CHAPTER-I

INTRODUCTION
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INTRODUCTION & HISTORICAL PERSPECTIVES

‘Consent’ is the active expression of Intention. However there are numerous stages through which a consent is passed such as volition, will, intention but the ultimate mental expression signifying a desire to do an act is ‘consent’. Before answering the ‘consent’, a human being keeps on thinking, it is the individual area of a person which is unblameworthy or unpraiseworthy but whenever a person expresses his/her desire for any target, such conduct becomes the subject matter of other’s concern. In other words, this is the stage where a desire of the person comes in the worldly area where law starts to operate.

Under criminal law, the mens rea has much importance in judicial system of every country rather it is the basis of punishing or acquitting a person. If an offence is committed in the presence of mens rea, the act is punishable and if absence of mens rea is found, the alleged person is acquitted honourably. Upon this criteria the whole criminal law is based. Chapter IV (General Exceptions) of I.P.C. is based on absence of mens rea.

There was a time in Ancient period when mens rea had no place in Criminal law rather actus reus was seen is every incident even in British Criminal Law which is now enlisted in forward Administration of justice system.

Review of Literature

Uptill now, the concept of consent has its existence in various Acts (such as IPC, Cr. P.C., Indian Contract Act) in scattered form and undefined in real sense. There is no elaborate and complete definition of consent in positive form yet the concept has been used in various provisions to the advantage or disadvantage to the Accused or Accessory party.
Concept of consent has been defined in I.P.C. negatively under section 90 where it is mentioned that desired consent in I.P.C. is not such a 'consent' which is affected by fear of injury or misconception of fact or a consent which has been obtained from a person of unsound mind or intoxicated person or a child below 12 yrs. In this way, it appears that I.P.C. defines consent as a consent free from any lacuna of healthy mental expression. In other words, a legal consent is recognised to be given a right and real place to the terminology of consent in I.P.C. Synonym to the desired consent in I.P.C., there is a concept of 'Free Consent' under sec. 14 of Indian Contract Act signifying almost same meaning which has been positively defined. Under Indian Contract Act free consent is that consent which has not been affected by fraud, misrepresentation, mistake, compulsion etc.

Under Indian Penal Code, two types of consent is noticed viz. –

(i) consent given by the victim
(ii) consent given by co-accused

There are many sections in I.P.C. such as 87, 88, 89, 92, 497, also in Criminal Procedure Code, Section 265A-265L (recently inserted by the criminal law Amendment Act 2005) where an accused is exonerated from criminal liability if consent has already been given by the victim or on his/her behalf by any legal representative. The principle underlying these sections is that all the acts were done in good faith for victim’s benefit. In other words *mens rea* is missing while doing such noble acts. There are other group of offences where after giving consent by victim, still the accused is guilty because the so called ‘consent’ is not the desired consent as is intended by I.P.C. due to affected by fear of injury or misconception of fact. Such offences have been defined in Sections viz. 94, 361-362, 375-376D, 383-389, 493-498. In these offences the accused is not exonerated by merely stating that the
victim has already consented for the act/crime because in these cases the accused is suffered with mala fide intention. There are other situations where even after obtaining consent from the victim, still such consent is not considered the legal consent due to inability of victim to understand the nature and consequence of the act consented such as consent given by person of unsound mind or intoxicated person or a child below 12 years. This factum has already been incorporated in Section 90 of the I.P.C. itself and further elaborated under Sections 82, 83, 84, 85, 86 of IPC. In other words mens rea is perceived present in these offences and desired consent is found absent.

There are some special acts which are independently offences meaningless to see whether harm caused or not in other words accused is definitely punished even the act was done with the consent of the opposite party. Such offences are offences not against a particular individual rather against the general public. Such offences are embodied in IPC in Sections 91, 312-316.

There is another batch of offences where if the accused succeeds to prove that the victim had consented before the act done, the criminal liability of the accused is mitigated. Such offences have been described in sections viz. exception 5 to Sections 300 and 305-306 of I.P.C.

The other type of consent incorporated in I.P.C. is consent given by co-accused to join in committing the crime which will constitute joint liability of the persons consented reciprocally. Such liability is also called group liability. When a member of a group commits crime, other members automatically held liable because other members have also consented to do the alleged crime. The answer is with the time that which act or acts are completed by different members but one thing is sure that each member is desirous to achieve the mala fide target. Hence all offences involving group liability are based on expressed consent of all the members of a group to commit a crime.
Such consent has been identified with common intention or common object or conspiracy or abetment by conspiracy or harbouring or receiving stolen property etc. in numerous Sections viz., 34, 107, 120A, 121A, 124, 128-130, 134-137, 141, 142, 149, 154-158, 169, 185, 197, 212, 213, 215, 219, 221-223, 225A, 242, 243, 411-414, 475

Questions under research

The present study is undertaken on the above lines in depth by bifurcating the scheme in various chapters on the basis of different dimensions. In this chapter the true meaning, nature and scope of consent is necessary to identify so that the actual place of the concept in IPC may be acknowledged and on the basis of true demarcation, criminal liability of the accused may be known exactly. Attempt has been made to know the historical development of mental element which is the first and foremost deciding factor of the fate of an alleged accused that whether a person is liable for punishment or acquittal in line of an act done? It is also to be seen whether consent had importance in deciding criminal cases and in social ceremonies particularly in marriages? It is also studied that what are stages through which mental element of consent passes through other sub-concepts such as volition will, desire, motive intention etc? Whether a consent can be conveyed by keeping mum? Whether keeping knowledge of any thing, without expressing any intention amounts to consent? In addition to the circumference of the first chapter, the researcher has tried to know other dimensions of the consent minutely such as whether consent of the victim exonerates the accused from criminal liability absolutely or conditionally? What is termed as legal consent as desired by the Indian Penal Code? Up to what extent the fear of injury or misconception of fact can invalidate the consent? Whether a consent has negligible importance if given by person of unsound mind, intoxicated person or a minor? Whether an act be an offence even after done with consent of the
necessary party? Whether a consent can mitigate the criminal liability (i.e. minimise the quantum of sentence) if obtained from the victim? Attempt is also made to know that up to which extent joint liability is based on expression of consent? Whether all members of a group are liable equally for act done or unequally? What are the grounds upon equal or unequal criminal liability is fixed? When a member of a group is called active member and when a distantly related member for determining their criminal liability?

As we have already assessed that consent is specie of the genesis of the Intention. It is necessary to know various elements of consent in criminal law.

**Difference Between English and Indian Law:** English law, however, excuses a person doing an offence even against the State if he is threatened with his own life, while in India, the law does not excuse the committing of those offences even under compulsion of instant death, which are against State punishable with death or the offence of committing murder. Therefore, Section 94 would not apply to offences contained under Sections 121 and 302, I.P.C.

**Consent (Sections 87 to 92).** – Nothing is an offence which is not intended to cause death or grievous hurt, if the person to whom such hurt is caused being above the age of eighteen years has expressly or impliedly consented to suffer harm, or to take the risk of any harm (Section 87). This rule is founded upon two very simple propositions: (1) that every person is the best judge of his own interest; (2) that no man will consent to what he thinks harmful to himself. Players of ordinary games, such as fencing, boxing, football and the like are protected under this section.

**Leading Cases**
(i) Nagwarkin. – A, a middle-aged man, believed himself to have been rendered *dah* proof by charms and asked B to try a *dah* on his right arm. B believed in the presence of A and inflicted a blow with a *dah* with moderate

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1 30 IC 138.
force; the result was that the arteries were cut and A bled to death. The Appellate Court set aside the conviction under Section 304 of the Code and held that the case was governed by Sections 87 and 90, and that B had no intention of causing death or grievous hurt and that he might not even have known that his act was likely to cause any such result.

(ii) Bishambher. The complainant was taken by a self-constituted panchayat round the village with a blackened face and was given a shoe-beating. The Court held that the action of the accused in enforcing the decision of the panchayat cannot be an offence. The accused persons acted *bona fide* without any criminal intent, in order to save the complainant from serious consequences, resulting from his own indecent behaviour, with his consent obtained in writing and for his benefit.

An act not intended to know to be likely to cause death, come in good faith by consent of the person to whom harm is caused for his benefit is not an offence (Section 88). This section allows the infliction of any injury if it is for the benefit of the person to whom it is caused. For example, A, a surgeon. Knowing that a particular operation is likely to cause the death of Z, who suffers under the painful complaint, but not intending to cause Z’s death, and intending, in good faith to Z’s benefit, performs that operation on Z, with Z’s consent. A has committed no offence.

