causing of death of a human being.

(2) Such death must have caused by doing an act (*i*) with the intention of causing death ; or (*ii*) with the intention of causing such bodily injury as is likely to cause death ; or (*iii*) with the knowledge that the doer is likely by such act to cause death.

The fact that the death of a human being is caused is not enough. Unless one of the mental states mentioned above in ingredients (2) is present, an act causing death cannot amount to culpable homicide.

A few illustrations will bring out the principle of this section clear : (*a*) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(*b*) A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely to cause Z's death induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence ; but A has committed the offence of culpable homicide.

(*c*) A, by shooting at a fowl with intent to kill and steal it, kills B, who is behind a bush ; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B or cause death by doing an act that he knew was likely to cause death.

English law.—Under the English law manslaughter is the unlawful killing of man by man without malicea forethought, express or implied. The death must ensue within a year and a

day from the culpable act or issue assigned as its cause. If the deceased dies after that time the law would presume that his death has proceeded from some other cause. This rule has not been adopted in the Pakistan Penal Code.

Manslaughter is of two kinds :

(1) Voluntary, and

(2) Involuntary.

(1) Voluntary.—Voluntary manslaughter is where a man greatly provokes another and the other kills him, or where upon a sudden quarrel, two persons fight, and one of them kills the other.

(2) Involuntary.—Involuntary manslaughter consists of death caused by accident in doing an unlawful act not amounting to felony, or where death is caused by culpable neglect *i.e.* while doing a lawful act in an unlawful manner.

Murder.—Section 300 of the Pakistan Penal Code lays down that culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or secondly, if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or thirdly if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or fourthly, if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Illustrations.—(*a*) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(*b*) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such

a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death or such bodily injury as in the ordinary course of nature would cause death.

(*c*) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.

(*d*) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

When culpable homicide is not murder.—The following exceptions to section 300 provide for cases where culpable homicide is not murder :—

(1) Grave and sudden provocation.—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

This exception is subject to the following provisos :—

First.—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.—That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Exception 1 mentioned above provides that the act must be done whilst the person doing it is deprived of self-control by grave and sudden provocation ; that is, it must be done under the

immediate impulse of provocation. The provocation must be grave and sudden and of such a nature as to deprive the accused of the power of self-control. Mere verbal provocation, however, even if it be by threats or gestures or by the use of abusive or insulting language cannot induce a reasonable man to commit an act of violence or be regarded as a great provocation within the meaning of exception 1 to section 300. The test of grave and sudden provocation is whether the provocation given was in the circumstances of the case likely to cause a normal reasonable man to lose control of himself to the extent of inflicting the injury or injuries that he did inflict.

Illustrations.—(*a*) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(*b*) Y gives grave and sudden provocation to A. A, on this provocation fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(*c*) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.

(*d*) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(*e*) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, inasmuch as the provocation was given by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a by-stander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

(2) Exceeding the right of private defence.—Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

In the case of a right of private defence, even if the defence had failed to prove affirmatively that there existed circumstances which entitled him to a right of private defence but succeeded in proving merely the circumstances which were likely to give rise to a right of private defence it is enough and the accused are entitled to acquittal if they have not exceeded their right of self-defence.[1]

Illustration.—Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 2 mentioned above only applies where the right of private defence is exceeded without any intention of doing more harm than is necessary.

(3) Public servant exceeding his powers.—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

(4) Death caused in a sudden fight.—Culpable homicide is not murder if it is committed without premeditation in a sudden

1. *Jalal Ahmed v. State* (1968) 21 D.L.R. 164.

fight, in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party offers the provocation or commits the first assault.

To attract the provisions of Exception 4 of section 300 P.P.C. it is not enough to establish that the attack was unpremeditated and that the act was committed in the heat of passion. It has to be proved further that the act committed was the result of 'sudden fight' without the offenders 'having taken undue advantage' over the victim. Besides, it must also be proved that the offender did not act in a cruel and unusual manner.[1]

Before an accused can pray in aid of the provisions of Exception 4 to section 300 P.P.C. all its ingredients must be satisfied.[2]

The most important element here is that there should be a fight—an offer of violence on both sides. The exception would not be applicable where, in the course of wordy quarrel, the accused hit the deceased on the head with a *lathi* and killed him.

(5) Death caused with victim's consent.—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

Illustration.—A, by instigation, voluntarily causes Z, a person under eighteen years of age, to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death. A has therefore abetted murder.

Distinction between culpable homicide and murder.—Culpable homicide is the genus of which murder is a species. In order that an offence may amount to murder it must fall within the ambit of culpable homicide, but an offence may amount to culpable homicide without amounting to murder. It follows, therefore, that all murders are culpable homicides, but all culpable homicides are not murders.

1. *Ekram Hossain v. State* (1961) 13 D.L.R. 431 : 1962 P.L.D. 590.
2. *Ibid.*

The distinction between culpable homicide and murder has very ably and lucidly been set forth by Melvill J. in *Reg v. Govinda*.[1] In this case the accused, a young man of 18 years was married to a girl of 15. It appeared that he was habitually ill-treating the girl. On the fateful day the accused knocked his wife down, put one knee on her chest, and struck her two or three violent blows on the face with closed fist, producing extravasation of blood on the brain, and she died in consequence, either on the spot, or very shortly afterwards. The accused was held guilty of the offence of murder by the Session Judge. The case came up before a Bench of two Judges of the Bombay High Court for confirmation of the death sentence. As there was a division of opinion between the learned Judges constituting the Bench as to whether the facts constituted an offence of murder, or an offence of culpable homicide not amounting to murder, the case was referred for opinion to a third Judge, Melvill, J. His Lordship compared the provisions of sections 299 and 300 of the Penal Code, *viz.*, culpable homicide and murder, thus :

Culpable homicide (s. 299)	**Murder (s. 300)**
A person commits culpable homicide, if the act by which the death is caused is done	Subject to certain exceptions, culpable homicide is murder, if the act by which death is caused is done
(*a*) With the intention of causing death ;	(1) With the intention of causing death ;
(*b*) With the intention of causing such bodily injury as is *likely* to cause death ;	(2) With the intention of causing such bodily injury as the offender *knows to be likely* to cause the death of *the person to whom the harm is caused* ;

1. (1876) I.L.R. 1 Bom. 342.

Culpable homicide (s. 299)	Murder (s. 300)
	(3) With the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is *sufficient in the ordinary course of nature* to cause death ;
(*c*) With the knowledge that the act is *likely* to cause death.	(4) With the knowledge that the act is *so imminently dangerous that it must in all probability cause death*, or such bodily injury as is likely to cause death.

The words marking the difference between the two offences have been italicised above.

Nos. (*a*) and (1) show that where there is an intention to kill, the offence is always murder.

Nos. (*c*) and (4) are intended to apply to cases where there is no intention to cause death or bodily injury *e.g.*, furious driving, firing at a mark near a public road. Whether the offence is culpable homicide or murder, depends upon the degree of risk to human life. If death is a likely result, it is culpable homicide ; if it is the most probable result, it is murder.

No. (2) denotes that the offence is murder, if the offender *knows* that the *particular person injured* is likely, either from peculiarity of constitution, or immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death.

As regards (*b*) and (3), the offence is culpable homicide, if the bodily injury intended to be inflicted is *likely* to cause death ; it is murder, if such injury is *sufficient in the ordinary course of nature* to cause death. The distinction is fine, but appreciable. It is a question of degree of probability. Practically, it will generally resolve itself into a consideration of the nature of the weapon used. A blow from the fist or a stick

on a vital part may be likely to cause death ; a wound from a sword in a vital part is sufficient in the ordinary course of nature to cause death.

Applying the above observations to the case His Lordship came to the conclusion that there was no intention to cause death, nor was the bodily injury sufficient in the ordinary course of nature to cause death. The accused was accordingly found guilty of the offence of culpable homicide not amounting to murder and sentenced to transportation for seven years.

Punishment for murder and culpable homicide not amounting to murder.—Section 302 lays down that death or transportation for life is the punishment provided for murder. Section 304 lays down that in case of culpable homicide not amounting to murder, if the act by which death is caused is done with the intention of causing death or causing such bodily injury as is likely to cause death, the punishment is transportation for life or transportation of either description for a term which may extend to 10 years, and fine but if the act is done with the knowledge that it is likely to cause death but without any intention to cause death or such bodily injury as is likely to cause death, the punishment is imprisonment of either description for a term which may extend to 10 years or with fine, or with both.

English law.—Murder is unlawfully causing the death of another with malice aforethought, express or implied. Malice aforethought in murder practically means—

(1) An intent to kill or do grievous bodily harm to the person who is killed.

(2) An intent to kill or do grievous bodily harm to any one else.

(3) An intent to do any criminal act which will probably cause death or grievous bodily harm to some one.

(4) An element to oppose by force any officer of justice who is lawfully arresting or keeping in custody some one whom he is entitled to arrest, or keep in custody, provided the accused knows that he is such officer of justice.

Throughout the web of the English Criminal law one golden thread is always to be seen, that it is the duty of the prose-

cution to prove the prisoner's guilt. In every charge of murder, if the prosecution have proved homicide, namely, the killing by the accused, the prosecution must prove further that the killing was malicious and murder, as there is no presumption that the act was malicious, and at no point of time in a criminal trial can a situation arise in which it is incumbent upon the accused to prove his innocence, subject to the defence of insanity and subject also to any statutory exception. Where intent is an ingredient of a crime there is no onus on the accused to prove that the act alleged was accidental.[1]

(b) **Causing death by negligence.**—Section 304A provides that whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

The provisions of this section apply to cases where there is no intention to cause death, and no knowledge that the act done in all probability would cause death. It only applies to cases in which, without any intention or knowledge, death is caused by rash or negligent act.

In order to establish a charge of negligence under section 304A of the Pakistan Penal Code, it must be established that the accident was the direct result of the negligence or rashness of the accident.

We may cite some cases decided under this section :

In the case of *Sukaroo Kabiraj v. Empress*[2] the accused, a village doctor, uneducated in matters of surgery, cut out the piles of a person with an ordinary knife, and the person died from profuse bleeding, it was held that the accused is guilty under section 304A. Similarly, in the case of *Emperor v. De Souza*,[3] a Compounder, in order to make up a fever mixture took a bottle from a cupboard where non-poisonous

1. *Woolmington v. The Director of Public Prosecutions* (1935) A.C. 462.
2. (1887) I.L.R. 14 Cal. 566.
3. (1920) I.L.R. 42 All. 272.

medicines were kept and without reading the label of the bottle which was on its wrapper, added its full contents to a mixture which was administered to 8 persons out of whom 7 died. The bottle was marked poison and it contained Strychnine Hydrochloride and not quinine hydrochloride as he supposed. It was held that the Compounder was guilty under this section. Again in the case of *Emperor v. Ramava*,[1] A administered to her husband a deadly poison believing it to be a love potion, in order to stimulate his affection for her. The husband died from the effect of the poison. It was held that A was guilty under section 304A inasmuch as she acted both rashly and negligently in dealing with a deadly form of poison as a love potion.

In an Allahabad case,[2] the applicant Tapti Prasad was the Assistant Station Master at a Railway Station called Bharwari. While he was on duty a collision took place within the limits of that Station between a down passenger train and an up goods train. The latter train was standing within the Station limits but beyond the starting signal at the moment when Tapti Prasad gave the line clear which permitted the passenger train to leave the next station on the line. The collision which followed was attended with loss of life. The applicant was convicted by a Magistrate under section 304 A of the Penal Code and section 101 of the Railways Act. The convictions were affirmed by the Session Judge and Tapti Prasad filed a revision application in the High Court.

It was pleaded by the applicant that there was neither rashness nor negligence on his part, so as to bring the offence within the purview of section 304A of the Penal Code. The High Court repelled that plea and observed that the applicant by giving the line clear when he knew that the line was not actually clear and by taking it for granted that he would succeed in getting the line cleared within the time available, displayed precisely that quality of mind which was indicated by the word "rashness." In the result the application was dismissed.

1. (1915) 17 Bom. L.R. 217 : A.I.R. 1915 Bom. 297.
2. *Tapti Prasad v. Emperor* (1917) 15 A.L.J. 590 : 18 Cr. L.J. 815 : 41 I.C. 335.

(c) **Abetment of Suicide.**—There are two provisions regarding abetment of suicide :

(1) Abetment of suicide of a child or an idiot or an insane or a delirious or an intoxicated person. (S. 305). Punishment.—Death or transportation for life or imprisonment for 10 years and fine. (S. 305),

(2) Abetment of suicide by any person. (S. 306). Punishment.—Imprisonment for 10 years and fine. (S. 306).

(d) **Attempt to commit culpable homicide, or murder, or suicide.**—Attempt to destroy life are of three kinds :

(1) Attempt to commit murder.

(2) Attempt to commit culpable homicide.

(3) Attempt to commit suicide.

(1) Attempt to commit murder *i.e.* doing an act with such intention or knowledge, and under such circumstances that if the doer by that act caused death he would be guilty of murder. (S. 307). Punishment.—If hurt is caused to any person by such an act—Transportation for life or imprisonment of either description for 10 years and fine. In other cases—Imprisonment of either description for 10 years and fine. (S. 307).

Illustrations.—(*a*) A shoots at Z with intention to kill him, under such circumstances that, if death ensued, A would be guilty of murder. A is liable to punishment under this section.

(*b*) A with the intention of causing the death of a child of tender years exposes it in a desert place. A has committed the offence defined by this section, though the death of the child does not ensue.

(*c*) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section, and, if by such firing he wounds Z, he is liable to the punishment provided by the latter part of the first paragraph of this section.

(*d*) A, intending to murder Z, by poison, purchases poison and mixes the same with food which remains in A's keeping ; A has not yet committed the offence defined in this section. A places the food on Z's table or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this section.

(2) Attempt to commit culpable homicide, *i.e.*, doing an act with such intention or knowledge, and under such circumstances, that, if the doer by that act causes death, he would be guilty of culpable homicide not amounting to murder. (S. 308). Punishment.—If hurt is caused to any person—Imprisonment of either description for 7 years, or fine, or both. In other cases—Imprisonment of either description for 3 years, or fine or both. (S. 308).

Illustration.—A, on grave and sudden provocation, fires a pistol at Z, under such circumstances that if he thereby caused death he would be guilty of culpable homicide not amounting to murder. A has committed the offence defined in this section.

(3) Attempt to commit suicide.—Section 309 provides that whoever attempts to commit suicide and does any act towards the commission of such offence, shall be puinshed with simple imprisonment for a term which may extend to one year, or with fine, or with both. But if the person has committed suicide he escapes punishment altogether, for there is none left to bear the consequences of his act.

(e) **Thug.**—A 'thug' is a person who has been (*i*) habitually associated with any other or others for the purpose of committing (*a*) robbery, or (*b*) child stealing ; (*ii*) by means of, or accompanied with, murder. (S. 310). Punishment.—Transportation for life and fine. (S. 311).

(f) **Offences relating to birth of children.**—The following offences relate to birth and exposure of children :—

(1) Voluntarily causing a woman with child or quick with child to miscarry, otherwise than in good faith for the purpose of saving the life of the woman (s. 312) and without her consent. (S. 313). Punishment.—If the woman be quick with child—Imprisonment of either description for 7 years and fine. In other cases—Imprisonment of either description for 3 years or fine or both. (S. 312). If the offence is committed under section 312 without consent—Transportation for life or imprisonmet of either description for 10 years and fihe. (S. 313).

(2) Causing the death of a woman by an act done with intent to cause miscarriage. (S. 314). Punishment.—If the act is done without the woman's consent—Transportation for life or imprisonment of either description for 10 years and fine. In other cases—Imprisonment of either description for 10 years and fine. (S. 314).

(3) Doing an act without good faith with intent to prevent a child being born or to cause it to die after birth. (S. 315). Punishment.—Imprisonment of either description for 10 years or fine or both. (S. 315).

(4) Causing the death of a quick unborn child by an act amounting to culpable homicide. (S. 316). Punishment.—Imprisonment of either description for 10 years or fine. (S. 316).

(5) Exposure and abandonment of a child under twelve years by parent or persons having care of it. (S. 317). Punishment.—Imprisonment of either description for 7 years or fine or both. (S. 317).

(6) Concealment of birth by secret disposal of dead body. (S. 318). Punishment.—Imprisonment of either description for 2 years or fine or both. (S. 318).

2. Offences against human body may be divided into the following heads :—

(*a*) Hurt (ss. 319-338) ;

(*b*) Wrongful restraint and wrongful confinement (ss.339-348);

(*c*) Criminal force and assault (ss. 349-358) ;

(*d*) Kidnapping and abduction (ss. 359-369) ;

(*e*) Slavery and forced labour (ss. 370-374) ;

(*f*) Rape (ss. 375-376) ; and

(*g*) Unnatural offence (s. 377).

(a) **Hurt.**—Section 319 provides that "whoever causes bodily pain, disease, or infirmity to any person is said to cause hurt."

A person voluntarily causes hurt, if he does any act (*a*) with the intention of thereby causing hurt to any person, or (*b*) with knowledge that he is likely thereby to cause hurt. (S. 321). Punishment.—Imprisonment of either description for one year, or fine upto Rs. 1000, or both. (S. 323).

In the case of *Emperor v. Anis Beg*,[1] a boy of about 16 years of age, being in love with a girl some three or four years younger, and apparently intending to administer to her something in the nature of a love philtre, induced another boy younger than himself to give the girl some sweetmeats. The girl and some of the other members of her family ate the sweetmeats and all the persons who partook of them were seized with more or less violent symptoms of *dhatura* poisoning, though none of them died. It was held that the boy was guilty of causing hurt.

Grievous hurt.—Section 320 lays down the following kinds of hurt only which are designated as "grievous" :—

(1) Emasculation.
(2) Permanent privation of the sight of either eye.
(3) Permanent privation of the hearing of either ear.
(4) Privation of any member or joint.
(5) Destruction or permanent impairing of the powers of any member or joint.
(6) Permanent disfiguration of the head or face.
(7) Fracture or dislocation of a bone or tooth.
(8) Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

Punishment.—Imprisonment of either description for 7 years and fine. (S. 325).

Aggravated forms of the offence of hurt and grievous hurt.—The following are the aggravated forms of the two kinds of offences :

(1) Voluntarily causing hurt, or grievous hurt by an instrument used for shooting, stabbing, or cutting or which used as a weapon of offence is likely to cause death ; or by fire or heated substance or poison, or any explosive or deleterious substance ; or by means of any animal. Punishment.—In case of simple hurt—Imprisonment of either description for 3 years or fine or both. (S.324). In case of grievous hurt—Transportation for life or imprisonment of either description for 10 years and fine. (S. 326).

1. (1923) I.L.R. 46 All. 77.

(2) Voluntarily causing hurt, or grievous hurt to extort from the sufferer or any one interested in him property or valuable security; or to constrain him to do anything illegal; or to facilitate the commission of an offence. Punishment.—In case of simple hurt—Imprisonment of either description for 10 years and fine. (S. 327). In case of grievous hurt—Transportation for life or imprisonment of either description for 10 years and fine. (S. 329).

(3) Causing hurt by administering poison or any stupefying, intoxicating, or unwholesome drug, with intent to commit or facilitate the commission of an offence. (S. 328). Punishment.—Imprisonment of either description for 10 years and fine. (S. 328).

(4) Voluntarily causing hurt, or grievous hurt to extort from the sufferer or any one interested in him, a confession or any information which may lead to the detection of an offence; or to constrain the restoration of property, or the satisfaction of any claim. Punishment. – In case of simple hurt--Imprisonment of either description for 7 years and fine. (S. 330). In case of grievous hurt--Imprisonment of either description for 10 years and fine. (S. 331).

(5) Voluntarily causing hurt, or grievous hurt, to a public servant in the discharge of his duty, or to prevent or deter him from so discharging it. Punishment.—In case of simple hurt—Imprisonment of either description for 3 years or fine or both. (S. 332). In case of grievous hurt--Imprisonment of either description for 10 years and fine. (S. 333).

(6) Simple or grievous hurt caused on grave and sudden provocation. (Ss. 334, 335). Punishment. – In case of simple hurt—Imprisonment for one month or fine of Rs. 500 or both. (S. 334). In case of grievous hurt—Imprisonment of either description for 4 years or fine of Rs. 2,000 or both. (S. 335).

(7) Rash or negligent acts which endanger human life or the personal safety of others. (S. 336). Punishment.—Imprisonment of either description for 3 months or fine of Rs. 250 or both. (S. 336).

(8) Causing hurt, or grievous hurt to any person by doing any act so rashly or negligently as to endanger human life or

personal safety of others. (S. 337). Punishment.—In case of simple hurt—Imprisonment of either description for 6 months or fine of Rs. 500 or both. (S. 337). In case of grievous hurt--Imprisonment of either description for 2 years or fine of Rs. 1000 or both. (S. 338).

(b) Wrongful restraint.--The expression 'wrongful restraint' implies keeping a man out of a place where he wishes and has a right to be. Section 339 of the Pakistan Penal Code lays down that "Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person."

Exception.—The obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.[1]

Punishment.---Simple imprisonment for one month or fine of Rs. 500 or both. (S. 341).

Illustration.—A obstructs a path along which Z has a right to pass, A not believing in good faith that he has a right to stop the path. Z is thereby pevented from passing. A wrongfully restrains Z.

The ingredients of wrongful restraint are :

(1) Voluntary obstruction of a person.

(2) The obstruction must be such as to prevent that person from proceeding in any direction in which he has a right to proceed.

The following illustrations, given in the original Draft Code, further elucidate the meaning of this section :—

Illustrations.—(*a*) A builds a wall across a path along which Z has a right to pass. Z is thereby prevented from passing. A wrongfully restrains Z.

(*b*) A illegally omits to take proper order with a furious buffalo which is in his possession and thus voluntarily deters Z from passing along a road along which Z has a right to pass. A wrongfully restrains Z.

1. *Kabir Ahmed v. S.D.O. Chittagong Authority* (1967) 19 D.L.R. 623.

(*c*) A threatens to set a savage dog at Z, if Z goes along a path along which Z has a right to go. Z is thus prevented from going along that path. A wrongfully restrains Z.

(*d*) In the last Illustration, if the dog is not really savage, but if A voluntarily causes Z to think that it is savage, and thereby prevents Z from going along the path, A wrongfully restrains Z.

Wrongful Confinement.—Section 340 lays down that whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said "wrongfully to confine" that person. Punishment.—Imprisonment of either description for one year or fine of Rs. 1000 or both. (S. 342).

Illustrations.—(*a*) A causes Z to go within a walled space, and locks Z in. Z is thus prevented from proceeding in any direction beyond the circumscribing line of wall. A wrongfully confines Z.

(*b*) A places men with firearms at the outlets of a building, and tells Z that they will fire at Z if Z attempts to leave the building. A wrongfully confines Z.

The elements which go to constitute the wrongful confinement are :

(1) Wrongful restraint of a person.

(2) Such restraint must prevent that person from proceeding beyond certain circumscribing limits.

Wrongful confinement which is a form of wrongful restraint, is keeping a man within limits out of which he wishes to go, and has a right to go. There must be a total restraint, not a partial one. If one man merely obstructs the passage of another in a particular direction, whether by threat of personal violence or otherwise, leaving him at liberty to stay where he is or to go in any other direction if he pleases, he cannot be said thereby to imprison him. Imprisonment is a total restraint of the liberty of the person, for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring to him.[1]

1. *Bird v. Jones* (1845) 7 Q. B. 742, 751,752.

Distinction between wrongful restraint and wrongful confinement.—(1) Wrongful confinement is a form of wrongful restraint. It is keeping a man within limits out of which he wishes to go and has a right to go while wrongful restraint is keeping a man out of a place where he wishes to be, and has a right to go.

(2) In wrongful confinement a person is restrained from proceeding in all directions beyond a certain area within which he is confined, but in wrongful restraint he is restrained from proceeding in some particular direction, though free to proceed elsewhere. In other words, there is full restraint in the former, but only partial restraint in the latter. That is to say, the difference between them is only the distinction between obstruction on all sides and obstruction in one direction only.

(3) Wrongful confinement is a more serious offence than wrongful restraint inasmuch as it prescribes punishment with imprisonment, simple or rigorous, extending to one year or fine upto Rs. 1000, or both, while wrongful restraint is punishable with simple imprisonment upto one month, or with fine upto Rs. 500 or with both.

Aggravated forms of wrongful confinement.—The following are the aggravated forms of this offence :—

(1) Wrongful confinement for 3 or more days. (S. 343). Punishment.—Imprisonment of either description for 2 years or fine or both. (S. 343).

(2) Wrongful confinement for 10 or more days. (S. 344). Punishment.—Imprisonment of either description for 3 years and fine. (S. 344).

(3) Wrongful confinement of a person knowing that a writ for his liberation has been issued. (S. 345). Punishment.—Imprisonment of either description for 2 years in addition to any term of imprisonment provided by any other section of this Chapter. (S. 345).

(4) Wrongful confinement of a person in secret so as to indicate an intention that the confinement of such person may not be known to any one interested in that person or to any

public servant. (S. 346). Punishment.—Imprisonment of either description for 2 years in addition to any punishment provided for such wrongful confinement. (S. 346).

(5) Wrongful confinement of a person for the purpose of extorting any property or valuable security, or for the purpose of constraining the person to do anything illegal or to give any information which may facilitate the commission of an offence. (S. 347). Punishment.—Imprisonment of either description for 3 years and fine. (S. 347).

(6) Wrongful confinement for the purpose of extorting confession or information which may lead to the detection of an offence, or for the purpose of compelling the restoration of any property or valuable security or the satisfaction of any claim or demand. (S. 348). Punishment.—Imprisonment of either description for 3 years and fine. (S. 348).

(c) **Force.**—Section 349 of the Pakistan Penal Code provides that a person is said to use force to another, (1) if he causes motion, change of motion, or cessation of motion to that other, or (2) if he causes to any substance such motion, or change of motion or cessation of motion as brings that substance into contact (*a*) with any part of that other's body, or (*b*) with anything which that other is wearing or carrying, or (*c*) with anything so situated that such contact affects that other's sense of feeling: Provided that the person does so in any of the following ways :—

(*i*) by his own bodily power,

(*ii*) by disposing any substance in such a manner that the motion or change of motion, or cessation of motion takes place without any further act on his part, or on the part of any other person, and

(*iii*) by inducing any animal to move, to change its motion, or to cease to move.

The term force contemplates here the use of force to a person and not to a thing, and as such the presence of the person using the force and of the person to whom it is used is essential.

Criminal force.—Section 350 of the Pakistan Penal Code defines criminal force. It lays down that "Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other." Punishment.—For using criminal force to any person otherwise than on grave and sudden provocation given by that person— Imprisonment of either description for 3 months or fine of Rs. 500 or both. (S. 352). On grave and sudden provocation given by that person—Simple imprisonment for one month or fine of Rs. 200 or both. (S.358).

The following illustrations will make the principle of this section clear :—

(*a*) Z is sitting in a moored boat on a river. A unfastens the moorings, and thus intentionally causes the boat to drift down the stream. Here A intentionally causes motion to Z, and he does this by disposing substances in such a manner that the motion is produced without any other action on any person's part. A has therefore intentionally used force to Z ; and if he has done so without Z's consent, in order to the committing of any offence, or intending or knowing it to be likely that this use of force will cause injury, fear or annoyance to Z, A has used criminal force to Z.

(*b*) Z is riding in a chariot. A lashes Z's horses, and thereby causes them to quicken their pace. Here A has caused change of motion to Z by inducing the animals to change their motion. A has therefore used force to Z ; and if A has done this without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy Z, A has used criminal force to Z.

(*c*) Z is riding in a palanquin. A, intending to rob Z, seizes the pole and stops the palanquin. Here A has caused cessation of motion to Z, and he has done this by his own bodily

power. A has therefore used force to Z; and as A has acted thus intentionally, without Z's consent, in order to the commission of an offence, A has used criminal force to Z.

(*d*) A intentionally pushes against Z in the street. Here A has by his own bodily power moved his own person so as to bring it into contact with Z. He has therefore intentionally used force to Z; and if he has done so without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy Z, he has used criminal force to Z.

(*e*) A throws a stone, intending or knowing it to be likely that the stone will be thus brought into contact with Z, or with Z's clothes, or with something carried by Z, or that it will strike water, and dash up the water against Z's clothes or something carried by Z. Here, if the throwing of the stone produces the effect of causing any substance to come into contact with Z, or Z's clothes, A has used force to Z; and if he did so without Z's consent, intending thereby to injure, frighten or annoy Z, he has used criminal force to Z.

(*f*) A intentionally pulls up a woman's veil. Here, A intentionally uses force to her, and if he does so without her consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy her, he has used criminal force to her.

(*g*) Z is bathing. A pours into the bath water which he knows to be boiling. Here A intentionally by his own bodily power causes such motion in the boiling water as brings that water into contact with Z, or with other water so situated that such contact must affect Z's sense of feeling. A has therefore intentionally used force to Z; and if he has done this without Z's consent, intending or knowing it to be likely that he may thereby cause injury, fear or annoyance to Z, A has used criminal force.

(*h*) A incites a dog to spring upon Z, without Z's consent. Here, if A intends to cause injury, fear or annoyance to Z, he uses criminal force to Z.

Under section 350 force becomes criminal (1) when it is used without consent and in order to the committing of an

offence, or (2) when it is intentionally used to cause injury, fear or annoyance to another to whom the force is used.

The essential ingredients of criminal force are :

(1) The intentional use of force to any person.

(2) Such force must have been used without the person's consent.

(3) The force must have been used—(*a*) in order to the committing of an offence ; or (*b*) with the intention to cause, or knowing it to be likely that he will cause injury, fear, or annoyance to the person to whom it is used.

The term 'criminal force' which as defined here includes what in English Law called 'battery' which is defined as any loss, hurt or violence unlawfully and wilfully or culpably done to the person of another.

Points that must be proved in order to convict a person of the offence of using criminal force.—The points requiring proof in the case of a charge of using criminal force are :—

(1) That the accused used force to the complainant.

(2) That he did so intentionally.

(3) That he used it without the complainant's consent.

(4) That he did so in order to commit an offence, or with the intention of causing, or with the knowledge of the likelihood of causing injury, fear or annoyance to the complainant.

(5) That he received no grave and sudden provocation from the complainant.

Assault.— 351 of the Pakistan Penal Code lays down that "Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault."

Explanation.—Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparations such a meaning as may make those gestures or preparations amount to an assault.

Punishment.—For assaulting to any person otherwise than on grave and sudden provocation given by that person—Imprison-

ment of either description for 3 months or fine of Rs. 500 or, both. (S. 352). On grave and sudden provocation given by that person—Simple imprisonment for one month or fine of Rs. 200 or both. (S. 358).

Illustrations.—(*a*) A shakes his fist at Z, intending or knowing it to be likely that he may thereby cause Z to believe that A is about to strike Z. A has committed an assault.

(*b*) A begins to unloose the muzzle of a ferocious dog, intending, or knowing it to be likely that he may thereby cause Z to believe that he is about to cause the dog to attack Z. A has committed an assault upon Z.

(*c*) A takes up a stick, saying to Z, "I will give you a beating." Here, though the words used by A could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstances, might not amount to an assault, the gesture explained by the words may amount to an assault.

The elements which go to constitute assault are :

(1) Making of any gesture or preparation by a person in the presence of another.

(2) Intention or knowledge of likelihood that such gesture or preparation will cause the person present to apprehend that the person making it is about to use criminal force to him.

Points that must be proved in order to convict a person of the offence of assault.—(1) That the accused made a gesture or preparation to use criminal force.

(2) That it was made in the presence of the complainant.

(3) That he intended or knew that it was likely that such gesture etc. would cause the complainant to apprehend that such criminal force would be used.

(4) That such gesture or preparation did cause the complainant to apprehend it.

(5) That the accused received no grave and sudden provocation from the camplainant.

Distinction between assault and criminal force.—An assault is something less than the use of criminal force, the force being cut short before the blow actually falls. It seems to

consist in an attempt or offer by a person having present ability with force to do any hurt or violence to the person of another. And it is committed whenever a well founded apprehension of immediate peril, from a force already partially or fully put in motion, is created. Thus in the case of assault the person assaulting puts another in reasonable fear of criminal force by means of a threat, gesture or preparation but in criminal force the offender actually does something to the person to whom criminal force is used. To shake one's fist at a person is an assault, but to bring it into contact with the force itself is criminal force. Therefore an assault is included in every use of criminal force.