A, a surgeon examined Z and found him suffering from an abdominal pain which A knew could not cause Z’s death. A, however, at the request of Z performs a difficult operation on Z which A knew was likely to cause Z’s death, in order to relieve Z of the pain. Z dies as a result of the operation [Ans: No offence, covered by Section 88].

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2 52 Cr LJ 179.
It may be noted here that the persons who have no medical qualifications are not entitled to the protection given under this section as they can hardly be deemed to act in ‘good faith’ (as defined in Section 52).

In English law it is recognised that a school master may inflict corporeal punishment on a pupil for purposes of correction of enforcing school discipline. In *Regina v. Hopley*, it was observed that by the law of England, a parent or a school master may for the purpose of correcting what is evil in a child inflict moderate and reasonable corporeal punishment.

In *R. v. Ghatge*, it was observed that a headmaster of a school, inflicting in good faith moderate and reasonable corporeal punishment to correct the erring pupil and thus maintaining the discipline of the school, is protected under Section 88, as delegate of the parent of the child in the exercise of necessary corrective jurisdiction for the benefit of the child.

In *P. Rathinam Nagbhushan Patnaik v. Union of India*, the Supreme Court declared Section 309 of I.P.C. unconstitutional because it violates Articles 14 and 21 of the Constitution. The question again arises if a person wants to finish his life and permits another to kill him whether killer will be responsible for the offence of murder.

A, a snake-charmer claims magical powers of curing snake-bites and asks for volunteer to be bitten by his poisonous cobra. B offers himself and dies: Has A committed any offence? [Yes; under Section 304 or 304-A].

Nothing is an offence which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, consent whether express or implied, of the guardian or any other person having the lawful

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4 (1949)21 Bom LR 103.
5 AIR 1994 SC 1844.
charge of that person, although harm is thereby caused (Section 89). The exceptions to this section as given in the Code are as follows:

1. Intentionally causing or attempting to cause death.
2. The doing of anything which the doer knows to be likely to cause death, except to prevent death or grievous hurt or cure any grievous disease or infirmity.
3. Voluntarily causing or attempting to cause grievous hurt except as above.
4. The abetment of any offence which cannot be exempted under this section.

An act falling in any of the above four classes shall not receive the protection of Section 89.

The three circumstances as enunciated in Section 87, 88 and 89, in which this Code excuses the causing of death or grievous hurt have one ingredient in common viz., consent. Consent is an act of reason, accompanied with deliberation, the mind weighing, as in balance, the good and evil on each side (Story): Stephens defines consent as 'a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents'. There is no definition of "consent" in the Code, but the Code indicates with sufficient precision the circumstances in which consent may be effective to give the protection provided for in the aforesaid three sections.

**Conditions necessary:** The following conditions may be present to make consent effective:

1. The consenting party must not be under a fear of injury or a misconception of facts. The consent must be borne of free-will and a knowledge of the truth of facts. Thus, a snake-charmer making a
demonstration of his skill, causing the members of his audience to allow themselves to be bitten by snake on the strength of his assertion that he can protect them from harm, secures consent by placing them under a misconception of facts. Such consent shall, therefore, fail to protect him from penalty for causing their death.\(^6\) If the party securing consent does not know that the party giving such consent has acted under fear of injury or from a misconception of facts, the party securing consent cannot be punished because an evil mind cannot be ascribed to such party, the act in question being done under a mistake of facts.

(2) The consent must be given by a person who is able to understand the nature and consequences of the act to which he gives consent. Thus, the consent of an infant or an insane person is no consent. Consent to be true and effective requires a maturity of deliberation. The Code, therefore, refuses to recognise as ‘consent’ – the consent given by a person under twelve years of age.

We may summarise the above principles as follows. Consent must be borne of (i) a mature and sound understanding, (ii) a free choice, and (iii) must not result from a mistake of facts. These principles have been embodied in Section 90 which may be represented in the following manner:

An honest misconception by both the parties does not invalidate the consent. Acts which are offences independently of any harm which they may cause to the person giving the consent or on whose behalf consent is given are

\(^6\) R. v. Poonai Fattemam, (1869) 12 WR Cr. 7.
not exempted (Section 91), e.g., causing miscarriage, unless caused in good faith for saving the life of the woman, is an offence independently of any harm which it may cause or be intended to cause to the woman and the consent of the woman or her guardian to such act shall not protect the act from punishment.

Consent thus goes a long way to justify many acts otherwise punishable. There are several offences in which absence of consent is an essential ingredient, i.e. where they are done with consent they are not offences, e.g., sexual intercourse with a woman above 16 years of age is rape when done without her consent and is not rape when done with such consent (see Section 375, I.P.C.). It is outside the scope of our study at present to enumerate or go into the details of such offences which shall be dealt at their respective places. Our concern here is only to study certain general exceptions.

Coming back to the subject of consent, as it is, we may visualise situations in which the life and safety of a person is in peril but it is impossible to obtain consent as when he is unconscious or when he is an infant or an insane person incapable of giving consent or when no guardian or other person in lawful charge of him is present who could have given consent on his behalf. Shall we go out to search for a guardian or other person who would give consent or assume responsibility themselves in respect of such person. A moment's delay may be too costly. Z is thrown off from his horse and is lying insensible. A who is a surgeon, finds that only a delicate surgical operation which it is not unlikely, may kill him, can save his life. There is no guardian nearby to give his consent to such operation. Shall A under such circumstances act on his own initiative for the good of Z and not hesitate on account of the risk inherent in the operation? A is, in a house on fire, with Z, a child; people
below hold out a blanket. A drops the child from the house top, knowing it to be likely that the fall may kill the child but he does it with the intention to save the child and if Z dies of the fall shall A be guilty? In the circumstances in which consent cannot be obtained a man cannot be punished for causing harm to a person provided he acts in good faith and for the benefit of such person.

The Supreme Court has discussed the doctrine of consent to *Udaya v. State of Karnataka.* In the instant case the facts were that the prosecutrix consented to have sexual intercourse with the appellant accused. The accused was charged for the offence of rape. The Supreme Court held that the accused is not guilty of rape as the prosecutrix has given her consent for sexual intercourse with the accused. A false promise by accused to marry her is not a fact within the meaning of the Penal Code.

Nothing is an offence by reason of any harm done to the person for whose benefit it is done even without that person's consent, provided it is done, in good faith, and the circumstances are such that it is impossible to obtain that person's consent, or if that person is incapable of giving consent, there is no lawful guardian near at hand from whom it is possible to obtain consent in time for the thing to be done with benefit (Section 92). Good faith and the benefit of the person for whom the act is done are the two principal considerations on which the law allows exemption. These two elements repudiate the evil intention necessary to constitute crime and they protect acts as well as utterances. The provisions given in Section 92 are not applicable to (i) the intentional causing of death, or the attempt to cause death, (ii) the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt or the curing of any grievous disease or infirmity; (iii) the voluntary causing of hurt, or to

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2003 Cr. LJ 1539.
the attempting to cause hurt, for any purpose other than the preventing of death or hurt; (iv) the abetment of any offence to the committing of which offence, the exception given in Section 92 would not extend.

It is now clear that Section 92 deals with cases of emergency and not covered by Section 88 or Section 89. It was thus justified by the Draft Committee of the Code that there yet remains a kindred class of cases which are by no means of rare occurrence. For example, a person fails down in an apoplectic fit. Bleeding alone can save him and he is unable to signify his consent to be bled. The surgeon who bleeds him commits an act falling under the definition of an offence. The surgeon is not the patient’s guardian and has no authority from any such guardian, yet it is evident that surgeon ought not to be punished. Again, a house is on fire. A person snatches up a child too young to understand the danger, and flings it from the house top with the faint hope that it may be caught on a blanket below, but with knowledge that it is highly probable that it will be dashed to pieces. Here, though the child may be killed by the fall, though the person who threw him down knew that it would very probably be killed, and though he was not the child’s parent or guardian, he ought not to be punished.

In these examples there is what may be called a temporary guardianship justified by the exigency of the case and by the humanity of the motive. This temporary guardianship bears a considerable analogy to that temporary magistracy with which the law invests every person who is present when a great crime is committed, or when the public peace is concerned. To acts done in the exercise of this temporary guardianship, we extend a protection very similar to that which we have given to the acts of regular guardians.
No communication made in good faith is an offence by reason of any harm to the person to whom it is made for the benefit of that person (Section 93).

Illustration to this section is that A, a surgeon, in good faith communicates to a patient his opinion that the cannot live. That patient dies in consequence of shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient’s death. The purpose of this section is to protect the innocent without unduly cloaking the guilty. A timely warning to the patient of the hopeless condition of his health is necessary so that he may set the things all right.