Distinction between assault and affray.--(1) Assault may take place either in a public or private place, but an affray must always be committed in a public place.

(2) An assault is an offence against the person of an individual, but an affray is an offence against the public peace.

(3) Assault may be committed even by one person but an affray must be committed by two or more persons.

(4) In the case of an assault the punishment provided is slightly higher than that provided in the case of an affray.

Aggravated forms of the offence of assault or use of criminal force.--The following are the aggravated forms of the offence of "assault" or "use of criminal force."—(1) Assaulting or using criminal force to deter a public servant from the discharge of his duty. Punishment.—Imprisonment of either description for 2 years or fine or both. (S. 353).

(2) Assaulting or using criminal force to woman with intent to outrage her modesty. Punishment.--Imprisonment of either description for 2 years or fine or both. (S. 354).

(3) Assaulting or using criminal force with intent to dishonour a person otherwise than on grave provocation. Punishment.—Imprisonment of either description for 2 years, or fine or both. (S. 355).

(4) Assaulting or using criminal force in attempting to commit theft of property carried by a person. Punishment.--Imprisonment of either description for 2 years or fine or both. (S. 356).

(5) Assaulting or using criminal force to any person, in attempting wrongfully to confine that person. Punishment.--Imprisonment of either description for 1 year or fine of Rs. 1,000 or both. (S. 357).

(d) Kidnapping.—Kidnapping is of two kinds, *viz.* kidnapping from Pakistan and kidnapping from lawful guardianship.

Section 360 of the Pakistan Penal Code lays down that whoever conveys any person beyond the limits of Pakistan without the cosent of that person, or of some person legally authorised to consent on behalf of that person, is said to kidnap that person from Pakistan. Punishment. – Imprisonment of either description for 7 years and fine. (S. 363).

The essential ingredients of kidnapping are :

(1) Conveying of any person beyond the limits of Pakistan, and

(2) Such conveying must be without the consent of that person or of some person legally authorised to consent on behalf of that person.

Section 361 lays down that whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.—The words 'lawful guardian' in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.—This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

Punishment.—Imprisonment of either description for 7 years and fine. (S. 363).

The essential ingredients of the offence of kidnapping from lawful guardianship are :

(1) Taking or enticing away a minor or a person of unsound mind.

(2) Such minor must be under 14 years of age, if a male, or undar 16 years of age, if a female.

(3) The taking or enticing must be out of the keeping of the lawful guardian of such minor or person of unsound mind.

(4) Such taking or enticing must be without the consent of such guardian.

Distinction between Kidnapping from Pakistan and Kidnapping from lawful guardianship.—(1) A person of any age can be kidnapped from Pakistan whereas only a minor (under 14 years if a male, and 16 years if a female) and a person of unsound mind can be kidnapped from lawful guardianship.

(2) Want of consent of the person kidnapped or of some person legally authorised to consent on behalf of that person is essential to be proved in case of kidnapping from Pakistan, whereas consent of the person kidnapped from lawful guardianship is immaterial.

(3) The offence of kidnapping from Pakistan is a continuing offence and can be abetted. But the offence of kidnapping from lawful guardianship is not a continuing offence and cannot therefore be abetted.

Abduction.—Section 362 defines abduction. It states that "whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person."

This section requires two things : (1) Forceful compulsion or inducement by deceitful means. (2) The object of such compulsion or inducement must be the going of a person from any place.

Distinction between abduction and kidnapping.—Abduction differs from kidnapping on the following points :—

(1) 'Kidnapping' is committed only in respect of a minor under 14 years of age if a male, and under 16 years if a female, or a person of unsound mind ; abduction is committed in respect of a person of any age.

(2) In kidnapping, the person kidnapped is removed out of lawful guardianship. A child without a guardian cannot be kidnapped. Abduction has reference exclusively to the person abducted.

(3) In kidnapping, the minor or the person of unsound mind is simply taken away or enticed to go with the kidnapper. The means used may be innocent. In 'abduction' force, compulsion, or deceitful means are used.

(4) In kidnapping, consent of the person taken or enticed is immaterial ; in abduction, consent of the person removed, if freely and voluntarily given, condones abduction.

(5) In kidnapping, the intent of the offender is wholly irrelevant ; in abduction, it is all an important factor. Abduction must be with certain intent.

(6) Kidnapping from guardianship is a substantive offence under the Code ; but abduction is an auxiliary act, not punishable by itself, but made criminal only when it is done with one or other of the intents specified in sections 364 to 369.

Aggravated forms of the offence of kidnapping or abduction.—The following are the aggravated forms of the offence of kidnapping or abduction :—

(1) Kidnapping or abducting in order to murder. (S. 364). Punishment.—Transportation for life or rigorous imprisonment for 10 years and fine. (S. 364).

(2) Kidnapping or abducting a person under the age of 10. (S. 364 A). Punishment.—Death or transportation for life or rigorous imprisonment for 14 years. (S. 364A).

(3) Kidnapping or abducting with intent secretly and wrongfully to confine a person. (S. 365). Punishment.—Imprisonment of either description for 7 years and fine. (S. 365).

(4) Kidnapping or abducting a woman to compel her to marry any person against her will, or to force or seduce her to illicit intercourse. (S. 366). Punishment.—Imprisonment of either description for 10 years and fine. (S. 366).

(5) Inducing a woman to go from any place, by means of criminal intimidation or abusing of authority or any method of compulsion, in order that she may be forced or seduced to illicit intercourse. (S. 366). Punishment.—As above.

(6) Inducing a minor girl under the age of 18 years to go from any place or to do any act with the intention or

knowledge that she will be forced or seduced to illicit intercourse. (S. 366 A). Punishment.—Imprisonment of either description for 10 years and fine. (S. 366 A).

(7) Importing a girl under 21 years of age from any country outside Pakistan with intent or knowledge that she will be forced or seduced to illicit intercourse. (S. 366 B). Punishment.—Imprisonment for 10 years and fine. (S. 366 B).

(8) Kidnapping or abducting in order to subject a person to grievous hurt, slavery, or unnatural lust. (S. 367). Punishment.—Imprisonment of either description for 10 years and fine. (S. 367).

(9) Wrongfully concealing or confining a person known to have been kidnapped or abducted. (S. 368). Punishment.—Same as for kidnapping or abduction. (S. 368).

(10) Kidnapping or abducting a child under 10 years with intent to steal moveable property from the person of such child. (S. 369). Punishment.—Imprisonment of either description for 7 years and fine. (S. 369).

(e) Slavery.—There are two provisions dealing with slavery :

(1) (a) Importing, exporting, removing, buying, selling or disposing of any person as a slave, or (b) accepting, receiving, or detaining any person against his will as a slave. (S. 370). Punishment.—Imprisonment of either description for 7 years and fine. (S. 370).

(2) Habitually importing, exporting, removing, buying, selling, trafficking or dealing in slaves. (S. 371). Punishment.—Transportation for life or imprisonment of either description for 10 years and fine. (S. 371).

Sale or purchase of minors for immoral purposes.—There are two provisions which relate to selling or buying of persons under 18 years of age for immoral purposes :

(1) Selling, letting to hire, or otherwise disposing of any person under the age of 18 years for the purpose of (*a*) prostitution, or (*b*) illicit intercourse, or (*c*) for any unlawful and immoral purpose, or (*d*) knowing it to be likely that such person will at any age be used for such a purpose. (S. 372). Punishment.—Imprisonment of either description for 10 years and fine. (S. 372).

(2) Buying, hiring or otherwise obtaining possession of such person for a like purpose. (S. 373). Punishment.—Imprisonment of either description for 10 years and fine. (S. 373).

When a girl under 18 years is disposed of to, or is obtained possession of by, a prostitute or a brothel keeper, the person disposing of or obtaining possession of such girl shall be presumed to have disposed of her or obtained possession of her, for prostitution. (Explanation 1, Ss. 372 and 373).

'Illicit intercourse' means sexual intercourse between persons not united by marriage, or by any union or tie which, though not amounting to a marriage, is recognized by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi-marital relation. (Explanation 2, Ss. 372 and 373).

Forced labour.—Section 374 deals with forced labour. It states :

(1) Whoever unlawfully compels any person to labour against the will of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

(2) Whoever compels a prisoner of war or a protected person to serve in the Armed Forces of Pakistan shall be punished with imprisonment of either description for a term which may extend to one year.

(f) **Rape.**—Rape is defined in section 375 of the Pakistan Penal Code. It states : A man is said to commit 'rape' who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions :—

(1) Against her will.

(2) Without her consent.

(3) With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

(4) With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(5) With or without her consent, when she is under fourteen years of age.

Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under fourteen years of age, is not rape.

Punishment.—If the woman raped is the offender's own wife and is not under 12 years of age—Imprisonment of either description for 2 years, or fine or both. In other cases—Transportation for life or imprisonment of either description for 10 years and fine. (S. 376).

In the definition of rape, the first clause operates, where the woman is in possession of her senses, and therefore capable of consenting; the second, where she is insensible whether from drink or any other cause, or so imbecile that she is incapable of any rational consent: the third and the fourth, where there is consent, but it is not such a consent as excuses the offender, because in the one case it is extorted by putting the woman in fear, and in the other, it is obtained by deception of a particular kind; and the fifth, where the intercourse is with a girl so young that consent is immaterial.

Ingredient.—Section 375 requires two essentials:

(1) Sexual intercourse by a man with a woman.

(2) The sexual intercourse must be under circumstances falling under any of the five clauses in the section.

If a girl does not resist intercourse in consequence of misapprehension, this will not amount to a consent on her part. *In William's case*,[1] a medical man, to whom a girl of 14 years of age was sent for professional advice, had criminal connection with her, she making no resistance from a *bona fide* belief that he was treating her medically, it was held that he could be convicted of rape. Similarly, in the case of *Flattery*,[2] the accused professed to give medical advice for money, and

1 (1850) 4 Cox 220.

2. (1877) 2 Q. B. D. 410.

a girl of 19 consulted him with respect to illness from which she was suffering, and he advised that a surgical operation should be performed and, under pretence of performing it, had carnal intercourse with her, it was held that he was guilty of rape. In the case of *Williams*,[1] the accused, who was engaged to give lessons in singing and voice production to a girl of 16 years of age, had sexual intercourse with her under the pretence that her breathing was not quite right and that he had to perform an operation to enable her to produce her voice properly. The girl submitted to what was done under the belief, wilfully and fraudulently induced by the accused, that she was being medically and surgically treated by the accused and not with any intention that he should have sexual intercourse with her. It was held that the accused was guilty of rape.

That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent.[2]

Under the third clause, the mere fact that a woman submits through fear does not take the offence out of the catagory of rape.[3]

Fifth clause is provided to meet cases in which the check of the law may be necessary to restrain men from taking advantage of their marital right prematurely. Instances of abuse by the husband in such cases will fall under this clause. The policy of the law is to protect a girl of immature age against sexual intercourse, hence connection with even a girl under 14 would be rape, even though she consents to the act.

The age-limit was raised from ten to twelve years by the Indian Criminal Law Amendment Act (X of 1891) for the following reasons: "The limit at which the age of consent is now fixed (*i. e.*, ten years) favours the premature consummation

1. (1923) 1 K. B. 340.
2. Per Wills, J., in *Clarence*, (1888) 22 Q.B.D. 23, 27.
3. *Akbar Kazee* (1864) 1 W. R. (Cr.) 21.

by adult husbands of marriages with children who have not reached the age of puberty, and is thus, in the unanimous opinion of medical authorities, productive of grievous suffering and permanent injury to child-wives and of physical deterioration in the community to which they belong."[1]

The age-limit was again raised from twelve to fourteen years by the Indian Penal Code (Amendment) Act (XXIX of 1925), section 2, for the following reasons: "Books of medical jurisprudence establish the fact that the age of puberty in India is attained by a girl upon her reaching the age of fourteen. Even though puberty may be reached at the age, it is obvious that girls are unfit for sexual cohabitation till they are older and more developed in physique and strength. The appalling infant mortality in the country is partially ascribed to early marriages and the consummation which follows with immature girls. It is, therefore, not only for the protection of minor girls as also of their progeny that the age of consent should be raised to at least fourteen years."[2]

By raising this limit female children are protected (*a*) from premature cohabitation,[3] and (*b*) from immature prostitution.

In the case of *Shambhu Khatri*,[4] the accused, a youth of about eighteen, had, without any ancillary violence, sexual intercourse with a well-developed girl probably under twelve years of age; the girl did not consent; her vagina was ruptured and, as a result, she died of shock; it was held that the accused was guilty of rape.

The explanation says that penetration is sufficient to constitute rape. To constitute penetration it must be proved that some part of the virile member of the accused was within the labia

1. Statement of Objects and Reasons to Bill No. 3 of 1891, Gazette of India, 1891, part V, p. 5.
2. Statement of Objects and Reasons to Bill No. 12 of 1924, Gazette of India, 1924, Part V, p. 49.
3. *Huree Mohun Mythee*, (1880) I.L.R. 18 Cal. 49.
4. (1924) I.L.R. 3 Pat. 410.

of the pudendum of the woman, no matter how little.[1] The only thing to be ascertained is whether the private parts of the accused did enter into the person of the woman. It is not necessary to decide how far they entered.[2] It is not essential that the hymen should be ruptured, provided it is clearly proved that there was penetration[3] even though partial.[4] In *Reg. v. Ferroll*, Green, J., directed the jury that vulval penetration only was sufficient, under the law of India, to constitute rape without actual seminal emission. In this case the accused was charged with rape on a child of six years old. The child had not complained, and admitted on cross-examination that she had not been hurt. The medical evidence proved that there was no injury to the parts. The child was found to be suffering from gonorrhoea, so was the accused. It was clear that the penetration (if any) had been only vulval. Green, J., directed the jury that this was sufficient to constitute rape, and the accused was convicted of rape.[5] There is a distinction between vulval penetration and vaginal penetration. In order to constitute rape the statute merely requires medical evidence of penetration, and this may occur and the hymen remain intact.[6]

Where no penetration is attempted or intended the act is not punishable under this section.[7]

In the exception to section 375 the age limit was raised to 14 years by Act 29 of 1925, section 2. A man cannot be guilty of rape on his own wife when she is over the age of fourteen years, on account of the matrimonial consent she has

1. *Joseph Lines*, (1844) I C&K. 393.
2. *Allen*, (1839) 9 C. & P. 31, 34.
3. *Jordan*, (1839) 9 C&P. 118 ; *Hughes*, (1841) 9 C&P. 752 ; *John Cox*,(1832) 5 C&P. 297 ; *Russen*: (1777) I East P.C. 438. 439 ; *Moharaj Din*, (1927) 28 Cr, L.J. 244 : (1927) A.I.R. (Lahore) 222.
4. *Abdul Majid*, (1927) 28 Cr. L.J. 241 : (1927) A.I.R. (Lahore) 735.
5. Bombay High Court Sessions, February 10, 1879. Referred to by Lyon in his Medical Jurisprudence for India, 9th Edn., p. 370, Followed in *Natha*, (1923) 26 Cr. L.J. 1185.
6. *Jantan*, (1934) 36 P.L.R. 35 ; 36 Cr. L.J. 310.
7. *Tottitodiyil Ahmed Kutti*, (1891) 1 Weir 383:

given which she cannot retract. But he has no right to enjoy her person without regard to the question of safety to her.[1] A husband can be guilty of abetment of rape by another on his wife. This was held in the notorious *case of Lord Audley* who held his wife by force while his butler ravished her.[2] A husband suspecting the fidelity of his wife, went about in search of her, with nine companions, and found her in the company of her paramour. By way of punishment the wife was there and then ravished by all the nine companions in succession while the husband was looking on. The nine persons were held guilty of rape.[3]

A person who through impotency or otherwise is physically incapable of committing rape cannot be guilty of its attempt but he may be found guilty of indecent assault under section 354.

In the case of *Mumtaz Ahmad Khan v. State*,[4] it was observed that "the evidence of a prosecutrix in a rape case is customarily received by Courts with some suspicion. In certain jurisdictions, it is the rule that the solitary evidence of the prosecutrix being a woman of full-age, is not accepted as sufficient, but requires corroboration by independent evidence, in order to be believed."

Points requiring proof in case of Rape.—(1) In the case of a girl below 14 the only point required to prove is that there was some penetration. The question of consent in such a case is wholly immaterial. (2) For girls above that age, it is necessary to prove further that there was no valid consent in the act.

The whole evidence must be directed to showing whether the woman gave her consent to the act. The only direct evidence available on this point is the statement of the woman herself, but her bare testimony unsupported by circumstances corroborating the point will not be enough for a conviction. The following

1. *Huree Mohun Mythee*, (1890) I.L.R. 18 Cal. 49.
2. *Mervin Lord Audley's Case*, (1631) 3 St. Tr. 401.
3. *Tatya Tukaram Khabali*, (1930) Cr. App. Nos. 19 and 20 of 1930, decided by Mirza and Broomfield, JJ., on March 5, 1930 (Unrep. Bom.), Quoted by Ratanlal in his *Law of Crimes*, 18th Ed. p. 917.
4. (1967) 19 D.L.R. (SC) 259.

points should, therefore, be taken into account as throwing light upon the matter : (1) Comparative age of parties and consequent inequality of strength. (2) Existence of marks of resistance on the body of the girl. Non-existence how accounted for ? (3) Was she suddenly overpowered by superior force, so as to make resistance useless ? (4) Her conduct before or after the crime. Did she cry out, did she complain etc. (5) Was she idiot or weak in intellect ? (6) Was she put in fear ? (7) Was she stupefied with intoxicants ? (8) The character of the woman—was she a prostitute, was she intimate or familiar with the accused ? Did she receive his encouragements in good light ? (9) Scene of the crime—was it in a confined place or remote from human assistance ? (10) Medical evidence showing marks of injury either on the male or female organ, marks on clothing etc. (11) Was the accused physically impotent ?

(g) **Unnatural offences.**—Section 377 of the Pakistan Penal Code provides punishment for unnatural offences. It states : "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

This section provides punishment for what is known as sodomy, buggery and bestiality. The offence consists in a carnal knowledge committed against the order of nature by a man with a man, or in the same unnatural manner with a woman, or by a man or woman in any manner with an animal. As in rape, penetration, however slight, is essential.

Consent is immaterial in a case under this section. The person who takes a passive part is equally guilty as an abettor with the person actively participating in the act.

CHAPTER XVII

OF OFFENCES AGAINST PROPERTY

Chapter XVII may be divided into three main groups :

1. Offences dealing with deprivation of property (ss. 378–424).
2. Offences dealing with damage to property (ss. 425–440).
3. Offences dealing with violation of rights to property in order to commit some other offences (ss. 441–461).

1. Offences dealing with deprivation of property.—The following offences fall under this head :—

(1) Theft (ss. 378-382).
(2) Extortion (ss. 383-389).
(3) Robbery (390, 392-394, 397,398 & 401).
(4) Dacoity (ss. 391, 395-400 & 402).
(5) Criminal misappropriation of property (ss. 403 & 404).
(6) Criminal breach of trust (ss. 405–409).
(7) Receiving stolen property (ss. 410–414).
(8) Cheating (ss. 415-420).
(9) Fraudulent deeds and disposition of property (ss. 421-424).

(1) Theft.—Section 378 of the Pakistan Penal Code states that whoever, (*i*) intending to take dishonestly (*ii*) any moveable property (*iii*) out of the possession of any person (*iv*) without that person's consent, (*v*) moves that property in order to such taking, is said to commit theft.

Explanation 1.—A thing so long as it is attached to the earth, not being moveable property, is not the subject of theft ; but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2.—A moving effected by the same act which effects the severance may be a theft.

Explanation 3.—A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

Explanation 4.—A person, who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.

Explanation 5.—The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied.

Punishment.—Imprisonment of either description for three years, or fine, or both. (S. 379).

Ingredients.—In order to constitute theft the following five ingredients are necessary :—

(1) Dishonest intention to take property.—It is initially for the prosecution to prove that the accused had acted dishonestly and where the circumstances show that the property has been removed in the assertion of *bona fide* claim or right, it is not theft. A person can, however, be convicted of stealing his own property, as where A having pawned his watch to Z takes it out of Z's possession without Z's consent, not having paid what he borrowed on the watch. And though the watch is his own property, A commits theft as he takes it dishonestly. [*Illustration* (*k*)]. Similarly, if A owes money to Z for repairing the watch, and if Z retains the watch lawfully as a security for the debt, and A takes the watch out of Z's possession, with the intention of depriving Z of the property as a security for his debt, he commits theft, inasmuch as he takes it dishonestly. [*Illustration (j)*]. But if A having not owed to Z any debt for which Z could detain the watch as security, enters the shop openly and takes his watch by force out of Z's hand, A is not guilty of theft as he did not act dishonestly, although he may have committed criminal trespass and assault. [*Illustration* (*i*)]. Similarly, if A, in good faith, believing property belonging to Z to be A's own property, takes that property out of Z's possession. Here, as A does not take dishonestly, he does not commit theft. [*Illustration* (*p*)]. But if A takes an article belonging to Z out of Z's possession without Z's consent with the intention of keeping it until he obtains money from Z as a reward for

its restoration. A having taken the article dishonestly has committed theft. [*Illustration* (*l*)]. A servant is, however, not guilty of theft when what he does is at his master's bidding, unless he participates in his master's knowledge of the dishonest nature of the acts. But if the servant entrusted by his master with the care of a certain moveable property runs away with it without his master's consent the servant is guilty of theft. [*Illustration* (*d*)].

(2) The property must be moveable.—A thing so long as it is attached to the earth, not being moveable property, is not the subject of theft ; it becomes capable of being the subject of theft when it is severed from the earth. Thus A cuts down a tree on Z's ground, with the intention of dishonestly taking the tree out of Z's possession without Z's consent. Here, as soon as A has severed the tree in order to such taking, he has committed theft. [*Illustration* (*a*)].

(3) It should be taken out of the possession of another person. —The property must be in the possession of another person from where it is removed. There is no theft of wild animals, birds or fish while at large, but there is a theft of tamed animals. A finds a ring lying on the high-road, not in the possession of any person. A, by taking it, commits no theft, though he may commit criminal misappropriation of property. [*Illustration* (*g*)]. Similarly, Z, going on a journey, entrusts his plate to A, the keeper of a warehouse, till Z shall return. A carries the plate to a goldsmith and sells it. Here the plate was not in Z's possession. It could not therefore be taken out of Z's possession, and A has not committed theft, though he may have committed criminal breach of trust. [*Illustration* (*e*)].

(4) It should be taken without the consent of that person.— The consent may be express or implied and may be given either by the person in possession, or by any person having for that purpose express or implied authority. A being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent for the purpose of merely reading it, and with the intention of returning it. Here, it is probable that A may have conceived that he had

Z's implied consent to use Z's book. If this was A's impression, A has not committed theft. [*Illustration* (*m*)]. A asks charity from Z's wife. She gives A money, food and clothes, which A knows to belong to Z, her husband. Here it is probable that A may conceive that Z's wife is authorized to give away alms. If this was A's impression, A has not committed theft. [*Illustration* (*n*]. The position is not the same if A is the paramour of Z's wife and she gives A valuable property, which A knows to belong to her husband Z, and to be such property as she has not authority from Z to give. If A takes the property dishonestly, he commits theft. [*Illustration* (*o*)].

(5) There must be some removal of the property in order to accomplish the taking of it.—A puts a bait for dogs in his pocket, and induces Z's dog to follow it. Here, if A's intention be dishonestly to take the dog out of Z's possession without Z's consent, A has committed theft as soon as Z's dog has begun to follow A. [*Illustration* (*b*)]. Again A meets a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move, A has committed theft of the treasure. [*Illustration* (*c*)]. Similarly, A sees a ring belonging to Z lying on a table in Z's house. Not venturing to misappropriate the ring immediately for fear of search and detection, A hides the ring in a place where it is highly improbable that it will ever be found by Z, with the intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here A, at the time of first moving the ring, commits theft. [*Illustration* (*h*)].

The points requiring proof to convict a person on the charge of theft are :

(1) That the property in question is moveable property.

(2) That such property was in possession of a person.

(3) That the accused moved such property while in the possession of that person.

(4) That he did so without the consent of that person.

(5) That he did so in order to take the same out of the possession of that person.

(6) That he did so dishonestly, *i. e.*, with a view to cause wrongful gain to himself or wrongful loss to that person.

Aggravated forms of theft.—The following are the aggravated forms of the offence of theft :—

(1) Theft in any building, tent, or vessel, used as human dwelling or for the custody of property. (S. 380). Punishment.—Imprisonment of either description for 7 years and fine. (S. 380).

(2) Theft by a clerk or a servant, of property in possession of his master. (S. 381). Punishment.—Imprisonment of either description for 7 years and fine. (S. 381.)

(3) Theft after preparation made for causing death, hurt, or restraint, or fear of death, hurt, or restraint to any person, in order (*i*) to commit such theft, or (*ii*) to escape after committing it, or (*iii*) to retain property taken by such theft. (S. 382). Punishment. —Imprisonment of either description for 10 years and fine. (S. 382).

Difference between Larceny and Theft.—The crime of theft under the Pakistan Penal Code corresponds to the offence of larceny in English law. Larceny is the wilful and wrongful taking away of the goods of another against his consent and with intent to deprive him permanently of his property. There are, however, the following points of difference :—

(1) The Penal Code makes everything the object of theft which is moveable *i. e.* capable of being severed from its place. Hence, it is theft under the Code to sever and remove things which are attached to the earth, such as stones, minerals, trees, vegetables etc. But under the English law, there cannot be a larceny of matters that "savour of realty," such as minerals, trees, fixtures, title deeds etc.

(2) Under the English law of larceny, the thing stolen must have some appreciable value of its own. But this is not necessary under the Pakistan Penal Code. The authors of the Code observed :

"We have not, like Mr. Livingstone, made it a part of theft that the property should be of some assignable value."

(3) In English law there is a presumption that husband and wife constitute one person in law; consequently, a wife cannot ordinarily steal the goods of her husband nor can an indifferent person

steal the goods of the husband by the delivery of the wife. But if the person to whom the goods are delivered by the wife be an adulterer, it is otherwise ; for, he can be properly convicted of theft, even though they be delivered to him by the wife. There is, however, no such presumption in Pakistan law and consequently a wife may be guilty of stealing the goods of her husband, if she removes them from his possession with dishonest intention. The same reasoning would apply in the case of a husband.

(4) Theft, under the Penal Code, is an offence against possession, whereas larceny under the English law is an offence against ownership. In larceny, the taking must be from the owner against his consent, while in theft under the Code, the taking must be from the person in possession without his consent. Under the Pakistan law, a theft may be committed though the person from whose possession the thing is taken has no title to it. Similarly, under the Code a man may be guilty of stealing his own property if he takes it when in pawn or in possession of an usufructuary.

(5) In order to constitute larceny under the English law, there must be an intention to take entire dominion over the property *i.e.* the taker must intend to appropriate the property to his own use and make it permanently his own property ; but under the Penal Code, there may be theft without an intention to deprive the owner of the property permanently. The definition of larceny requires an intention to deprive the owner of his property permanently ; but this is not necessary under the Code. A charge of theft will lie under the Penal Code even where there is no intention to assume entire dominion over the property or to retain it permanently.

(6) The English law of larceny requires a taking a thing out of the possession of the owner, whereas the Penal Code requires a moving a thing out of the possession of any person. Thus, to constitute theft, it is not necessary to prove that the thief ever had the stolen thing in his power ; but there can be no larceny, even if there has been an actual removal, if the offender never had the thing in his power. For instance, where A intending

to take dishonestly a pencil out of the possession of a shop-keeper Z, without Z's consent, moves the pencil in order to such taking, he commits theft under the Code even though he is unable to carry the pencil on account of its being tied to Z's counter. In such a case A cannot be convicted of larceny.

(2) **Extortion.**—Under section 383 of the Pakistan Penal Code a person commits extortion if he (1) intentionally puts any person in fear of any injury (*a*) to that person, or (*b*) to any other, and thereby (2) dishonestly induces the person so put in fear (3) to deliver to any person any (*a*) property, or (*b*) valuable security, or (*c*) anything signed or sealed, which may be converted into a valuable security.

Punishment.—Imprisonment of either description for 3 years or fine or both. (S. 384).

Illustrations.—(*a*) A threatens to publish a defamatory libel concerning Z unless Z gives him money. He thus induces Z to give him money. A has committed extortion.

(*b*) A threatens Z that he will keep Z's child in wrongful confinement unless Z will sign and deliver to A a promissory note binding Z to pay certain money to A. Z signs and delivers the note. A has committed extortion.

(*c*) A threatens to send club-men to plough up Z's field unless Z will sign and deliver to B a bond binding Z under a penalty to deliver certain produce to B, and thereby induces Z to sign and deliver the bond. A has committed extortion.

(*d*) A, by putting Z in fear of grievous hurt, dishonestly induces Z to sign or affix his seal to a blank paper and deliver it to A. Z signs and delivers the paper to A. Here, as the paper so signed may be converted into a valuable security, A has committed extortion.

Ingredients.—To constitute the offence of extortion it is necessary to prove the following essentials :—

(1) Intentionally putting any person in fear of injury to himself or another, and thereby (2) dishonestly inducing such person to deliver any property or valuable security.

We may now explain the ingredients of extortion. (1) A person must be threatened, and threatened with injury, and injury not

necessarily to himself but to any person. The fear of injury need not necessarily be personal violence ; it may be of any harm illegally caused to body, mind, reputation or property. Injury is defined in section 44 as any "harm whatever illegally caused to any person in body, mind, reputation or property."

The 'fear' in extortion must be such as to unsettle the mind of the person on whom it operates and to take away from his acts that element of free voluntary action which alone constitutes consent. The terror of a criminal charge or of loss of an appointment amounts to a fear of injury. "Fear" must precede the delivery of property. Thus, wrongful retention of property obtained without threat will not amount to extortion, even though subsequent threats are used to retain it.

Thus, (*i*) A threatens to publish defamatory libel concerning Z unless Z gives him money. He thus induces Z to give him money. A has committed extortion.

(*ii*) A notorious robber writes to Z "if you do not send me Rs. 1,000 I shall see that your only son will be killed by my gang." Z, so threatened, sends him the amount. This is extortion though the threatened injury is directed not to Z but to his son.

(2) The intention of the offender must be dishonest, *i. e.*, to cause wrongful gain or loss. He must dishonestly induce the person put in fear to deliver property etc. The delivery of property must take place. Without this the offence may amount to an attempt. The property delivered may be any property—moveable or immoveable, valuable security or anything convertible into such. Such delivery of property may be direct from the person threatened to the offender or to another person by his direction or it may be by placing the property in some place of deposit or by otherwise putting it at the immediate disposal of the offender.

Putting person in fear of injury in order to commit extortion.—Section 385 lays down that whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

In the case of *Emperor v. Fazlur Rahman*[1], the accused, a mukhtar, was engaged in a criminal case. He threatened, with intent to extort money, to put questions to the prosecution witnesses which were irrelevant, scandalous and indecent and which were intended to insult and annoy. It was held that he had committed an offence under this section. Similarly, in the case of *Emperor v. Chaturbhuj*,[2] a cloth seller was threatened with the imposition of a fine if he continued to sell foreign cloth. He continued to sell such cloth and, to enforce payment of the fine, his shop was picketed for two hours and he lost a certain amount of business and ultimately paid the fine. It was held that the person responsible for the picketing was guilty of an offence under this section.

Aggravated forms of extortion.—The following are the aggravated forms of extortion :—

(1) Committing extortion by putting a person in fear of death, or grievous hurt to that person or to any other. (S. 386). Punishment.—Imprisonment of either description for 10 years and fine. (S. 386).

(2) Putting or attempting to put any person in fear of death, or grievous hurt to that person or to any other in order to commit extortion. (S. 387). Punishment.—Imprisonment of either description for 7 years and fine. (S. 387).

(3) Committing extortion by putting any person in fear of an accusation against that person or any other (*i*) of an offence, punishable with death or transportation for life, or ten years' imprisonment, or (*ii*) of having attempted to induce any other person to commit such offence. Punishment.—If the offence be one punishable under section 377—Transportation for life or imprisonment of either description for 10 years and fine. In other cases —Imprisonment of either description for 10 years and fine. (S. 388).

(4) Putting or attempting to put any person in fear of such accusation as is mentioned above in order to commit extortion. (S. 389). Punishment.—Same as under section 388. (S. 389).

1. (1929) I. L. R. 9 Pat. 725.
2. (1922) I. L. R. 45 All. 137.