**Concept of Consent under Indian Contract Act**

Section 13 and 14 of the contract Act, define the concept of consent. The word ‘Free Consent’ mentioned in Section 14 of the Contract Act is somewhat similar to the consent intended by Section 90 of I.P.C. The phrase ‘fear of injury’ used in Section 90 is similar upto much extent with the coercion. Similarly the phrase ‘misconception of fact’ used in Section 90 is also much similar with the term misrepresentation used in Contract Act. Now we will discuss the concept in detail in Indian Contract Act.

**Section 13.** Two or more persons are said to consent when they agree upon the same thing in the same sense. (Indian Contract Act)

**Apparent and real consent:**– If the section is to cover all kinds of contracts, the word “thing” must obviously be taken as widely as possible. We must understand by “the same thing” the whole contents of the agreement, whether it consists, wholly, or in part, of delivery of material objects, or payment, or other executed acts or promises.8

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Generally parties who have concurred in purporting to express a common intention by certain words cannot be heard to deny that what they did intend was the reasonable effect of those words; and that effect must be determined, if necessary, by the Court according to the settled rules of interpretation. Whoever becomes a party to a written contract “agrees to be bound, in case of dispute, by the interpretation which a Court of law may put upon the language of the instrument,” whatever meaning he may attach to it in his own mind, unless it is proved that the mind of the person signing did not accompany his signature.

Ambiguity:- An apparent agreement can be avoided by showing that some term (such as a name applying equally to two different ships) is ambiguous, and there has been a misunderstanding without fault on either side. Such cases, however, are extremely rare. It usually turns out that there is no real ambiguity, for either (1) the terms have an ascertained sense by which the parties are bound whatever they may profess to have thought, or (2) the proposal was never accepted according to its terms, as when a broker employed to sell goods delivered to the intending purchaser and the intending seller sold notes describing goods of different qualities. “The contract,” said the Court, “must be on the one side to sell, and on the other side to accept, one and the same thing.” No such contract being shown on the face of the transaction, there was no need to say, and the Court did not say, anything about mistake.

Section 14. Consent is said to be free when it is not caused by –

(1) coercion, as defined in section 15, or

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10 Chimanram v. Diwanchand, 56 Bom. 181 (190); Banku Bihari v. Krishto, 30 Cal 433 (438).

11 Thornton v. Kempster (1814) 5 Taunt, 78.
(2) undue influence, as defined in section 16, or
(3) fraud, as defined in section 17, or
(4) misrepresentation, as defined in section 18, or
(5) mistake, subject to the provisions of sections 20, 21 and 22.
Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

Free Consent: Not only consent but free consent is declared by sec. 10 to be necessary to the complete validity of a contract. Where there is no consent or no real and certain object of consent there can be no contract at all. Where there is consent, but not free consent, there is generally a contract voidable at the option of the party whose consent was not free. This section declares in general the causes which may exclude freedom of consent, leaving them to be more fully explained by the later sections referred to in the text.

A father consenting to a settlement in respect of a bank's claim against his son who forged his father's signatures on the pro-notes and thereby defrauded the bank although no threat of prosecution was held out, was held to be not a free agent to consent to the settlement.12

Extent of "coercion" under the Act: The words of this section are far wider than anything in the English authorities; it must be assumed that this was intended. As the definition stands the coercion invalidating a contract need not proceed from a party to the contract13 or be immediately directed against a person whom it is intended to cause to enter into the contract or any member of his household, or affect his property, or be specifically to his prejudice. In England the topic of "duress" at Common Law has been almost rendered obsolete, partly by the general improvement in manners and morals, and partly

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12 Kessowji Tulsidas v. Harivan Mulji 11 Bom. 566.
by the development of equitable jurisdiction and under the head of Undue Influence detaining property is not duress.

**Act forbidden by the Penal Code:** The words “act forbidden by the Indian Penal Code” make it necessary for the Court to decide in a civil action, if that branch of the section is relied on, whether the alleged act of coercion is such as to amount to an offence. The mere fact that an agreement to refer matters in dispute to arbitration was entered into during the pendency, and in fear, of criminal proceedings is not sufficient to avoid the agreement on the ground of “coercion” though the agreement may be void as opposed to public policy within the meaning of sec. 23. It must further be shown that the complainant or some other person on his behalf took advantage of the state of mind of the accused to apply pressure upon him to procure his consent. So if a false charge of criminal trespass is brought against a person and he is coerced into agreeing to give half of his house to the complainant the agreement will not be enforced.

In a Madras case the question arose whether if a person held out a threat of committing suicide to his wife and son if they refused to execute a release in his favour, and the wife and son in consequence of that threat executed the release, the release could be said to have been obtained by coercion within the meaning of this section. Wallis, C.J., and Seshagiri Aiyar, J., answered the question in the affirmative, holding in effect that though a threat to commit suicide was not punishable under the Indian Penal Code, it must be deemed to be forbidden, as an attempt to commit suicide was punishable under the Code (s. 309). Oldfield, J., answered the question in the negative on the ground that the present section should be construed strictly,

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15 22 All. p. 227, citing Jones v. Merionethshire Building Society (1893) 1 Ch. 173.
16 Sanaullah v. Kalimuthah (1932) A.L. 446.
and that an act that was not punishable under the Penal Code could not be said to be forbidden by that Code. That view seems to be correct. A penal code forbids only what it declares punishable.

A demand by workers under the Industrial Dispute Act backed by a threat of strike being not illegal, the threat of strike would not amount to coercion.

Section 18. “Misrepresentation” means and includes –

(1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(2) any breach of duty which without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him;

(3) causing however innocently a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

Misrepresentation of fact or law: – It used to be said in English books that misrepresentation which renders a contract voidable must be of fact; but there does not seem to be really any dogmatic rule as to representations of law. The question would seem on principle to be whether the assertion in question was a mere statement of opinion or a positive assurance – especially if it came from a person better qualified to know– that the law is so and so. It seems probable in England, and there is no doubt here that at any rate deliberate misrepresentation in matter of law is a cause for avoiding a contract. Where a clause of re-entry contained in a Kabuliyat (counterpart of a lease) was represented by a zamindar’s agent as a mere penalty clause, the Judicial

17 Amiraju v. Seshama (1917) 41 Mad. 33.
Committee held that the misrepresentation was such as vitiated the contract, and the zamindar's suit was dismissed.\textsuperscript{19}

Where an executing party to a deed signed the deed upon a representation that the deed will not be enforced, there is a mistake as to the substance of the agreement, apart from the question that there was no consensus of mind.\textsuperscript{20}

\textbf{Fraud and misrepresentation distinguished} :- The principal difference between 'fraud' and misrepresentation' is that in the one case the person making the suggestion does not believe it to be true and in the other he believes it to be true, though in both cases, it is a misstatement of fact which misleads the promisor.\textsuperscript{21} 'Intention to deceive' is essential in fraud, while that is not necessary in 'misrepresentation.' Although in both the cases, the contract can be avoided, in case of misrepresentation or a fraudulent silence, the contract cannot be avoided if the party whose consent as so caused had the means of discovering the truth with ordinary diligence.

\textbf{Intention and Consent}

Intention is an operation of the will. In other words it is the last stage of mental state to do an act or omission. Still it is within knowledge of the intention holder. It means, no body in this world knows about the design or inclination of the intention-holder that what he has promised with himself (or undertaken) to do something. Whereas in case of 'consent' an offer is adhered by some one to another person to do or omit to do some act, in response to this offer either 'Yes' or 'No' is answered. If 'YES' is answered, it means the answering person has given consent to do or omit to do the act offered to him. If 'No' is answered, it means he has not consented to do or omit to do an act. Hence, existence of 'consent' takes place when there are two persons (i.e. two

\textsuperscript{18} Pertab Chander v. Mohendranath Purkhait (1889) 17 Cal. 291, L.R. 161 A. 233.

\textsuperscript{19} Tyagaraja v. Vedathanni (1936) 59 Mad. 446, 63 I.A. 126, (36) A.P.C. 70.

\textsuperscript{20} Naiz Ahmed v. Parshottom (1931) 53 All. 374 : AIR (1931) All. 154.
parties). Therefore whenever consent is expressed, the intention of the answering person comes in the knowledge of the world. Now intention is no more within sphere of the intention-holder. It means expression of consent can be proved by any evidence but mere intention can not be proved until the intention holder does some overt act for the motive. Therefore in cases of consent, always there is OFFER and ACCEPTANCE. Whenever acceptance is expressed it is called consent under criminal law. Whenever a person expresses his intention to do an act before a second person still it is not a consent rather it shows that he is willing to do an act yet it has come in the knowledge of another person. Therefore in the cases of consent, first stage is when a person puts an offer to do or omit to do an act and in answer to it when the second person becomes agree to do such act and expresses it also, it amounts to consent. In nutshell the Intention is the genesis and consent is its specie.

**Intention and Mens-rea**

All acts are done by intention of the doers but whenever any act is done with malafide ways or purpose, it becomes objectionable. If it is objectionable under civil law it is a civil wrong and when it is objectionable under criminal law, it is called criminal wrong. Therefore a guiltful intention is mens-rea and when such mens rea is expressed to do or omit to do some act before other person in answer to an offer, it is a consent expressed to do or omit to do for a particular motive. Hence it is necessary here to study the real circumference (i.e. meaning, scope) of mens rea so that proper identification of consent can be, marked for judging criminal liability. In other words research on consent can be known by studying mens-rea in depth as roots are necessary to be studied for complete knowledge of a tree.
Stages of Mental State (or Mental Element)

**Volition**

Every conscious act which we do is proceeded by a certain state of mind. No physical act is possible without bodily motions. And every bodily motion which constitutes an act is preceded by a desire for those motions. According to Austin, “bodily movements obey wills. They move when we will they should. The wish is volition and the consequent movements are acts. Besides the volition and act, it is supposed there is a will which is the author of both. The desire is called an act of the will, when I will a movement I wish it, and when I conceive the wish I expect that the movement wished will follow. The wishes followed by the act wished, are only wishes which attain their ends without external means. Our desires of acts which immediately follow our desires of them, are volitions. The act I will, the consequence I intended. This imaginary will is determined to action by motives.” The desire which implies the motion is known as volition. Where this desire is not produced by fear or compulsion the act is said to be a voluntary one. “The longing for the object desired which sets the volition in motion is motive. The expectations that desired motions will lead to certain consequences is the intention.”

**Will**

According to Stephen, “will is often used as being synonymous with the act of volition, which precedes or accompanies voluntary action.” By will he means either the particular act of volition, which is a stage in voluntary action, or a permanent judgment of the reasons that some particular course of

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conduct is desirable, coupled with an intention to pursue it, which issues from
time to time in a greater or lesser number of particular volititions.

Intention and Motive

According to Stephen, “Intention is an operation of the will directing an
overt act; motive is the feeling which prompts the operation of the will, the
ulterior object of the person willing, e.g., if a person kills another, the intention
directs the act which causes death, the motive is object which the person had
in view, e.g., the satisfaction of some desire, such as revenge etc.”

Intention is the purpose or design with which an act is done. It is the
foreknowledge of the act, coupled with the desire of it. Such foreknowledge
and being desire the cause of the act, inasmuch as they fulfil themselves
through the operation of will. In intention, the actor chooses, decides, resolves
to bring a prescribed harm into being, he consciously employs means to that
end. An act is intentional if, and in so far as, it exists in fact, the idea
realising itself in the fact because of the desire by which it is accompanied.
Intention is also said to be “an operation of the will directing an overt act;
motive is feeling which prompts the operation of the will, the ulterior object of
the person willing.” According to Bentham, motive is anything which by
influencing the will of a sensitive being is supposed to serve as a means of
determining him to act upon any occasion.

Intention refers to the immediate object, while motive refers to the
ulterior object which is at the root of the intention. In other words intention is
the means and motive is the end. But innocence of the motive may not excuse
where intention will excuse. Bad motive does not punish and good motive
does not excuse. A removes a cow belonging to B to save her from being

23 Stephen, History of the English Criminal Law, Vol. II.
24 Hall, Jerome; General Principles of Criminal Law (2nd ed.) 112.
26 Stephen, History of English Criminal Law, Vol. II.
slaughtered. Here A had an excellent motive but he will not be excused for he unlawfully deprives B of his cow which legally belongs to him. Similarly, where an executioner hangs his own enemy who was sentenced by court of law and thereby gratifies his spite, shall not be held liable for he has done the fact in the discharge of a legal duty. Thus, we see that criminal law does not take into account the motives of a man but his intentions. According to Salmond, "every wrongful act may raise two distinct questions with respect to the intent of the doer. The first of these is: how did he do the act? Intentionally or accidentally. The second is: if he did it intentionally, why did he do it? The first is an enquiry into his immediate intent; the second is concerned with his ulterior intent or motive."

According to Austin, "the intention is the aim of the act, of which the motive is the spring." The ulterior intent is the motive of the act. The immediate intent is coincident with the wrongful act itself; the ulterior intent or motive is that part of the total intent which lies outside the boundaries of the wrongful act. In reality motive is a specie of intent. According to Williams, "in criminal law, it is generally convenient to use the terms 'intention' with reference to intention as to the constituents of the actus reus, and the term 'motive' with reference to the intention with which the actus reus was done."

**Meaning of Mens Rea**

One of the main characteristics of our legal system is that the individual's liability to punishment for crimes depends, among other things, on certain mental conditions. The absence of these conditions, where they are

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27 Salmond, Jurisprudence, 523.
29 Salmond, Jurisprudence, 398.
30 Jerome Hall, General Principles of Criminal Law (2nd ed.) 85 (Hall's analysis of Salmond's views).
32 Williams, G., Criminal Law, 42.
required, negatives the liability. These conditions can best be expressed in negative form as excusing conditions.\textsuperscript{33} The liability to conviction of an individual depends not only on his having done some outward acts which the law forbids, but on his having done them in a certain frame of mind or with a certain will.\textsuperscript{34} These are known as 'mental elements' in criminal responsibility. That is, while acting in a particular way one intended certain consequences or might foresaw the likeliness of those consequences. Therefore an act in order to be a crime must be committed with a guilty mind, \textit{Actus non facit reum nisi mens sit rea} (act alone does not make a man guilty unless his intentions were so) is a well known principle of natural justice. No person could be punished in a proceeding of criminal nature unless it can be shown that he had a guilty mind.\textsuperscript{35}

In the earliest times the trials were held on fundamental presumption that a man must almost in every case be deemed to have intended to do what he had done. The older English Criminal Law began with the principle of strict liability for in those days the distinction between crime and tort was not clearly drawn and punishment in those days mainly consisted of money compensation to the person wronged. Therefore, the mental attitude of a person was an irrelevant consideration in so far as the trial and punishment were concerned.

But later on bodily punishment came as a substitute of the payment of damages. It was then that the importance of \textit{mens rea} or the mental attitude of a person, at the time of commission of crime was realised. With the passage of time the requirement of \textit{mens rea} as an essential element of a crime has firmly taken its roots.

\begin{itemize}
\item \textsuperscript{33} Hart, H.L.A.: Punishment and responsibility, 28.
\item \textsuperscript{34} Hart, H.L.A.: The Morality of the Criminal Law, 6.
\item \textsuperscript{35} Crisholm \textit{v.} Doulton, 22 Q.B.D. 739.
\end{itemize}
Now it is the combination of act and intent which makes a crime. The intent and the act must both concur to constitute a crime.\textsuperscript{36} An act by itself is not wrong. But act, if prohibited, done with a particular intent makes it criminal. There can be no crime large or small without any evil intent.\textsuperscript{37} The responsibility in crimes must depend on the doing of a ‘willed’ or ‘voluntary act’ and a particular intent behind that act.\textsuperscript{38} Most conscious and voluntary acts are directed towards a particular result or consequence. When one acts to produce a particular consequence he is said to do that act with that intention. If the consequence is not looked for the act may be voluntary but not intentional.\textsuperscript{39} For any criminal liability there must be a ‘voluntary act’. This proposition is derived from the maxim \textit{actus me invito factus non est mens actus} which means ‘an act done by me against my will is not my act’. This maxim supports the doctrine of \textit{mens rea} for no person can be held liable for an act done under fear or compulsion. For example, A holds B and compels him at gun point to open the lock of C’s house. Here B’s act is not a willed or intentional act. The difficult cases regarding the application of the doctrine are cases of voluntary acts where the evil intent the application of the doctrine are cases of voluntary acts where the evil intent is negatived by reasons of a mistake regarding the actual state of facts or other grounds of a like nature such as contained in Chapter IV of the Indian Penal Code. You are walking on a road. A man suddenly rushes to you and hits with a stick. You are injured. Later on you find that the assailant was a man of unsound mind. Your feeling of retribution will be lesser as you know that he was not in proper sense and had no mental capacity to feel that by hitting upon your head he would be

\textsuperscript{36} Fowler v. Padget, (1789) 7 T.R. 514.
\textsuperscript{37} Bishop's Criminal Law (7th ed.) 287.
\textsuperscript{38} Salmond, Jurisprudence (10th ed.) 366.
\textsuperscript{39} Huda S. Principles of Law of Crimes in British India, 172.
injuring you. On the other hand, your feelings will be different against the man who hits you deliberately. The act may be the same and the consequences too may be the same but the only difference lies in the intention. Therefore, what is important is an intent to injure.