Difference between theft and extortion.—(1) In theft the property is taken without the owner's consent; in extortion the consent is obtained by putting a person in fear of any injury to him or any other.

(2) Theft can only be committed of moveable property; extortion may be committed of immoveable property as well.

(3) In theft the thief takes the property without the owner's consent; in extortion the person intimidated is induced to deliver the property. Hence the element of delivery does not exist in theft as in extortion.

(4) In theft there is no element of force; in extortion there is the element of force, for property is obtained by putting a person in fear of injury to that person or to any other.

(3) **Robbery.**—Robbery is an aggravated form of either theft or extortion. In all robbery there is either theft or extortion.

Theft is "robbery" if, (1) in order to the committing of theft, or in committing the theft, or (2) in carrying away, or attempting to carry away, property obtained by the theft, (3) the offender, for that end, voluntarily causes, or attempts to cause to any person (*a*) death or hurt or wrongful restraint, or (*b*) fear of instant death or instant hurt, or instant wrongful restraint.

Extortion is "robbery" if the offender, at the time of committing the extortion, is (1) in the presence of the person put in fear, and (2) commits the extortion by putting that person in fear of instant death, or instant hurt, or instant wrongful restraint to that person, or to some other person, and (3) by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted. (S. 390).

Explanation.—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt or of instant wrongful restraint.

An accidental injury by a thief will not convert his offence into robbery. Similarly, if hurt is caused to avoid capture, the offence will not amount to robbery *e. g.* throwing stones to avoid pursuit.

Belonging to a wandering gang of persons associated for the purpose of habitually committing theft or robbery is made punishable. The punishment is rigorous imprisonment for 7 years and fine. (S. 401).

Punishment for robbery.—Rigorous imprisonment for 10 years and fine. If the robbery is committed on the high-way between sun-set and sunrise, the imprisonment may be extended to 14 years. (S. 392). For attempting to commit robbery—Rigorous imprisonment for 7 years and fine. (S. 393). If hurt is caused —Transportation for life or rigorous imprisonment for 10 years and fine. (S. 394).

Illustrations.—(*a*) A holds Z down, and fraudulently takes Z's money and jewels from Z's clothes, without Z's consent. Here A has committed theft, and, in order to the committing of that theft, has voluntarily caused wrongful restraint to Z. A has therefore committed robbery.

(*b*) A meets Z on the high-road, shows a pistol, and demands Z's purse. Z, in consequence, surrenders his purse. Here A has extorted the purse from Z by putting him in fear of instant hurt, and being at the time of committing the extortion in his presence. A has therefore committed robbery.

(*c*) A meets Z and Z's child on the high-road. A takes the child, and threatens to fling it down a precipice, unless Z delivers his purse. Z, in consequence delivers his purse. Here A has extorted the purse from Z, by causing Z to be in fear of instant hurt to the child who is there present. A has therefore committed robbery on Z.

(*d*) A obtains property from Z by saying.—"Your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees." This is extortion, and, punishable as such : but it is not robbery, unless Z is put in fear of the instant death of his child.

Difference between theft and robbery.—(1) Robbery is a special and aggravated form of either theft or extortion. Theft becomes robbery if the accused voluntarily causes or attempts

to cause to any person death, or hurt or wrongful restraint, or fear of instant death, hurt or wrongful restraint. (2) In both the offender takes the property without the owner's consent and the number of culprit may be one only.

Difference between extortion and robbery.—(1) In extortion a person is forced to deliver any property against his will when he is put in fear of injury to himself or another and is dishonestly induced to deliver the property. But whenever theft is accompanied by violence or fear of instant violence, or extortion is accompanied by violence or fear of instant violence, the presence of the offender and the delivery of the thing extorted, there is robbery.

(2) Robbery is an aggravated form of extortion.

(3) The element of fear exists in both and there is delivery of property by the victim.

(4) **Dacoity.**—Section 391 of the Pakistan Penal Code states that when five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity." Punishment.—Transportation for life or rigorous imprisonment for 10 years and fine. (S. 395).

Ingredients.—The ingredients of the offence of dacoity are :

(*a*) Five persons attempting to commit robbery, or

(*b*) Five persons committing robbery, or

(*c*) One person committing robbery plus four present and aiding in its commission, or

(*d*) One person attempting robbery plus four present and aiding the attempt.

In the case of dacoity the prosecution must prove :

(1) that robbery was committed or attempted ;

(2) that five or more persons conjointly committed or attempted to commit robbery, or that the whole number of persons

conjointly committing or attempting to commit robbery and persons present and aiding such commission or attempt amounted to five or more.

Dacoity is robbery committed by five or more persons, and so it must be either theft or extortion. It is a more serious offence than robbery because of the terror caused by the presence of a number of offenders. Abettors who are present and aiding when the crime is committed are counted in the number. The definition of dacoity includes attempt to commit dacoity. Further, dacoity furnishes another instance of constructive liability, inasmuch as if any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death or transportation for life, or rigorous imprisonment which may extend to 10 years and also fine.

In the case of *Queen Empress v. Ram Baran*,[1] a large body of Hindus acting in concert and apparently under the influence of religious feelings attacked certain Mahomedans who were driving cattle along a public road, and forcibly deprived them of the possession of such cattle under circumstances which did not indicate any intention of subsequently returning the cattle to them, it was held that they were guilty of dacoity. But where there were only five accused who committed the dacoity and out of five two were acquitted holding that only three took part in the offence, it was held[2] that the remaining three could not be convicted of dacoity, as the offence of dacoity could not be committed by less than five persons.

It may be mentioned in this connection that the preparation to commit dacoity (s. 399) belonging to a gang of dacoits (s. 400) and assembling for the purpose of committing dacoity (s. 402) are all punishable.

Dacoity with murder.—Section 396 enacts that if any one of the dacoits commits murder in committing dacoity every one of

1. (1893) I. L. R. 15 All. 299.
2. *Debi* (1952) Raj. 177 ; *Lingayya* (1953) A. I. R. (A. P.) 510.

them shall be punished with death or transportation for life or rigorous imprisonment for 10 years and fine. This section is another instance of what is known as constructive criminality. It does not matter whether a particular dacoit was inside the house where the dacoity was committed, or outside the house, so long as the murder is committed in the commission of the dacoity. It is not necessary that the murder should be committed in the presence of all.

In the case of *Lashkar v. Crown*,[1] the house of a person was raided by a gang of 5 dacoits, one of whom was armed with a gun. The dacoits ransacked the house and made good their escape with their booty. A number of villagers had assembled outside the house and in fighting their way through the crowd one of the dacoits shot one man dead and inflicted fatal wounds upon another, who died shortly afterwards. The question before the Court was whether under these circumstances every dacoit was equally liable for the consequences of the act of one of them. It was held that murder committed by dacoits while carrying away the stolen property was 'murder committed in the commission of dacoity,' and every offender was therefore liable for the murder committed by one of them.

Ingredients.—There are two ingredients of the offence of dacoity with murder :

(1) The dacoity must be the joint act of the persons concerned.

(2) Murder must have been committed in the course of the commission of the dacoity.

Aggravated forms of robbery or dacoity.—The following are the aggravated forms of robbery or dacoity :—(1) Using any deadly weapon or causing grievous hurt to any person or attempting to cause death or grievous hurt to any person at the time of committing robbery or dacoity. (S. 397). Punishment.—Rigorous imprisonment for at least 7 years. (S. 397).

1. (1921) I. L. R. 2 Lah. 275.

(2) Being armed with any deadly weapon at the time of attempting to commit robbery or dacoity. (S. 398). Punishment.—Rigorous imprisonment for at least 7 years. (S. 398).

Distinction between robbery and dacoity.—(1) The essence of the difference between the two lies only in the number of persons involved in the offence.

(2) Robbery can be committed by one culprit, whereas in dacoity there must be five or more.

(3) Dacoity is an aggravated and more serious form of robbery.

(4) There is no consent in both, but in dacoity it is obtained wrongfully as in extortion.

Distinction between extortion, theft, robbery and dacoity.—Extortion occupies a middle place between theft and robbery or dacoity. Dacoity is robbery by five or more persons conjointly committed or attempted to be committed. Robbery, on the other hand, is a special and aggravated form of either theft or extortion. Theft is robbery if in the course of it the offender voluntarily causes or attempts to cause to any person death, hurt, or wrongful restraint, or fear of instant death, hurt or wrongful restraint. Thus, if hurt is actually caused when the offence is committed the offence is punishable as robbery. Extortion is robbery if the former is accompanied by violence (*i. e.* by putting the person in fear of instant death, hurt or wrongful restraint), presence of the offender and delivery of the thing extorted.

Extortion differs from theft inasmuch as in the former there is the wrongful obtaining of consent by putting the person in possession of property in fear of injury to him or to any other. The offence of extortion is carried out by over-powering the will of the owner. In theft there is never the intention of the offender to obtain the consent of the owner of the property. Moreover in theft the property involved is moveable property, but in case of extortion it may be any property.

(5) **Criminal misappropriation of property.**—A person commits "criminal misappropriation" if he (*i*) dishonestly misappropriates or converts to his own use (*ii*) any moveable

property. (S. 403). Punishment.—Imprisonment of either description for 2 years or fine or both. (S. 403).

Illustrations.—(*a*) A takes property belonging to Z out of Z's possession in good faith, believing, at the time when he takes it, that the property belongs to himself. A is not guilty of theft, but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(*b*) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.

(*c*) A and B, being joint owners of a horse, A takes the horse out of B's possession, intending to use it. Here, as A has a right to use the horse, he does not dishonestly misappropriate it. But, if A sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation 1 to section 403 provides that a dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

Illustration.—A finds a Government promissory note belonging to Z, bearing a blank endorsement. A, knowing that the note belongs to Z, pledges it with a banker as a security for a loan, intending at a future time to restore it to Z. A has committed an offence under this section.

Explanation 2 to this section provides that a person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take, or misappropriate it dishonestly, and is not guilty of an offence ; but he is guilty of the offence defined above, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give

notice to the owner and has kept the property for a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it, it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believes that the real owner cannot be found.

Illustrations.—(*a*) A finds a rupee on the high-road, not knowing to whom the rupee belongs. A picks up the rupee. Here A has not committed the offence defined in this section.

(*b*) A finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this section.

(*c*) A finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person, who has drawn the cheque, appears. A knows that this person can direct him to the person on whose favour the cheque was drawn. A appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.

(*d*) A sees Z drop his purse with money in it. A picks up the purse with the intention of restoring it to Z, but afterwards appropriates it to his own use. A has committed an offence under this section.

(*e*) A finds a purse with money, not knowing to whom it belongs ; he afterwards discovers that it belongs to Z, and appropriates it to his own use. A is guilty of an offence under this section.

(*f*) A finds a valuable ring, not knowing to whom it belongs. A sells it immediately without attempting to discover the owner. A is guilty of an offence under this section.

It would thus appear from the above illustrations that the two main ingredients of the offence of criminal misappropriation are :

(1) Dishonest misappropriation or conversion of property for a person's own use, and

(2) such a property must be moveable.

Criminal misappropriation takes place when the possession has been innocently come by, but where, by a subsequent change of intention, or from the knowledge of some new fact with which the party was not previously acquainted, the retaining becomes wrongful and fraudulent.[1] The offence consists in the dishonest misappropriation or conversion, either permanently or for a time, of property which is already without wrong in the possession of the offender.[2] *Illustrations* (*a*), (*b*) and (*c*) will show that the original innocent taking amounts to criminal misappropriation by subsequent acts.

Section 403 lays down a principle quite at variance with English law, according to which only the intention of the accused at the time of obtaining the possession of property is taken into account. If the intention was not dishonest when the possession was obtained, subsequent change of intention does not convert the possession into an illegal one. According to English law, innocent taking followed by conversion, owing to subsequent change of intention, is a civil wrong but not an offence. Explanation 2 emphasizes the difference between English Law and the Pakistan Law.

Criminal misappropriation Explained.—"Criminal Misappropriation" may be defined as "dishonest conversion to one's own use, even for a time, of moveable property of another which has come lawfully into the possession of the offender."

"Criminal misappropriation takes place when the possession has been innocently come by, but where, by a subsequent change of intention, or from the knowledge of some new fact with which the party was not previously acquainted, the retaining becomes wrongful and fraudulent." Thus, if money is paid to a person by mistake and such person, either at the time of receipt or at any time subsequently discovers the mistake but

1. Per Norris and Ghose, JJ., in *Bhagiram Dome v. Abar Dome*, (1888) I.L.R. 15 Cal. 388, 400.
2. *Ramakrishna*, (1888) I.L.R. 12 Mad. 49, 50.

determines to appropriate the money, he would be guilty of "criminal misappropriation."

In criminal misappropriation a dishonest conversion of property to a man's own use, for a time only, is sufficient, as in theft an intention to take dishonestly for a time and afterwards to restore the property is sufficient.

If a man loses or mislays property, he is still the owner, and another, who finds it, merely assumes control of it. He has implied authority from the owner to keep it in custody on his behalf. The finder, therefore, in removing the property to a place of safety does no wrong, but in doing so he takes upon himself the duty of finding out the owner by reasonable efforts and to make it over to him when found. If he does not do so, the taking will be dishonest. Thus, if the finder (*i*) takes (*ii*) with an intention of appropriation and (*iii*) with a knowledge of or a clue to the identity of the owner, he is guilty of criminal misappropriation. If he takes in the *bona fide* belief that the real owner cannot be found he is not guilty.

If A finds certain goods, he is simply a finder of goods, and his possession is lawful and is entitled to retain goods for the purpose of protecting them and restoring the same to the owner. A's duty is to find out the real owner with all reasonable means. If A does not care to find out the real owner and means to keep the goods for his own use, his intention becomes fraudulent in the eye of law and the subsequent change of intention on his part renders him liable for the offence of criminal misappropriation.

Distinction between theft and criminal misappropriation.— (1) In theft, the object of the offender always is to take property which is in the possession of a person, out of that person's possession, and the offence is complete as soon as the offender has moved the property in order to a dishonest taking of it. But in the offence of criminal misappropriation, there is not necessarily an invasion of the possession of another person by an attempt to take from him that which he possesses.

The offender is already in possession of property ; and either he is lawfully in possession of it, because either he has found it or is a joint owner of it, or his possession, if not strictly lawful, is not punishable as an offence, because he acquired it under some mistaken notion of right in himself, or of consent given by another.

(2) In theft, the moving itself is an offence. It is not necessary that the person should actually take the property in his own possession. But in criminal misappropriation, the moving may not be an offence. It may even be lawful, it is the subsequent intention to convert or misappropriate the property that constitutes the offence.

(3) In theft, the property is moved without the consent of the owner. In criminal misappropriation, the misappropriator might have come into the possession of the property even with the consent of the owner, and if he subsequently converts the property to his own use, he commits the offence.

(4) The dishonest intention to appropriate the property of another is common to theft and to criminal misappropriation. But this intention, which in theft is sufficiently manifested by a moving of the property, must, in criminal misappropriation, be carried into action by an actual misappropriation or conversion. In theft, the dishonest intention must precede the act of taking ; in criminal misappropriation, it is the subsequent intention to convert or misappropriate that constitutes the offence. Hence, it is rightly said that criminal misappropriation takes place when the possession has been innocently come by, but where, by a subsequent change of intention, or from the knowledge of some new fact with which the party was not previously acquainted, the retaining becomes wrongful and fraudulent.

Aggravated form of criminal misappropriation.— The aggravated form of criminal misappropriation of property is stated in section 404. Dishonest misapprproiation of (moveable) property possessed by a deceased person at the time of his death. Punishment.—If the offender was a clerk or servant

of the deceased at the time of death – Imprisonment of either description for 7 years and fine. Otherwise—Imprisonment of either description for 3 years and fine. (S. 404).

Illustration.—Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. A has committed the offence defined in this section.

(6) **Criminal breach of trust.**—Under section 405 of the Pakistan Penal Code a person commits criminal breach of trust if he (*i*) being in any manner entrusted with property, or with any dominion over property, (*ii*) dishonestly misappropriates, or converts to his own use that property, or (*iii*) dishonestly uses or disposes of that property in violation (*a*) of any direction of law prescribing the mode in which such trust is to be discharged, or (*b*) of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person to do so. Punishment.—Imprisonment of either description for three years or fine or both. (S. 406).

Illustrations.—(*a*) A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.

(*b*) A is a warehouse-keeper. Z, going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse-room. A dishonestly sells the goods. A has committed criminal breach of trust.

(*c*) A, residing in Dacca, is agent for Z, residing at Lahore. There is an express or implied contract between A and Z, that all sums remitted by Z to A shall be invested by A, according to Z's direction. Z remits a lakh of rupees to A, with directions to A to invest the same in Company's paper. A dishonestly disobeys the directions and employs the money in his own business. A has committed criminal breach of trust.

(*d*) But if A, in the last illustration, not dishonestly but in good faith, believing that it will be more for Z's advantage to hold shares in the Bank of Bengal, disobeys Z's directions, and

buys shares in the Bank of Bengal, for Z, instead of buying Company's paper, here, though Z should suffer loss, and should be entitled to bring a civil action against A, on account of that loss, yet A, not having acted dishonestly, has not committed criminal breach of trust.

(*e*) A, a revenue-officer, is entrusted with public money and is either directed by law, or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. A dishonestly appropriates the money. A has committed criminal breach of trust.

(*f*) A, a carrier, is entrusted by Z with property to be carried by land or by water. A dishonestly misappropriates the property. A has committed criminal breach of trust.

To constitute the offence of criminal breach of trust there must be dishonest misappropriation by a person in whom confidence is placed as to the custody or management of the property in respect of which the breach of trust is charged. The offence of criminal breach of trust closely resembles the offence of embezzlement under the English Law. Offences committed by trustees with regard to trust property fall within the purview of this section. A partner in a partnership firm can be held to be guilty of criminal breach of trust in respect of a partnership asset.[1]

Ingredients.—The prosecution must prove the following points for convicting an accused person on a charge of criminal breach of trust :—

(1) That the accused was entrusted with property or with dominion of it ;

(2) That he dishonestly (*i*) misappropriated it, or (*ii*) converted it to his own use, or (*iii*) used it, or (*iv*) disposed of it ;[2]

(3) That he did so in violation of (*i*) any direction of law prescribing the mode in which such trust was to be discharged or (*ii*) any legal contract (express or implied) which he had made touching the discharge of such trust ;

(4) That he wilfully suffered some other person to do as above.

1. *Devkinandan*, (1958) 60 Bom. L.R. 1413.
2. *Shakir Hossain v. State* (1957) 9. D. L. R. (SC) 14.

In the case of *Babaji Bin Bhau*,[1] the accused were entrusted with some silver for the purpose of making ornaments and they introduced copper into the ornaments. It was held that they were guilty of criminal breach of trust.

In the case of *Emperor v. Jamestji*,[2] the accused, a servant of a liquor contractor, was entrusted by his master with liquor to sell. For selling it, he was to receive a certain quantity himself and he was to account for the remainder to his master with whom he made a legal contract that he would not adulterate it with water before selling it. In violation of that contract he mixed water with the liquor. He then sold his increased quantity and appropriated the profit thus made to his own use. It was held that having thus gained by unlawful means, money to which the accused was not legally entitled he acted dishonestly within the meaning of the Code, and was guilty of criminal breach of trust.

In the case of *Emperor v. Moses*,[3] the accused hired a motor car of the complainant company under a hire-purchase system which provided that until the car was fully paid for by the accused the car was to remain the absolute property of the company; and the accused agreed during the hiring "not to assign, underlet or part with the possession" of the car in any way. Whilst the agreement was in force the accused pledged the car to three different persons on three different occasions. It was held that the accused was guilty of criminal breach of trust as the pledging of the car by him was a violation of the legal contract made by him in regard to the hire of the car and that violation amounted to dishonesty.

Distinction between theft and criminal breach of trust.— The following are the points of difference between theft and criminal breach of trust :—

(1) In theft there is a wrongful taking of a moveable property out of the possession of the owner, *i.e.*, by stealth without the

1. (1967) 4 B.H.C. (Cr.) 16.
2. (1888) Cr. R. No. 53 of 1888, Unrep. Cr. C. 395, quoted by Ratanlal, *op. cit.* p.1013.
3. (1915) 17 Bom. L. R. 670.

owner's knowledge, but in criminal breach of trust the property is given on trust or received on one's behalf and instead of discharging the trust, it is dishonestly misappropriated or used or disposed of in violation of the law. The owner here parts with something in good faith but the person who takes it keeps the thing for himself.

(2) In theft there is no prior lawful possession; the offence is completed as soon as the property is dishonestly taken away, but in criminal breach of trust the offender prior to the offence is himself in possession of the property and the offence is completed when he dishonestly converts the same to his own use.

(3) In theft the property involved is a moveable property, but in criminal breach of trust it may be any property.

(4) Criminal breach of trust is ordinarily punished with the same severity as theft, but where there is a greater degree of trust as in the case of a carrier or a clerk or servant entrusted with his master's property or in the case of a public servant or banker, heavier punishment is provided under sections 407, 408 and 409 of the Pakistan Penal Code.

Distinction between criminal misappropriation and criminal breach of trust.—The following are the points of difference between the two classes of offences :—

(1) In criminal misappropriation the property comes into the possession of the offender by some casualty or otherwise and he afterwards misappropriates it. In the case of criminal breach of trust the offender is lawfully entrusted with the property and he dishonestly misappropriates the same, or wilfully suffers any other person to do so, instead of discharging the trust attached to it.

(2) In criminal misappropriation there is no contractual relationship, but there is such a relationship in criminal breach of trust.

(3) In criminal misappropriation there is the conversion of property coming into possession of the offender anyhow, but in criminal breach of trust there is the conversion of property held in a fiduciary character.

(4) Criminal misappropriation can only be of moveable property; whereas criminal breach of trust can be of any property, moveable or immoveable.

(5) A breach of trust includes criminal misappropriation, but the converse is not always true.

Aggravated forms of criminal breach of trust.—The following are the aggravated forms of criminal breach of trust :—

(1) Criminal breach of trust by a carrier, wharfinger, or warehouse keeper. (S. 407). Punishment.—Imprisonment of either description for 7 years and fine. (S. 407).

(2) Criminal breach of trust by a clerk or servant. (S. 408). Punishment.—Imprisonment of either description for 7 years and fine. (S. 408).

(3) Criminal breach of trust by a public servant, banker, merchant, factor, broker, attorney or agent. (S. 409). Punishment.—Imprisonment of either description for 10 years and fine. (S. 409).

Stolen property.—Section 410 defines stolen property as 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 criminal breach of trust has been committed. It is immaterial whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without Pakistan. But if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be the stolen property.

Section 410 explains what comes under the words 'stolen property.' Things which have been stolen, extorted, or robbed or which have been obtained by criminal misappropriation or criminal breach of trust come under the extended signification given to these words.

The words "Whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without Pakistan" were inserted by Act VIII of 1882, s. 9. They have enlarged the scope of the term 'stolen property,' and the act by which property has been stolen no longer need be an act punishable under the Code. The amendment was made in consequence

of *Moorga Chetty's case*,[1] which decided that bills of exchange stolen in Mauritius were not 'stolen property' so as to make the receiver at Bombay liable under section 411.

The receipt or retention must take place within Pakistan, unless the person receiving or retaining out of Pakistan is a citizen of Pakistan.[2]

Where there is a dishonest retention in Pakistan of property stolen elsewhere, it is no defence by the accused, being a foreign subject, that the property was stolen by himself, he not being liable to be tried, convicted, or punished by the Pakistan Court for the theft.[3]

In the case of *Sunkergope*[4] a Nepalese subject, having stolen cattle in Nepal, brought them into Indian territory, it was held that he could not be convicted of theft but that he might be convicted of an offence under section 410.

But if theft has been committed in Pakistan and the accused is found in possession of stolen property outside Pakistan, he cannot be tried for an offence under section 411 by a Pakistan Court having jurisdiction over the place where the theft took place because the offence of receiving or retaining stolen property was committed at a place beyond "Pakistan territory."[5]

If the owner of stolen property somehow resumes possession of the stolen property before its receipt by the person accused of receiving it, it ceases to be stolen property ; and the accused cannot be convicted of receiving it knowing it to have been stolen.[6] If stolen goods are restored to the possession of the

1. (1881) I.L.R. 5 Bom. 338, F.B. ; *Adivigadu* (1876) I.L.R. 1 Mad. 171, is also now obsolete.
2. See s. 188, Criminal Procedure Code.
3. See *Jafar Ali*, (1893) P. R. No. 30 of 1894, quoted by Ratanlal, *op. cit.* p. 1033.
4. (1880) I.L.R. 6 Cal. 307. Held similarly where the accused, a foreign subject, stole a horse in the Bhawalpur State and brought it in India : See *Mul Chand*, (1943) I.L.R. 24 Lah. 62.
5. See *Moheshwari Prasad Singh*, (1914) 18 C.W.N. 1178 : 15 Cr. L. J. 537 : (1914) A.I.R. (Cal.) 725.
6. *Villensky* (1892) 2 Q.B. 597.

owner, and he returns them to the thief for the purpose of enabling him to sell them to a third person, they are no longer stolen goods, and that third person cannot be convicted of feloniously receiving stolen goods, although he received them, believing them to be stolen. Where, therefore, stolen goods were found by the owner in the pockets of a thief, and the owner sent for a policeman who took the goods, but subsequently returned them to the thief, who was sent by the owner to sell them where he had sold others, and the thief then went to the shop of the accused and sold goods and gave the money to the owner, it was held that the accused was not guilty of feloniously receiving stolen goods, inasmuch as they were delivered to him under the authority of the owner by a person to whom the owner had bailed them for that purpose.[1]

If a person buys in good faith property which has been stolen he does not acquire any ownership therein.[2]

In the case of *Schmidt*,[3] four thieves stole goods from the custody of a railway company, and sent them in a parcel by the same company's line addressed to the accused. During the transit the theft was discovered ; and, on the arrival of the parcel at the station for its delivery, a policeman in the employ of the company opened it and then returned it to the porter whose duty it was to deliver it, with the instructions to keep it till further orders. On the following day the policeman directed the porter to take the parcel to its address, when it was received by the accused, who was afterwards convicted of receiving the goods knowing them to be stolen. It was held that the goods had got back into the possession of the owner, so as to be no longer stolen goods, and that the conviction was wrong. In the case of *Villensky*[4] a parcel was handed to the prosecutors, a firm of carriers, for conveyance to the consignees. While in the prosecutors' depot a servant of the prosecutors removed the parcel to a

1. *Dolan*, (1885) 6 Cox 449 ; *Schmidt* (1866) L R. 1 C. C.R 15.
2. The Sale of Goods Act (III of 1930), s. 27.
3. (1866) L. R. I C. C. R. 15.
4. (1892) 2 Q. B. 597.

different part of the premises, and placed upon it a label addressed to the accused. The superintendent of the prosecutors' business, on receipt of information as to this, and after inspection of the parcel, directed it to be replaced in the place to which the thief had removed it, and to be sent in a van, accompanied by two detectives, to the address shown on the label. The parcel was received by the accused under circumstances which clearly showed knowledge on their part that it had been stolen. It was held that as the owners had resumed possession of the stolen property before its receipt by the accused, it had then ceased to be stolen property, and the accused could not be convicted of receiving it knowing it to have been stolen. In the case of *Hancock*,[1] a lad was detained on leaving his master's premises, and a policeman sent for, who searched him and took a stolen cigar from him in the master's presence. In consequence of the lad's statement, the cigar was returned to him with five others, which the lad took to the accused and gave them to him. It was held that the accused could not be convicted of receiving the cigars knowing them to be stolen for they were not stolen property at the time they were received, the master and the policeman having acted in concert in supplying the lad with six cigars, and instructing him what to do with them.

(7) **Receiving stolen property.**—Section 411 lays down that whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to 3 years or with fine or with both. The mere possession of stolen property is not an offence. The essence of the offence of receiving stolen property under section 411 consists in the receipt or retention of the same with a full knowledge at the time of receipt that the property was stolen property, *viz.*, obtained in one of the ways specified in section 410. The accused should dishonestly receive or retain the stolen property, knowing or having reason to believe the same to be stolen property.

1. (1878) 38 L T. 787.

A person is said to be acting dishonestly when he acts with the intention to cause wrongful gain to himself or wrongful loss to another.

Res nullius cannot be the subject of receiving, *e. g.* a bull let loose as a part of religious ceremony and belonging to no one is not the subject of theft.

If articles belonging to different persons are received at one time, the conviction will be only for one act of receiving and not separate convictions.

Distinction between dishonestly receiving and retaining stolen property.—The offences of receiving and retaining are different. Dishonest 'retention' can be distinguished from dishonest 'reception' in the following ways :—

(1) In the former the dishonesty supervenes after the act of acquisition of possession, while in the latter dishonesty is contemporaneous with the act of such acquisition. A dishonest receiver comes to know of the true nature of the property at the time of the receipt ; the retainer acquires that knowledge at a subsequent stage.

(2) To constitute dishonest retention, there must have been a change in the mental element of possession—from an honest to a dishonest condition of the mind in relation to the thing in possession.

(3) The offence of dishonest reception of stolen property is complete only if the receiver had guilty knowledge at the time of receipt, while the offence of dishonest retention of stolen property may be complete without any guilty knowledge at the time of receipt. Thus, a person cannot be convicted of 'receiving' if he had no guilty knowledge at the time of receipt. But he is guilty of 'retaining' if he subsequently knows or has reason to believe that the property was stolen.

Aggravated forms of receiving stolen property.—The following are the aggravated forms of receiving stolen property :—

(1) Dishonestly receiving property stolen in the commission of a dacoity. (S. 412). Punishment.—Transportation for life or rigorous imprisonment for 10 years and fine. (S. 412).

(2) Habitually dealing in stolen property. (S. 413). Punishment. —Transportation for life or imprisonment of either desecription for 10 years and fine. (S. 413).

(3) Voluntarily assisting in concealing or disposing of, or making away with stolen property. (S. 414). Punishment.—Imprisoment of either description for 3 years or fine or both. (S. 414).

(8) Cheating.—Section 415 of the Pakistan Penal Code lays down that whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat.'

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.

Punishment.—Imprisonment of either description for one year or fine or both. (S. 417).

Illustrations.—(*a*) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.

(*b*) A, by putting a counterfeit mark on an article, intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

(*c*) A, by exhibiting to Z a false sample of an article, intentionally deceives Z into believing that the article corresponds with the sample, and thereby dishonestly induces Z to buy and pay for the article. A cheats.

(*d*) A, by tendering in payment for an article a bill on a house with which A keeps no money, and by which A expects that the bill will be dishonoured, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats.

(*e*) A, by pledging as diamonds articles which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

(*f*) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats.

(*g*) A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats ; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not delilver it, he does not cheat, but is liable only to a civil action for breach of contract.

(*h*) A intentionally deceives Z into a belief that A has performed A' s part of a contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats.

(*i*) A sells and conveys an estate to B. A, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z, without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage money from Z. A cheats.

Ingredients.—The prosecution must prove the following points for convicting an accused on a charge of cheating :—

(1) Deception of any person.[1]

(2) (*a*) Fraudulently or dishonestly inducing that person (*i*) to deliver any property to any person, or (*ii*) to consent that any person shall retain any property ; or

(*b*) intentionally inducing that person to do or omit to do anything which he would not do or omit, if he were not so deceived, and which act or omission causes, or is likely to cause, damage or harm to that person in body, mind, reputation or property.[2]

1. *Prithiraj v. State* (1958) 10 D. L. R. 325.
2. *Raman Behari Roy v. Emperor* (1923) I. L. R. 50 Cal. 849 at 851.

In the definition of cheating there are set forth two distinct classes of acts which the person deceived may be induced to do. In the first place, he may be induced to deliver any property to any person or to consent that any person shall retain any property. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts the inducing must be intentional.[1]

To constitute the offence of cheating it is not necessary that the act which the person deceived is induced to do should actually cause harm to him. It is enough that the act which the person deceived has been induced to perform is likely to cause damage or harm to him.[2]

The ingredient of cheating can be explained with reference to the decided cases. In the case of *Rex v. Narain Rao*,[3] a debtor sent to his creditor a postal cover insured for Rs. 70. The creditor took delivery after signing the postal receipt and when the cover was opened it was found to contain seven one rupee notes and four blank sheets of paper. The debtor gave notice to his creditor to set off the sum of Rs. 70 alleged to have been sent by him under the insured cover. It was held that the debtor was guilty of cheating and not merely of an attempt to cheat, as he obtained by deceiving his creditor such a document as is likely to facilitate the evasion of payment by the debtor and to cause embarassment to the creditor when he seeks to enforce his claim.