The basic requirement of the principle of *mens rea* is that accused must have been aware of all those elements in his act which make it the crime with which he is charged. That means, he must have intended the *actus reus* or have been reckless whether he caused an *actus reus* or not. It is not necessary that he must know that the act which he is going to commit is crime.

**Origin and Development of Mens rea**

There can be no crime without an evil mind. It is principle of almost all legal systems that the essence of an offence is a wrongful intent without which it cannot exist. Coke traces the origin of the maxim *actus non facit reum nisi mens sit rea* to the Sermons of Augustin as *ream linguam non facit nisi mens rea*. The author of *Leges Henrici* picked it up from some intermediate work in which *Linguam* may possibly have disappeared. After Coke this maxim was taken help of in many English decisions. *Lord Kenyon* accepted this maxim to be a principle of natural justice and English law. It is a maxim older than the law of England that no man is guilty unless his mind is guilty' observed *Lord Arbinger in R. v. Allday*.

The liability in early English law was absolute. The law made men answerable for all the ills that their deeds may obviously bring upon their

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41 Bishop, Criminal Law (9th ed.) 287.
42 Fowler v. Padget, (1798) 7 T.R. 504 at 541.
43 (1837) 8 C & P, 136 at 139.
fellows. The doer of the deed was responsible, whether he acted innocently or inadvertently, because he was the doer.

The modern notion of *mens rea* was non-existent until twelfth century but criminal intent was not entirely disregarded in respect of certain offences while awarding punishment Thirteenth century English law was influenced by Roman law conceptional of *dolus* and *culpa*. By the time of Edward I the incapacities resulting from infancy and insanity were recognised as defences. By the reign of Edward III, coercion was a defence in certain cases of treasons and it had become settled that in order to hold the owner of an animal criminally liable for injuries done by it, his knowledge of its ferocity must be shown. During fourteenth and fifteenth century, the requirement of *mens rea* as a necessary element of crime was established, though there is some evidence to the contrary also. Common law laid emphasis on moral guilt. *Bracton* wrote: “We must consider with what mind (*animo*) or with what intent (*intent voluntate*) a thing is done in fact or in judgment in order that it may be determined, accordingly what action should follow and what punishment. For, take away the will and every act will be indifferent, because your state of mind gives meaning to unless the intent to injure (*non- cledivoluntas*) intervene nor is a theft committed except with intent to steal.”

Although the *mens rea* maxim appeared in the *Leges Henrici*, it does not seem to have been used by *Bracton*. *Voluntas nocendi, animo and maleficid* are his terms. Equivalent Norman-French is employed in the *Mirror* where it is said “... there can be no crime or sin without a corrupt will...” The first systematic treatment of *mens rea* was provided by *Hale*. According to him penal liability was based on “two great faculties, understanding, and

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Pollock and Maitland, History of English Law, 470.
Wigmore, Harv. L.R. 1894 He has further observed that: “the owner of an animal, the master of a slave was responsible because he was associated with it as owner, as master.”
The Mirror of Justice, 138 (Seldon Society ed. 1893) Quoted in Hall (2nd ed.) 81.
liberty of will.” No one incurs penal liability for doing an act “without intention of any bodily harm to any person” Malice in fact “has become a deliberate intention of doing some corporal harm to the person of another.

Hall posits that: “the consent of the will is that, which renders human actions either commendable or culpable…” Mens rea consists of two elements. One is the intent to do an act and second a knowledge of the circumstances that makes that act a criminal offence. Thus mens rea means the intention to do a wrong act, with concomitant knowledge of the material facts. In sum, the essential meaning of mens rea i.e. that represented in the intentional doing of a morally wrong act, implying concomitant knowledge of the material facts, has persisted for centuries. But the concept of mens rea has changed with the advance of the law and morals in general.

In England the common law doctrine of mens rea was not taken into consideration in many statutory offences. This maxim still applies in common law offences under the earlier statutes but it has no general application in case of modern statutory offences and these statutes are regarded themselves to be prescribing the mental element which is prerequisite to a conviction. However, the above generalisation does not hold good now. The eclipse of the doctrine of mens rea might be visible in certain discussions of the courts but the doctrine itself seems to have been revived with greater vigour after a temporary eclipse as may be witnessed from the observations of Lord Goddard, C.J.:
"The general rule applicable to criminal case is *actus non facit reum nisi mens sit rea*.... It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that unless a statute either clearly or by necessary implication rules our *mens rea* as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."\(^{55}\)

Section 22(2) of the road Traffic Act, 1930 provides that the driver of a vehicle which collides with another must bring the fact of accident to the notice of the proper authority. The trailer of the appellants' vehicle collided with another motor car. The driver had no knowledge of the collision but he was convicted by the magistrate for his failure to report the accident. Setting aside his conviction Lord Goddard, C.J. observed in *Harding v. Price*:

"In these days when offences are nullified by various regulations and orders to an extent which makes it difficult for the most law-abiding subjects in some way or at some time to avoid offending against the law, it is more important than ever to adhere to this principle".\(^{56}\)

**Applicability of Mens Rea to Indian Penal Laws**

The common law doctrine of *mens rea* has no general application in India, for the law in India is codified and offences are carefully defined so as to indicate in the definition itself the precise requirement of *mens rea* which is essence of a particular offence. Notwithstanding that the offences in the Indian Penal Code are defined with great care and precision and the Chapter on General Exceptions is very comprehensive, the application of the doctrine may on occasions be found useful in remedying defective and incomplete


definitions or at least interpreting them or where it is not expressly excluded by the terms of the statute itself. The Indian Penal Code gives effect to the doctrine of *mens rea* in two ways. First, the Chapter dealing with General Exceptions which controls all the offences defined in the Code as well as the offences under special and local laws deals with the general conditions which negative *mens rea*, and thereby provide a sufficient ground for exemption from criminal liability. This is how the Code negatively gives effect to the doctrine of *mens rea* because under these exceptions a large number of cases have been excluded where there is an absence of evil intent in one form or another. Secondly, every offence in the Indian Penal Code is carefully defined so as to include the precise evil intent which is the essence of a particular offence. This has been done by using such words as denote the requirement of *mens rea* such as voluntarily, intentionally, knowingly etc. These words qualify the consequences of the act and not the act itself.

There are some section in the Indian Penal Code where the words indicating evil intent are not used. Such cases are of two kinds:-

(i) Where the acts with their consequences are so harmful to the society or the State that it had been thought just and expedient to punish those acts irrespective of the intention to cause those consequences; such as waging war against the Government of India, sedition, kidnapping and abduction.

(ii) Where the acts themselves are of such a character that they raise a violent presumption that whoever willed the act must have intended the consequences; such as counterfeiting of coins and government stamps.

On an analysis the definitions under the Code are found to comprise of the following elements :-
(a) A human being;
(b) Evil intent: that is an intent on the part of such human being to cause a certain consequence considered injurious to individuals or to society;
(c) The act willed;
(d) The resultant evil consequence;
(e) A knowledge of the existence of such facts. This element is necessary only where the intended consequence is not injurious by itself, but is injurious in conjunction with certain other facts.

The second element i.e., the evil intent is indicated generally by the use of words intentionally, knowingly, voluntarily, dishonestly, fraudulently, maliciously, malignantly, corruptly, recklessly, negligently, wantonly and so on.

Words Denoting Mens Rea: Now we shall study the words which have been used in the Indian Penal Code to denote mens rea.

(a) Voluntarily: This term is defined in Section 39 of the Indian Penal Code thus:

A person is said to cause an effect "voluntarily," when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe, to be likely to cause it.

An illustration appended to the section makes its meaning very clear:

A sets fire, by night, to an inhabited house in a large town for the purpose of facilitating robbery and thus causes the death of a person. Here A may not have intended to cause death, and may even be sorry that death has been caused by his act; yet he knew
that he was likely to cause death, he has caused death voluntarily.

Section 26 of the Indian Penal Code defines "reason to believe" in these words: "A person is said to have 'reason to believe' a thing if he has sufficient cause to believe that thing but not otherwise".