In the case of *Kadir Bux*,[4] a person hired certain property for use at a wedding, paying a portion of the hire, and giving a written promise to pay the balance of the hire, and to restore the property after the wedding, he being well aware that there was to be no wedding, and intending, when he got the

1. *Kishori Lal Chatterji* (1905) 9 C. W.N. 764, 767, per Geidt J,.
2. *Harish Chandra v. Rex* (1948) A. L. J. 502 : A. I. R. 1949 All. 15.
3. (1948) A.L.J. 303 ; I.L.R. (1948) All. 374.
4. (1871) 3 N.W.P. 16.

property, to apply for its attachment in a civil suit in respect of an alleged claim. It was held that he was guilty of cheating.

In the case of *Krishnan*,[1] the appellant, who was an assistant to the Traffic Head Constable, took money from applicants for licenses for the driving of motor cars and other vehicles, promising to procure licenses for them without the necessity of their undergoing any tests. He arranged everything for the applicants, filled in their forms, forged the certificates attached to the applications, filed them in as if the tests had been completed, made entries himself in the Test Register, and then got the applications sent to the various officials in the office, upon which the licenses were in due course issued. It was held that the appellant was guilty of the offence of cheating under the first part of the definition in this section. "Fraudulently" and "dishonestly" imply some idea of wrongful loss to a person or wrongful gain. Fraud is committed if any advantage is expected to the person who causes the deceit. The act done by the appellant was fraudulent in that it procured a wrongful advantage to him. The license was "property" within the meaning of the section. As soon as the license reached the hands of the licensee, it had an actual value but even before it reached his hands, it was of value to the appellant, because without the license he would have been unable to fulfil his agreement and retain the money that was given to him.

In the case of *Sukhdeo Pathak*,[2] A goes to a railway station and obtains admission to the platform pretending that he is a C.I.D. officer, without purchasing a platform ticket. It was held that A was guilty of cheating.

As regards the ingredient No. 2 (*a*) (*ii*) mentioned above, *i.e.*, "to consent that any person shall retain any property, Morgan and Macpherson in their Indian Penal Code observed that it is equally a cheat whether a deception causes a person fraudulently or dishonestly to acquire property by delivery, or

1. (1948) I.L.R. Mad. 578.
2. (1917) 19 Cr. L.J. 209 : 3 P.L J. 389 : A.I.R 1918 Pat. 653.

to retain property already in his possession. If a man to whom property is lent or who is entrusted for a time with the charge of it deceives the owner and thereby induces him for some purpose of wrongful gain to the borrower or wrongful loss to the owner to allow the property to be retained in the borrower's possession, this amounts to cheating.[1]

In the case of *Rakma*,[2] a prostitute communicated syphillis to a man who had sexual intercourse with her on the strength of her misrepresentation that she was free from disease; it was held that she committed the offence of cheating. Similarly, in the case of *Komul Das*[3], the accused passed off girls of a low caste as girls of a higher caste and thus obtanied money from persons who married them, it was held that he had cheated.

Difference between English law and Pakistan law of cheating.— The English law differs from Pakistan law in the following respects :—

(1) A promise as to future conduct not intended to be kept is not itself a cheating under the English law. Under the Pakistan Penal Code, however, this will amount to cheating [see *Illustrations* (*f*) and (*g*) to s. 415].

(2) Under the English law the object of the accused must be to obtain any chattel, money or valuable security. The definition of cheating as given in section 415 is much wider and includes damage or harm done to a person in body, mind, reputation or property.

Distinction between cheating and extortion.—Both the offences of cheating and extortion are committed by obtaining wrongful consent. In the case of extortion, however, the extortioner obtains consent by intimidation; but the cheat obtains it by deception. Extortion is committed by putting a person in fear of injury or when he is compelled to part with his property by threats; but in the case of cheating the person is induced by fraudulent or dishonest means to deliver the property.

1. P. 382.
2. (1886) I.L.R. 11 Bom. 59.
3. (1865) 2 W.R. (Cr) 7; see also *Puddomonie Boistobee* (1866) 5 W.R. (Cr.) 98; *Dabee Sing* (1867) 7 W.R. (Cr.) 55; *Shewram* (1882) 2 A.W.N. 237.

Distinction between cheating and theft.—The following are the points of distinction between cheating and theft :—

(1) Cheating differs from theft in the fact that the cheat takes possession of the property without the owner's consent obtained by deception, while in theft the property is taken without the owner's consent.

(2) The property obtained by cheating may be moveable or immoveable, whereas moveable property only can be the subject of theft.

Difference between cheating and criminal misappropriation.—The following are the points of difference between cheating and criminal misappropriation :—

(1) As to possession of property.—In cheating deception is practised to get possession of the thing ; whereas in criminal misappropriation as in criminal breach of trust, the original reception of property is legal, the dishonest conversion takes place subsequently.

(2) As to intention.—In cheating the intent is fraudulently or dishonestly to induce the deceived person to deliver property ; whereas in criminal misappropriation the intent is to dishonestly misappropriate or convert property to one's own use.

(3) As to property.—Any property, moveable or immoveable, can be the subject matter of cheating ; whereas in criminal misappropriation the property misappropriated must be moveable.

(4) As to the mode of obtaining property.—In cheating any property is induced to be delivered or any damage or harm is done to property ; whereas in criminal misappropriation, the offender is already in possession of property. There is no invasion of possession.

Distinction between cheating, criminal misappropriation and criminal breach of trust.—(1) In cheating possession of the property is obtained by practising deception or fraudulent means. In criminal misappropriation the property comes by into the possession of the offender innocently, *i. e.* by some casualty and the subsequent change of his intention to misappropriate it

makes the possession wrongful and fraudulent. In criminal breach of trust the offender is lawfully entrusted with the property, but he dishonestly misappropriates or converts to his own use that property, or suffers any other person so to do.

(2) Cheating involves practising of deception for acquiring property. There is neither fiduciary relationship nor any conversion of property. In criminal misappropriation the property comes into the possession of the offender innocently and there is no fiduciary relationship. In criminal breach of trust there is the conversion of property held by a person in a fiduciary relationship.

(3) In cheating and criminal breach of trust the property may either be moveable or immoveable, but in criminal misappropriation the property which is dishonestly misappropriated or converted to his own use is always moveable property.

Cheating by personation.—Section 416 of the Pakistan Penal Code defines that a person is said to 'cheat by personation' if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation.—The offence is committed whether the individual personated is a real or imaginary person.

Punishment.—Imprisonment of either description for 3 years or fine or both. (S. 419).

Illustrations.—(*a*) A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.

(*b*) A cheats by pretending to be B, a person who is deceased. A cheats by personation.

Ingredients.—The ingredients of cheating by personation are :—

(1) Pretention by a person to be some other person.

(2) Knowingly substituting one person for another.

(3) Representation that he or any other person is a person other than he or such other person really is.

In the case of *Queen v. Appasami*,[1] A falsely represented himself to be B at a University Examination, got a hall ticket under B's name, and sat under that name in the hall and wrote answer

1. (1889) I.L.R. 12 Mad. 151.

papers in B's name, it was held that A had committed the offences of forgery and cheating by personation. Similarly in the case of *Kshitesh Chandra Chakarbati v. Emperor*,[1] the accused falsely represented to the mother of a girl that he was a Barendra Brahmin. Relying on the said representation she gave her consent to her daughter's marriage with him. She would never have given her consent if she had known that he was a Sudra (Barna Brahmin). On its being known that he was a Sudra, she was excommunicated. It was held that the accused was guilty of cheating by personation under section 416.

Summary of law relating to false personation.—There are seven sections in the Code scattered here and there dealing with false personation. They may be arranged as under :

Personation of—

(1) A soldier, sailor or airman. (S. 140).

(2) A public servant. (S. 170).

(3) Wearing garb or carrying the token used by a public servant. (S. 171).

(4) Personation at an election. (S. 171D).

(5) Personation for the purpose of an act or proceeding in a suit or prosecution. (S. 205).

(6) A juror or assessor. (S. 229).

(7) Cheating by personation. (S. 416).

Aggravated forms of cheating.—The following are the aggravated forms of cheating :—

(1) Cheating with knowledge that wrongful loss may thereby be caused to a person whose interest the offender is bound to protect. (S. 418). Punishment.—Imprisonment of either description for 3 years or fine or both. (S. 418).

(2) Cheating by personation. (Ss. 416 and 419). Punishment.—Imprisonment of either description for 3 years or fine or both. (S. 419).

(3) Cheating and thereby dishonestly inducing the person deceived to deliver any property to any person, or to make, alter, or destroy a valuable security, or anything which is signed

1. (1937) I.L.R. 2 Cal. 221.

or sealed, and which is capable of being converted into a valuable security. (S. 420). Punishment.—Imprisonment of either description for 7 years and fine. (S. 420).

(9) **Fraudulent deeds and dispositions of property.**—The following provisions relate to fraudulent deeds and dispositions of property :—

(1) Dishonest or fraudulent removal or concealment or transfer of property to prevent distribution among creditors. (S.421). Punishment.—Imprisonment of either description for 2 years or fine or both. (S. 421).

(2) Dishonestly or fraudulently preventing any debt or demand from being made available according to law for payment of debts. (S. 422). Punishment.—Imprisonment of either description for 2 years or fine or both. (S. 422).

(3) Dishonestly or fraudulently signing, executing or becoming a party to any instrument which purports to transfer or charge any property and which contains any false statement as to the consideration for such transfer or charge or as to the person or persons for whose benefit it is intended to operate. (S. 423).

Punishment.—Imprisonment of either description for 2 years or fine or both. (S. 423).

(4) Dishonestly or fraudulently concealing or removing any property of the offender or of any other person or assisting in the concealment or removal thereof, or dishonestly releasing any demand or claim to which the offender is entitled. (S. 424). Punishment.—Imprisonment of either description for 2 years or fine or both. (S. 424).

2. **Offences dealing with damage to property.**—Under this head falls the offence of mischief together with its aggravated forms.

Mischief.—Section 425 of the Pakistan Penal Code lays down that whoever, (1) with intent to cause, or knowing that he is likely to cause, wrongful loss or damage (*a*) to the public or (*b*) to any person, (2) causes (*a*) the destruction of any property, or (*b*) any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits 'mischief.'

Explanation 1.—It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2.—Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

Punishment.—Imprisonment of either description for 3 months or fine or both. (S. 426).

Illustrations.—(*a*) A voluntarily burns a valuable security belonging to Z intending to cause wrongful loss to Z. A has committed mischief.

(*b*) A introduces water into an ice-house belonging to Z and thus causes the ice to melt, intending wrongful loss to Z. A has committed mischief.

(*c*) A voluntarily throws into a river a ring belonging to Z, with the intention of thereby causing wrongful loss to Z. A has committed mischief.

(*d*) A, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to Z, destroys those effects, with the intention of thereby preventing Z from obtaining satisfaction of the debt, and thus causing damage to Z. A has committed mischief.

(*e*) A, having insured a ship, voluntarily causes the same to be cast away, with the intention of causing damage to the underwriters. A has committed mischief.

(*f*) A, causes a ship to be cast away, intending thereby to cause damage to Z who has lent money on bottomry on the ship. A has committed mischief.

(*g*) A, having joint property with Z in a horse, shoots the horse, intending thereby to cause wrongful loss to Z. A has committed mischief.

(*h*) A causes cattle to enter upon a field belonging to Z, intending to cause and knowing that he is likely to cause damage to Z's crop. A has committed mischief.

Ingredients.—The ingredients necessary to be proved in the offence of mischief are :

(1) That the accused caused (*i*) the destruction of some property, or (*ii*) some change in such property or in its situation.

(2) That such act destroyed or diminished its value or utility or affected it injuriously.

(3) That the accused did it with intent to cause or knowing that he was likely to cause, wrongful loss (*i*) to the public, or (*ii*) to any person.

It may be noted that all acts which cause damage cannot amount to mischief. Thus in the case of *Punjaji Bapuji Bagul v. Emperor*,[1] the accused installed an oil engine on his own property. His neighbour complained that his property was damaged by means of the vibrations from the engine. It was held that the accused is not liable to be convicted for mischief as the damage cannot be said to be caused by any unlawful means, though he may be liable in Civil suit for damages. It is not essential that the property interfered with should belong to the person injuriously affected. Thus in the case of *Emperor v. Chanda*,[2] the Dehra Dun Fishing Association had certain rights of fishery under the Government in a particular stretch of a river. The accused Chanda diverted the water of the river from the lessee's stretch as a result of which a large quantity of fish was destroyed to the detriment of the lessee. This was held to be a clear case of mischief.

Aggravated forms of mischief.—The aggravated forms of mischief are as follows :

(1) Committing mischief, and thereby causing damage to the amount of Rs. 50 or more. (S. 427). Punishment.—Imrisonment of either description for 2 years or fine or both. (S. 427).

(2) Committing mischief by killing, poisoning, maiming, or rendering useless any animal of the value of Rs. 10 or more. (S. 428). Punishment.—Imprisonment of either description for 2 years or fine or both. (S. 428).

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1. (1934) 37 Bom. L. R. 96 : A.I.R. 1935 Bom. 164.
2. (1905) I.L.R. 28 All. 204.

(3) Committing mischief by killing, poisoning, maiming or rendering useless any elephant, camel, horse, mule, buffalo, bull, cow or ox or any other animal of the value of Rs. 50 or upwards. (S. 429). Punishment.—Imprisonment of either description for 5 years or fine or both. (S. 429).

(4) Committing mischief by injury to works of irrigation or by wrongfully diminishing the supply of water for agricultural purposes or for food, or drink, or cleanliness. (S. 430). Punishment.—Imprisonment of either description for 5 years or fine or both. (S.430).

(5) Committing mischief by injury to public road, bridge, river or channel, so as to render impassable or less safe for travelling or conveying property. (S. 431). Punishment.—Imprisonment of either description for 5 years or fine or both. (S. 431).

(6) Committing mischief by causing inundation or obstruction to public drainage attended with injury or damage. (S. 432). Punishment.—Imprisonment of either description for 5 years or fine or both. (S.432).

(7) Committing mischief by destroying, or moving or rendering less useful a light-house or sea-mark or by exhibiting false lights. (S. 433). Punishment.—Imprisonment of either description for 7 years or fine or both. (S. 433).

(8) Committing mischief by destroying, moving, or rendering less useful any land-mark fixed by the authority of a public servant (S. 434). Punishment.—Imprisonment of either description for 1 year or fine or both. (S. 434).

(9) Committing mischief by fire or explosive substance with intent to cause damage to the amount of Rs 100 or upwards or where the property is agricultural produce—Rs. 10 or upwards. (S. 435). Punishment.—Imprisonment of either description for 7 years and fine. (S. 435).

(10) Committing mischief by fire or explosive substance with intent to destroy any building used as a place of worship or human dwelling or as a place for the custody of property. (S. 436). Punishment.—Transportation for life or imprisonment of either description for 10 years and fine. (S. 436).

(11) Committing mischief with intent to destroy or make unsafe a decked vessel or a vessel of 20 tons burden. (S. 437). Punishment.—Imprisonment of either description for 10 years and fine. (S. 437).

(12) Committing or attempting to commit by fire or any explosive substance such mischief as is described in the last section. (S. 438). Punishment.—Imprisonment of either description for 10 years and fine. (S. 438).

(13) Intentionally running a vessel aground or ashore with intent to commit theft or misappropriation of property. (S. 439). Punishment.—Imprisonment of either description for 10 years and fine. (S. 439).

(14) Committing mischief after making preparation for causing to any person death, hurt, or wrongful restraint, or fear of death, or of hurt, or of wrongful restraint. (S. 440). Punishment.—Imprisonment of either description for 5 years and fine. (S. 440).

3. Offences dealing with violation of rights to property in order to commit some other offences.—The following offences fall under this head :—

(1) Criminal trespass (ss. 441 and 447).

(2) House-trespass (ss. 442, 448-452).

(3) Lurking house-trespass (ss. 443,444, and 453).

(4) House breaking (ss. 445-462).