An act done willingly without being influenced or compelled, as contrary to an act compelled, is called a voluntary act in common parlance. It is opposed to an act done accidentally or negligibly. The Indian Penal Code does not make a distinction between cases in which a man causes an effect designedly and cases in which he causes it knowingly or having reason to believe that he is likely to cause it. In the illustration to Section 39, where A sets fire by night to an inhabited house in a large town for the purpose for facilitating robbery and thus causes the death of a person, although A may not have intended to cause death and may even be sorry that death has been caused by his act, yet if he knew that he was likely to cause death or had reason to believe that death would be caused as in this illustration, he has caused the death voluntarily.

A voluntary act is the physical expression of an effort of the will. We will the act, because we aim at the production of its immediate effect. As we have seen already belief is somewhat weaker than knowledge, but a well-grounded belief that a certain consequence will follow a certain act is ordinarily as good as knowledge. To know a thing is to have a mental cognition of it. To believe a thing is to assent to a proposition or affirmation, or to accept a fact as real or certain, without immediate personal knowledge. In the illustration to Section 39 referred to above the person had not the knowledge that the house was inhabited, but since he had reasons to believe that the house was inhabited, he was held liable. However, in some cases mere
reason to believe is considered insufficient. For instance, under Sections 321 and 322, which define “voluntarily causing hurt” and “voluntarily causing grievous hurt,” the words “reason to believe” have been omitted. It is, however, not clear why reasonable grounds of belief should be excluded in these cases.

Knowledge and reasonable grounds of belief supply the place of intention in most cases. The term “voluntarily” is a compendious term and covers intention, knowledge and reasonable grounds of belief.

Distinction between “Voluntarily” and “Intentionally.” Though it is sometimes difficult to discover the distinction between “voluntarily” and intentionally, yet, there is a difference between them. This difference becomes clear to us if we study Sections 184 and 186 of the Indian Penal Code closely. The former Section lays down:

Whoever intentionally obstructs any sale of property offered for sale by the lawful authority of any public servant, as such, shall be punished with imprisonment....

While Section 186 lays down:

Whoever voluntarily obstructs any public servant in the discharge of his public functions shall be punished with imprisonment....

Thus Section 184 penalises any one who intentionally obstructs the sale of property offered for sale by the lawful authority of any public servant as such, while Section 186 penalises any person who voluntarily obstructs a public

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57 Section 321: “Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and thus thereby cause hurt to any person, is said voluntarily to cause hurt.”

58 Section 322: “Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said voluntarily to cause grievous hurt.”

59 See Huda, Principles, pp. 197-98.
servant in the discharge of his public function. Therefore, the difference between the two words lies in the fact that “intentionally” refers to the obstruction to an act and the term “voluntarily” refers to an obstruction to an individual.

The distinction, however, is apparent and not a real one. When we speak of obstructing a person, we really mean obstructing some act of such a person.

(b) Dishonestly and Fraudulently :- These words frequently occur in the offences defined under the Indian Penal Code. “Dishonestly” has been defined very early in the code, while “fraudulently” has not been so defined. Section 24 of the code defines “dishonestly” thus:

Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing “dishonestly.” Wrongful gain\(^{60}\) is defined to be “gain by unlawful means of property to which the person gaining is not legally entitled.” Wrongful loss\(^ {61}\) is “the loss by unlawful means of property to which the person losing it is legally entitled.: “A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.”\(^ {62}\)

The word “fraudulently” has been defined in Section 25 of the Indian Penal Code but it is rather vague and is really not a definition and therefore it has been a fruitful source of conflicting decisions. Section 25 lays down : “A person is said to do fraudulently, if he does that thing with the intent to defraud

\(^{60}\) Section 23 I.P.C.
\(^{61}\) Ibid.
\(^{62}\) Ibid.
but not otherwise.” Thus we find that fraud has not been defined in the code. It is not possible to define it so as to cover all cases of fraud which arise as a result of vicious human ingenuity. Therefore, Sir Fitz James Stephen said in 1885, “that there is a great reluctance amongst lawyers to define fraud.” Half a century later, Maugham J. observed: “No judge had ever been willing to define fraud and I am attempting no definition.” So said O’Byrne J. in a recent case before the Irish Court of Criminal Appeal: “It would be difficult, if not impossible, to define fraud in such a way as to provide for every case in which the term may be used, and I do not propose to attempt to do so.”

We can, however, analyse the term in order to understand the principal elements essential to the commission of any crime involving fraud. Every fraud involves deception, but is all deception a fraud? No. For a legal fraud besides deception, there should also be an intention to cause an injury or an infraction of a legal right. So a mere deception is not punishable, unless it deceived somebody and causes him an injury or loss. For example, a person brings a present to his wife and magnifies its value. It is undoubtedly deception, but the wife is nonetheless worse for it. On the other hand, perhaps she is happier for the falsehood and therefore the act done by the person is not an offence. Then again, if a doctor tells a patient, who is to his knowledge suffering from a dangerous ailment and may even be nearing his death, that he is going to recover soon. This is a deception but will not amount to fraud.

Under the Indian Penal Code a mere deception irrespective of an intention to injure is not punishable. Thus, whenever the word “fraudulently” is used in any Section of the Penal Code, an intent to cause an injury is implied therein, and it is said expressly in the Section itself. For instance, Section 206,
which makes fraudulent removal or concealment of property to prevent its seizure an offence, insists that besides the fraudulent removal, there must be an intention to prevent the property from being taken in execution of a decree or other intention of the same nature. Similarly, Section 208 makes it punishable to cause or suffer a decree to be passed for a sum not due or for a larger sum than is due. Thus “fraudulently” or “intent to commit fraud” includes deception plus an intention to injure or cause an injury. Injury has been defined in Section 44 of the Penal Code to denote “any harm whatever illegally caused to any person, in body, mind, reputation or property.” Thus where a person forged a diploma of a College of Surgeons with the object of including a belief that the document was genuine and that he was a member of a College of Surgeons and showed it to one or two persons with intent to induce that belief in them was held not to intend to defraud, though he intended to deceive.66 The correctness of this decision, however, was not questioned. But, there was a great uproar in the medical profession, which led to the passing of the Medical Act, under which such an act by quacks was made punishable for the first time.

Section 464 of the Penal Code defines forgery and uses the term “fraudulently,” which involves two ideas, namely, a deception and an injury to another person. The definition contained in the Indian Penal Code follows the English law, as developed in modern times. Blackstone defined forgery “as the fraudulent making or altering of a writing to the prejudice of another’s right.” In 1865, however, Cockburn C.J.67 declared that forgery means “the making or altering of a writing so as to make the alternation to purport to be the act of some other person which it is not.” But this definition given by Cockburn C.J. was soon found to be defective and C.B. Kelly laid down that the offence

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66 R. v. Hodgson (1856) 3 D and B.
67 In re Windsor, 10 Cox. C.C. 118.
consists in the fraudulent making of the instrument in words purporting to be what they are not to the prejudice of another’s right, thus going back to the definition given by Blackstone. Stephen in his Digest defines forgery thus: “Forgery is making a false document... With intent to defraud.” Later on, he proceeds to explain what fraud means thus:

Whenever the word “fraud” or “intent to defraud” or “fraudulently” occur in the definition of a crime, two elements at least are essential to the commission of the crime, namely, 

**first**, deceit or an intention to deceive or in some cases mere secrecy; and **secondly**, either actual injury or possible injury by means of that deceit or secrecy. A practically conclusive test as to the fraudulent character of a deception for criminal purposes is this: did the author of the deceit derive any advantage from it which he could not have had if the truth had been known? If so, it is hardly possible that advantage should not have had an equivalent in loss, or risk of loss to some one else; and if so there was fraud, In practice, people hardly ever intentionally deceive each other in matter of business for a purpose which is not fraudulent.⁶⁸

That the element of fraud in criminal law should be judged by reference to the mental attitude of the accused was indicated by Stephen⁶⁹ when he wrote:

Fraud involves, speaking generally, the idea of injury willfully effected or intended to be effected either by deceit or secretly. It is essential to fraud that the fraudulent person’s conduct should not be merely wrongful, but should be intentionally and knowingly wrongful.

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⁶⁸ Stephen, Digest of Criminal Law.
So also, Burdick\(^70\) observes:

The word “fraudulently” is very broad in its meaning, since “fraud” includes all surprise, trick, cunning, dissembling and unfair ways by which another is deceived. In general it describes not the act done but the intent or motive which accompanies the act.

As we have noticed above that this term “fraudulently” is explained under Section 464, by operation of Section 7 of the Indian Penal Code,\(^71\) the term “fraudulently” will have the same meaning in all the definitions contained anywhere in this code. This view finds support by the decisions of the High Courts in our country. For instance, where a person fabricated a documental to obtain payment of money justly due to him, which was being illegally withheld, was held not guilty of forgery.\(^72\)

It may be of interest to know that the word “dishonestly” is used alone in six Sections, namely Section 378, 383, 390, 403, 405 and 411; but the words “dishonestly” and “fraudulently” together are used in a number of Sections, e.g. Sections 246, 247, 415, 463 and so on.