(1) Criminal trespass.—Under section 441 of the Pakistan Penal Code, a person commits criminal trespass if he (1) enters into or upon any property in the possession of another, (2) with intent to commit an offence, or (3) to intimidate, insult, or annoy any person in possession of such property ; or (4) having lawfully entered into or upon, such property, unlawfully remains there, (*a*) with intent thereby to intimidate, insult, or annoy any such person, or (*b*) with intent to commit an offence.

Punishment.—Imprisonment of either description for 3 years, or with fine of Rs. 500 or with both. (s. 447).

Ingredients.—The following are the ingredients necessary to constitute the offence of criminal trespass :—

(1) Entry into or upon the property of another.

(2) If such entry is lawful then unlawfully remaining upon such property.

(3) Such entry or unlawfully remaining must be with intent

(*i*) to commit an offence ; or

(*ii*) to intimidate, or insult or annoy any person in possession of the property.[1]

The use of criminal force is not a necessary ingredient to constitute criminal trespass.

In the case of *Bhola*,[2] one S lawfully seized a cow belonging to the accused and had it impounded in the cattle-pound. The accused, the owner of the cow, proceeded to the cattle-pound, opened the lock, entered and drove off the cow after slightly injuring the watchman who attempted to prevent him. It was held that the accused was guilty of criminal trespass, as his act amounted to an entry upon the property in the possession of another person with intent (1) to commit an offence (*i.e.*, an act which is made an offence by the Cattle Trespass Act), and (2) to intimidate the man in charge of the premises.

In the case of *Tanba Sadashio*,[3] the accused, the Vice-Chairman of a school committee, entered the school premises which were under the possession and control of the Head Master with the avowed object of giving a thrashing and actually beat two boys and abused the Head Master. It was held that the accused had committed criminal trespass.

The word 'intimidate' must be understood in its ordinary sense "to overawe, to put in fear, by a show of force or threats of violence." Where the accused came on the land of the complainant to oust him forcibly and by intimidation, that is to say, they entered upon the land with intent to intimidate the complainant and thereby to compel him to give up possession, it was held that they had committed criminal trespass.[4]

1. *Arjad v. Crown* (1951) 3 D.L.R. 13 : I P.L.R (Dac) 602 ; *S. Selvayagam v. King* (1952) 4 D.L.R (P.C) 74 ; *Rahmatullah v. State* (1958) 10 D.L.R. 143.
2. (1927) I.L.R. 8, Lah. 331.
3. (1963) 65 Bom. L.R. 477.
4. *T.H. Bird*, (1933) I.L.R. 13 Pat. 268

The word 'annoyance' must be taken to mean annoyance that would generally and reasonably affect an ordinary person, not what would specially and exclusively annoy a particular individual.[1] Where a person claiming a title to property, whether his title be good or bad, enters without any legal justification upon property in the established possession of another, he must be inferred to have had an intent to annoy the person in possession, even though he had no primary desire to annoy, and his only object was to obtain possession for himself.[2] Where the accused enclosed and cultivated a portion of a burial ground, it was held[3] that he had committed this offence as his act was calculated to cause annoyance to persons using the burial ground. Where the accused entered into the complainant's house with intent to have illicit intercourse with his widowed sister, it was held[4] that he was guilty of this offence as the illicit intercourse was bound to cause great annoyance to the complainant. The writing of love-letters by a student to an innocent girl, who is a perfect stranger to him, must necessarily annoy her and the student must have intended to annoy her, and, when the student enters the girl's house to deliver such a letter his act amounts to criminal trespass.[5] Where the accused broke open a lock and entered into a room which was in the possession of the complainant, behind the back of the latter, it was held[6] that the intention to commit an offence, or to intimidate, insult or annoy was clearly inherent in the act of the accused. When an accused has trespassed upon the land of another and refuses to go when asked by the owner to do so and compels the owner either to use force within the limits of his rights of defence of private property

1. *Gobind Prosad*, (1879) I.L.R. 2 All. 465, 467.
2. *Ram Saran*, (1905) P. R. No. 12 of 1906, F.B ; *Preman*, (1929) I.L.R. 11 Lah. 238. See, however, *Mathri*, (1964) A.I.R. S.C. 686.
3. (1871) 6 M.H.C. (Appx) xxv.
4. *Jiwan Singh*, (1908) P.R.No. 17 of 1908.
5. *Trilochan Singh v. Director S.I.S.*, (1963) A.I.R. Mad. 68.
6. *Jamna Das*, I.L. R. (1944) All. 754.

to remove an intruder or else to go to Court to achieve the same object, the conduct of the accused amounts to intimidation and annoyance and the intention to cause these is clear.[1]

The second part of the section applies where the entry is lawful, but subsequently the person who has entered insists on unlawfully remaining, either directly or constructively against the will of the person in possession with intent thereby to commit an offence or to intimidate, insult, or annoy any person in possession of the property.[2]

The following points should be considered with regard to the offence of trespass :—

(1) Trespass can only be committed in respect of immoveable corporeal property, such as land, houses etc.

(2) The essence of the offence is the intention with which it is committed. It must be proved that one or other of the intents named above was present in the mind of the offender at the time of committing the trespass. A knowledge of likelihood does not form a part of the definition.

(3) A person entering on the land of another in the exercise of a *bona fide* claim of right will not be guilty, though the claim is unfounded. But if the entry is made with intent to annoy, it does not matter whether it was made under a claim of right.

In the case of *Emperor v. Balkrishna Narhar Velhankar*[3] the complainant and the accused were neighbours. Their houses were divided by a wall which the complainant claimed as his own, but which, according to the accused, was a party wall. The accused gave a notice prohibiting the complainant from raising the height of the wall. The very next day complainant raised the height. While the complainant was absent the accused went into his house and demolished the new addition to the wall. It was held that no offence was committed as there was a *bona fide* claim of right by the accused to the wall in dispute.

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1. *Harkana Biswas v. Suvak Singh*, (1951) I.L.R. 2 Cal. 357.
2. *Gobind Prasad*, (1879) I.L.R. 2 All. 465, 466.
3. (1924) 26 Bom. L.R. 978.

(4) The word 'annoy' must be taken to mean annoyance that would generally and reasonably affect an ordinary person not what would specially and exclusively annoy a particular individual, *e.g.* fanciful person, or a person of a peevish temper.

(5) The property must be in the actual possession of a person other than the trespasser. It is *de facto* and *de jure* possession that is necessary. The person in possession may be an individual or a corporate person. A landlord cannot forcibly enter on land in the possession of a tenant and dispossess him after the expiry of the lease which gave the landlord a right of re-entry on its termination. If he did so, he would be guilty of criminal trespass.

(6) The remaining becomes unlawful if the accused remains against the wish, express or implied, of the person in actual possession of the property.

(2) **House trespass.**—Under section 442 of the Pakistan Penal Code a person commits 'house-trespass' if he

(1) commits criminal trespass,

(2) by entering into, or remaining in

(*a*) any building, tent, or vessel used as a human dwelling, or

(*b*) any building used (*i*) as a place for worship, or (*ii*) as a place for the custody of property.

Explanation.—The introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass.

Punishment.—Imprisonment of either description for one year, or with a fine of Rs. 1000, or both. (S. 448).

Ingredients.—In the case of an offence of house-trespass, the prosecution must prove : (1) that the accused committed criminal trespass ; (2) that such criminal trespass was committed by entering into, or remaining in a building, tent or vessel ; and (3) such building, tent or vessel was used as a human dwelling, or as a place of worship, or as a place for the custody of property.

Aggravated forms of house-trespass.—The following are the aggravated forms of house-trespass :—(1) House-trespass in order to the commission of an offence punishable with death. (S. 449).

Punishment.—Transportation for life or rigorous imprisonment for 10 years and fine. (S. 449).

(2) House-trespass in order to the commission of an offence punishable with imprisonment for life. (S. 450). Punishment. —Imprisonment of either description for 10 years and fine. (S. 450).

(3) House-trespass in order to the commission of an offence punishable for imprisonment. (S. 451). Punishment.—If the offence intended to be committed be theft—Imprisonment of either description for 7 years and fine. Otherwise---Imprisonment of either description for 2 years and fine. (S. 451).

(4) House-trespass after preparation made for causing hurt, assault or wrongful restraint to any person, or for putting any person in fear of hurt, assault, or wrongful restraint. (S. 452). Punishment.—Imprisonment of either description for 7 years and fine. (S. 452).

(3) Lurking house-trespass.—Lurking house-trespass is a trespass after taking precautions to conceal such house-trespass from some person who has a right to exclude or eject the trespasser from the building, tent or vessel which is the subject of the trespass. (S. 443).

In all "lurking house-trespass," there must be "house-trespass" and in all "house-trespass," there must be "criminal trespass." Unless, therefore, the intent necessary to prove the offence of "criminal trespass" is present, the offence of "lurking house-trespass" or "house-trespass" cannot be committed. In other words intention is the essence and gist of the offence of "lurking house-trespass." Where intention is not proved, no offence of "lurking house-trespass" or "house-trespass" can be said to have been committed.[1]

Punishment.—Imprisonment of either description for 2 years and fine. (S. 453).

Whoever commits lurking house-trespass after sunset and before sunrise is said to commit "lurking hous-trespass by night." (S. 444).

1. *Illahi Baksh v. State* (1959) 11 D.L.R. (WP) 131 : 1959 P.L.D. (Pesh) 61.

Punishment.—Imprisonment of either description for 3 years and fine. (S. 456).

(4) **House-breaking.**—Section 445 of the Pakistan Penal Code defines house-breaking. It states thus :

A person is said to commit "house-breaking" who commits house-trespass (*i*) if he effects his entrance into the house or any part of it in any of the six ways hereinafter described ; or (*ii*) if being in the house or any part of it for the purpose of committing an offence, or having committed an offence therein, he quits the house or any part of it in any of such six ways, that is to say.—

First.—if he enters or quits through a passage made by himself, or by any abettor of the house-trespass, in order to the committing of the house-trespass. Thus A commits house-trespass by making a hole through the wall of Z's house, and putting his hand through the aperture. This is house breaking. [*Illustration* (*a*)].

Secondly.—If he enters or quits through any passage not intended by any person, other than himself or an abettor of the offence, for human entrance, or through any passage to which he has obtained access by scaling or climbing over any wall or building.

Illustrations.—(*a*) A commits house-trespass by creeping into a ship at a port-hole between decks. This is house-breaking. [*Illustration* (*b*)].

(*b*) A commits house-trespass by entering Z's house through a window. This is house-breaking. [*Illustration* (*c*)].

Thirdly.—If he enters or quits through any passage, which he or any abettor of the house-trespass has opened, in order to the committing of the house-trespass by any means by which that passage was not intended by the occupier of the house to be opened. Thus A commits house-trespass by entering Z's house through the door, having lifted a latch by putting a wire through a hole in the door. This is house-breaking. [*Illustration* (*e*)].

Fourthly.—If he enters or quits by opening any lock in order to the committing of the house-trespass, or in order to

the quitting of the house after a house-trespass. Thus A finds the key of Z's house door, which Z had lost, and commits house-trespass by entering Z's house, having opened the door with that key. This is house-breaking. [*Illustration* (*f*)].

Fifthly.--If he effects his entrance or departure by using criminal force or committing an assault, or by threatening any person with assault.

Illustrations.—(*a*) Z is standing in his doorway. A forces a passage by knocking Z down, and commits house-trespass by entering the house. This is house-breaking. [*Illustration* (*g*)].

(*b*) Z, the door-keeper of Y, is standing in Y's doorway. A commits house-trespass by entering the house, having deterred Z from opposing him by threatening to beat him. This is house-breaking. [*Illustration* (*h*)].

Sixthly.—If he enters or quits by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself or by an abettor of the house-trespass. Thus A commits house-trespsass by entering Z's house through the door, having opened a door which was fastened. This is house-breaking. [*Illustration* (*d*)].

Explanation.--Any out-house or building occupied with a house, and between which and such house there is an immediate internal communication, is part of the house within the meaning of this section.

Punishment.—Imprisonment of either description for two years and fine. (S. 453).

Ingredients.—The ingredients which constitute the offence of house-breaking are :

(1) A person must commit house-trespass.

(2) He must effect his entrance into the house or any part of it in any of the six ways mentioned in section 445, or if he was in the house or any part of it for the purpose of committing an offence, he must quit in any of those six ways.

Invasion of a person's residence should naturally be meted out with deterrent punishment. This section describes six ways in which the offence of house-breaking may be committed. Clauses 1-3 deal with entry which is effected by means of a passage

which is not ordinary. Clauses 3-6 deal with entry which is effected by force. When a hole was made by the burglars in the wall of a house but their way was blocked by the presence of beams on the other side of the wall, it was held[1] that the offence committed was one of attempt to commit house-breaking and not actual house-breaking, and illustration (*a*) to section 445 of the Penal Code does not apply.

House-breaking by night.—Whoever commits house-breaking after sunset and before sunrise, is said to commit house-breaking by night. (S. 446). Punishment.—Imprisonment of either description for 3 years and fine. (S. 456).

Aggravated forms of the offence of lurking house-trespass or house-breaking.—The following are the aggravated forms of the offence of lurking house-trespass or house-breaking :—

(1) Lurking house-trespass or house-breaking in order to the commission of an offence punishable with imprisonment. (S. 454). Punishment.—If the offence intended to be committed is theft—Imprisonment of either description for 10 years and fine. Otherwise—Imprisonment of either description for 3 years and fine. (S. 454).

(2) Lurking house-trespass or house-breaking after preparation made for causing hurt, assault or wrongful restraint to any person. (S. 455). Punishment.—Imprisonment of either description for 10 years and fine. (S. 455).

(3) Causing grievous hurt or attempting to cause death or grievous hurt to any person while committing lurking house-trespass or house-breaking. (S. 459). Punishment.—Transportation for life or imprisonment of either description for 10 years and fine. (S. 459).

Aggravated forms of lurking house-trespass by night and house-breaking by night.—The following are the aggravated forms of the offence of lurking house-trespass by night and house-breaking by night :—

(1) Lurking house-trespass or house-breaking by night in order to the commission of an offence punishable with imprisonment.

1. *Ghulam v. Crown* (1923) I.L.R. 4 Lah. 399.

(S. 457). Punishment.—If the offence intended to be committed is theft—Imprisonment for 14 years and fine. Otherwise—Imprisonment of either description for 5 years and fine. (S. 457).

(2) Lurking house-trespass or house-breaking by night, after preparation made for causing hurt, assault or wrongful restraint to any person. (S. 458). Punishment.—Imprisonment of either description for 14 years and fine. (S. 458).

(3) Voluntarily causing, or attempting to cause, death or grievous hurt to any person at the time of committing lurking house-trespass or house-breaking by night. (S. 460). Punishment.—Transportation for life or imprisonment of either description for 10 years and fine. (S. 460).

Every person jointly concerned in committing lurking house-trespass or house-breaking by night are punishable where death or grievous hurt is caused by one of them. (S. 460).

Dishonestly breaking open a receptacle containing property is punishable under section 461. The punishment is much more severe when such act is committed by a person who is entrusted with its custody. (S. 462).

Distinction between house-trespass and house-breaking.—Both are aggravated forms of criminal trespass. One form of criminal trespass is the act of entering upon property in the possession of another with intent to commit an offence. If the property is used as a human dwelling the offence of criminal trespass becomes that of house-trespass. If house-trespass is further aggravated by an entry or departure of a forcible nature, then offence turns into house-breaking, a serious offence.

Distinction between criminal trespass and house-breaking.—House-breaking is an aggravated form of criminal trespass. Criminal trespass is committed by any person who enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy that person, or who, having lawfully entered into or upon the property, remains there with that intent. (S. 441). If the property in question is a human dwelling or is a building used as a place

of worship, or is a place for the custody of property, the offence becomes house-trespass. (S. 442).

Distinction between criminal trespass, house-trespass and house-breaking.—Criminal trespass may be committed by entering upon another's property with intent to intimidate, insult or annoy that person. If the property is used as a human dwelling, the offence of criminal trespass becomes the offence of house-trespass. But if the offence of house-trespass is further aggravated by the entry or departure of a forcible nature or entry or departure through any passsage not intended for human entrance or departure, then the offence becomes house-breaking. House-breaking is thus an aggravated form of criminal trespass.

In all house-breaking there must be house-trespass and in all house-trespass there must be criminal trespass. In order, therefore, to establish an offence either of house-breaking ro house-trespass, the intent necessary to prove criminal trespass must be present.