Distinction between “Dishonestly” and “Fraudulently.” Sometimes it has been said\(^73\) that the term “dishonestly” as defined in Section 24 is synonymous with “fraudulently.” But this view is not correct.\(^74\) The former view perhaps is based on the notion that since the intention to cause an injury is an essential part of the meaning of the term “fraud,” the distinction between a dishonest and a fraudulent act practically disappears. But this is not so. There still remains a clear distinction between the meaning of the two words. The term

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\(^{71}\) Section 7 : “Every expression which is explained in any part of this code is used in every part of this code in conformity with the explanation.”

\(^{72}\) Q.E. v. Syed Hussain 7 All. 403.

\(^{73}\) Lal Mohd. v. K.E. 22 W.R. 821.

\(^{74}\) Kedar Nath v. K.E. 5 C.W.N. 897.
“dishonest” is used in the Penal Code in a technical sense. It has nothing to do with probity, i.e. honestly. It is used in connection with property. If a person causes wrongful gain or loss intentionally, he is dishonest. The points of difference between the two terms may be stated thus:75

(a) “Fraud” necessarily involve deception, while “dishonesty” does not. This is clear and needs no further explanation, (b) “Dishonestly” necessarily involves the idea of injury to property, while “fraud” covers injury to property as well as well as injury of every other kind. Although “dishonestly” includes wrongful gain as well as wrongful loss of property, there can hardly be a wrongful gain without a wrongful loss to somebody else. The illustrations to Section 464 may, at first, create the impression that the injury involved in forgery is injury to property only, but this is not so. In R. v. Harris [1. Moody 393 (1833)], it was held to be forgery to forge an order of the magistrate for the discharge of a prisoner, and it has been generally accepted from the earliest of English Common Law that forgery of any matter of judicial or executive record is indictable. (c) A dishonest intention is intention to cause loss of specified property, actually belonging to a definite individual known or unknown and it must be property belonging to an individual at the time of the act described as dishonest. This is fairly clear from the words of Section 24. “Fraudulently,” on the other hand, even where it implies injury to property may refer to injury in respect of unspecified property, to unknown and unascertained individuals.

75 Huda, pp. 204-5.
The last distinction is to a great extent borne out first by the New York Code which lays down that where an intention to defraud constitutes a part of the crime, it is not necessary to prove an intent to defraud any particular person; secondly, by decided cases. It has, for instance, been held to be an offence to forge a certificate of character, to induce the Trinity house to enable a seaman to act as a Master.\footnote{R. v. Toshak (1849) 4 Cox. C.C. 38.} Similarly, an offender who obtained an appointment as a police constable by forging testimonials was held liable.\footnote{R. v. Moah (1856) D and B 550.} So also, A who forged a certificate that as a liberated convict he was living honestly with a view to obtaining an allowance was held guilty.\footnote{R. v. Mitchel (1860) 2 F. and F. 44.} In all the above instances, there is no tendency to prejudice the rights of others, but they do involve an injury to others. One S applied to the Principal, Queen’s College, Benaras for an admission to the second year LL.B. classes, alleging that he had attended the first year LL.B. classes in the Canning College, Lucknow. The Principal allowed him to attend the LL.B. Final class on condition that he produced a certificate from the Principal, Canning College Lucknow that he had attended the first year LL.B. classes. He produced a forged certificate purporting to have been signed by Mr White, the Principal, Canning College, Lucknow. He was held liable for forgery.\footnote{Shashi Bhushan v. K.E. 15 All. 210 relying on illustration (K) to Section 464.} His act was fraudulent for two reasons; first, because he was saving one year’s fees; and, secondly, because he had induced college authorities to admit him to the second year LL.B class. Similarly, A, falsely represented himself to B at a university examination, got an admission under B’s name. He was held liable for forgery and cheating by impersonation.\footnote{Appaswamy v. K.E. (1889) 2 Mad. 151.} This case was approved of by the Calcutta High Court.\footnote{Ashwani Kumar Gupta v. K.E. (1937) 1 Cal. 71.} Similarly, an accused obtained admission as a student of the Inner temple by
means of a forged certificate stating that he has passed an examination in an African university. He was held liable as he had the requisite intent to defraud.  

This case has been criticised on the ground that a person cannot have an intent to defraud if he does not intend to cause economic loss to others by means of deceit, and no economic loss could have arisen to benchers. Nevertheless, most people would say that they had been induced to act to their injury by admitting an unqualified student.

Let us now turn to some cases in which the meaning of the term "dishonestly" have been discussed. In the case of Emp v. Nabi Bux, where the accused had removed his master's box to a cowshed and kept it concealed there in order, as he said, to give a lesson to his master, it was held that this did not amount to wrongful loss. The judges observed:

Of course, when the owner is kept out of possession with the object of depriving him of the benefit arising from the possession even temporarily, the case will come within the definition. But where the owner is kept out of possession temporarily, not with any such intention, but only 'with the object of causing him trouble, in the sense of mere mental anxiety, and with the ultimate intention of restoring the thing to him without exacting or expecting any recompense it is difficult to say that the detention amounts to causing wrongful loss in any sense.

In another case, it was held that gaining possession of property for a temporary purpose by a creditor, in order to coerce the debtor to pay his debt, was not taking dishonestly. The cases for and against this view were fully

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83 25 Cal. 416.
84 Prasawna Kumar Patra v. Uday Sant 22 Cal. 60.
discussed by Petheram C.J. and Beverley J. However, the above decision was over-ruled by a stronger court in the case of Shri Churn Changa. In this decision the words of Section 23 were relied upon and the following passage occurring in Mayne's Penal Code was cited with approval:

It is sufficient to show an intention to take dishonestly the property out of any person's possession without his consent and that it was moved for that purpose. If the dishonest intention, the absence of consent, and the moving are established, the offence will be complete, however temporary may have been the proposed retention.

There are some cases which may be noted, as they bring out clearly the distinction between the two words “dishonestly” and “fraudulently.” In Lalit Mohan Sen v. Q.E., it was contended that a person who had altered certain challans with the intention of concealing past acts of fraud and dishonestly could not be said to have done so “dishonestly” or “fraudulently” within the meaning of Section 464, in as much as there was no intention to cause any wrongful gain or wrongful loss in future. In overruling this contention, the learned judge observed:

We think the word “fraudulently” must mean something different from “dishonestly.” It must be taken to mean as defined in Section 25 of the Code, “with intent to defraud,” and this was the view taken by the Bombay High Court in the case of Q.E. v. Vithal Narain Joshi (13 Bom. 515).

"The intention to defraud" in the above passage means an intention to deceive somebody. A full bench of the Calcutta High Court took the same view of

85 (1895) 22 Cal. 1017.
86 22 Cal. 313.
the distinction between “fraudulently” and “dishonestly.” In this case a man had forged a certificate in order to qualify himself for the examination of engine drivers. The judges observed that “fraudulently” and “dishonestly” do not cover the same ground and that an intention to defraud does not necessarily involve deprivation of property, actual or intended. An English judge has brought out this distinction in these words:

To deceive is, I apprehend, to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit; it is by deceit to induce a person to act to his injury. More tersely ... to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.

As the greater includes the lesser, so we may say that an intent to deceive is included in an intent to defraud.

Finally, it may be observed that a mere intent on to defraud without any intention to cause wrongful gain to one person or wrongful loss to another is sufficient for offences mentioned in Sections 206, 207, 208, 210, 239, 240, 242, 243, 250, 251, 252, 253, 161, 262, 263, 264, 265, 482 and 488. But causing of wrongful gain or wrongful loss is essential for offences of theft, extortion, criminal misappropriation, criminal breach of trust, receiving stolen property and other like offences. But either of the two intentions would suffice to constitute offences under Sections 209, 246, 247, 415, 421, 422, 423, 424, 464, 471, 477 and 496.

(c) Corruptly, Malignantly and Wantonly. (i) Corruptly occurs in Sections 196, 198, 200, 219 and 220 only. This word is easily understood. This term has not been defined in the Code, but probably it is used in the above Sections

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88 J. Buckley in Re
to denote impropriety brought about by bribery or undue influence resulting in acts which are inconsistent with the proper discharge of official duty or the rights of others. This term implies impropriety, but not necessarily venality, i.e. prostitution of talents for a reward.

An act may be corrupt, if it is wicked or immoral, though it may not be technically dishonest or fraudulent. This term does not imply only influence by bribery. If an accused intentionally used false evidence, he is using it corruptly. Thus the term implies moral depravity. In relation to a magistrate or other public servant, the term may imply bribery or a wicked frame of mind. Burdick observes:

The words “corrupt” and “corruptly” when used in criminal law imply, usually, that an act is done dishonestly, without integrity, for the sake of unlawful gain or advantage… It is also said that “corruptly” implies moral turpitude and intentional fraud, and is synonymous with intentional wrong doing.

(ii) Malignantly. This term occurs only in Sections 153 and 270 of the Indian Penal Code and means “maliciously,” which occurs in Sections 219, 220 and 270. A thing is done “maliciously,” if it is done wickedly or in a depraved or perverse or malignant spirit, regardless of social duty and deliberately bent on mischief. “Malice” has been defined by Russel to be any formed design of doing mischief. Stephen calls it a vague general term introduced into the law without much perception of its vagueness, and gradually reduced to a greater or lesser degree of certainty in reference to particular offences by a series of judicial decisions. It means “a wrongful act done intentionally without just

89 B. Gupta (1949) 2 Cal. 440.
cause or excuse." It does not mean in law, as it does in common parlance, any spite or ill will against a person. All it means is an illegal act done perversely and to the knowledge of the accused. When applied to doing of an illegal act, it means nothing more than that it was done willfully or intentionally. For instance, A in striking B accidentally wounded C. He was liable for unlawfully an maliciously wounding C even though in fact he did not intended to wound C. The blow was unlawful and malicious, i.e. intended to wound, and it wounded C and hence he was liable. The word “malice” is used in different senses in different branches of criminal law. For example, in relation to murder, it means intention to kill, while in libel, it means only an intention to publish; no express knowledge of the defamatory nature of the publication is implied.

(iii) Wantonly. It occurs in Section 153 and means the doing of a thing recklessly or thoughtlessly, without regard for consequences. It implies a disposition not evil, but reckless or mischievous. A man may do a thing wantonly, when he has no reason to do it; but he does it because he takes pleasure in doing it, though he knows that its consequences to others may be serious. Burdick observes that it “implies a state of mind that is heedless, without excuse, regardless of the rights of others, reckless and perverse.” For instance the accused published a poem giving an account of an outbreak of a Hindu-Muslim riot in Bombay in 1883 and incidentally exalted certain classes of the Hindu community for the brave resistance which they offered to the Mohammedan rioters. It wound up with an exhortation to the Hindus to fight again and not be afraid of death. The accused was prosecuted and convicted

92 Millar, Handbook of Criminal Law, p. 69; See also Bromage v. Prosser (1825), 4B and C. 247.
93 Holmes, Common Law, p. 52.
under Sections 117 and 153 of the Indian Penal Code, but on appeal he was acquitted on the ground *inter alia* that his composition could not be regarded as an illegal act, nor was its publication malignant or wanton within the meaning of Section 153. To kill a cow in the open would be a reckless or thoughtless act, and therefore wanton; but if the act is not illegal, however wanton, however undesirable it may be there could be no offence under Section 153.

(d) **Rashly and Negligently** :- These words have not been explained in the code. They have been used in the code not to denote a positive evil intent but to denote that want of care with which reasonable people are expected to act and the want of which is culpable.

There are at least 13 Sections in the code dealing with the offences due to criminal negligence or rashness. They all possess one feature in common, namely, that the act is not premeditated and done on purpose to produce the consequence. In all of them the act is rash, that is to say, an overhasty act done without due deliberation and caution. It produces a result which the offender never expected and which he may most regret. But he is punished not for the effect produced which he could not perhaps foresee, but for the manner of doing the act which was fraught with danger. The two terms "rash" and "negligent" are closely allied, but they are none the less distinguishable. In cases of negligence the party does not perform an act to which he is obliged; he breaks a positive duly, he does not advert to the act which it is his duty to do. In rashness the party does not act

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96 Kahanji, 18 Bom. 758.
which he is bound to forbear; he breaks a negative duty. Here he
adverts to the act but not to the consequences of the act he does.
Both in rash as well as in negligent acts no thought is bestowed
on the consequences. But in the one, there is a knowledge of the
consequence, but there is overconfidence which makes one
believe its happening unlikely. In the other, the consequence is
never adverted to. 99

The difference between culpable rashness and culpable negligence has been
brought out very ably by Holloway J. 100 thus:

Culpable rashness is acting with the consciousness that
mischievous and illegal consequences may follow, but with the
hope that they will not and often with the belief that the actor
has taken sufficient precautions to prevent their happening. The
imputability arises from acting despite the consciousness.
Culpable negligence is acting without the consciousness that
illegal or mischievous effects will follow, but in circumstances
which show that the actor has not exercised the caution
incumbent on him, and that, if he had, he would have had the
consciousness. The imputability arises from the neglect of the
civic duty of circumspection. It is manifest that personal injury,
consciously and intentionally caused, cannot fall within either of
these categories which are wholly inapplicable to the case of an
act or series of acts, themselves intended, which are the
producers of death.

The English law on the subject of culpable negligence is stated by Stephen 101
in his digest of Criminal Law thus:

100 In re Nidamarti Nagabhushanam 7 Mad. H.C.R. 119. The above observation was quoted
with approval in Emp. v. Kitabdi Mandal I.L.R. 4 Cal. 766; also see 53 Cal. 33, 341-2.
Everyone upon whom the law imposes any duty, or who has by contract or by any wrongful act taken upon himself any duty tending to the preservation of life, and who neglects to perform that duty, and thereby causes injury to the health of such person is guilty of misdemeanour. Provided, that no one is deemed to have committed the crime only because he has caused the death of or bodily injury to another by negligence which is not culpable. What amount of negligence can be called culpable is a question of degree for the jury, depending on the circumstances of each particular case. An intentional omission to discharge legal duty always constitutes culpable negligence.

Provided, also that no one is deemed to have committed a crime by reason of the negligence of any servant or agent employed by him. Provided also, that it must be shown that injury to health not only follows, but is also caused by the neglect of duty.

The distinction between the two terms is not of any great practical importance in the interpretation of the Sections of the Code dealing with offences involving criminal negligence, for in all these Sections the two words have been used together. Rash and negligent acts have been made penal when they effect the safety of the public. It has been very well explained by Lord Esher\textsuperscript{102} thus:

The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other or may injure his

\textsuperscript{102} In Le Neve. v. Gould (1893)1 W.B. 491, 497.
property. For instance, if a man is driving along a road, it is his
duty not to do that which may injure another person whom he
meets on the road, or his horse or his carriage.

The following illustrations given by Stephen in his Digest of Criminal Law
on the subject of criminal negligence may be of help to understand the English
law on the subject. (1) It is A's duty, by contract, as the banksman of colliery
shaft, to put a stage on the mouth of the shaft in order to prevent the loaded
trucks from falling down it. A omits to do so, either carelessly or intentionally.
A truck falls down the shaft and kills B. A is in the same position as if he had
pushed the truck down the shaft carelessly or intentionally.

Negligence is non-compliance with a standard of conduct and involves
a blameworthy inadvertence to the influences and consequences mentioned in
the definition of the offence. It means the absence of such care as it is the legal
duty to use in any particular circumstances. It must, however, be noted that the
test of responsibility for negligence is not the same in criminal proceedings as
in civil proceedings. In an action for damages for the injury caused by the
negligence of the defendant, no question of mens rea arises and the test of the
defendant's liability to make compensation is whether he did or omitted to do
something which in the circumstances would not have been done or omitted by
a reasonable man; if by this standard his conduct was negligent, the fact that
he acted to the best of his own judgment is no defence. In criminal
proceedings, on the other hand, the liability of the accused to punishment
depends upon the existence of mens rea. The test accordingly is, whether he
was guilty of such culpable negligence as amounted to criminal misconduct
deserving punishment and in order to establish this it must be shown that he
was guilty of a very high degree of culpable negligence.

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There is a difference of academic opinion on the question whether negligence should be punished at all. Those who object to the punishment on the ground of negligence are, however, not opposed to the exercise of control and pressure over such persons like the negligent drivers or shopkeepers by means of withholding licenses. All that they mean is that negligence should not be treated as a justification for the stigma of criminal proceedings. As a matter of fact the extent to which negligence is a basis of criminal liability is limited. Traffic offences and manslaughter are its important instances.

Under the Indian Penal Code negligent acts have been made penal, when they affect the safety of the public, such as rash driving or riding\textsuperscript{105} on a public road, rash navigation\textsuperscript{106} of vessel, negligently conveying for hire any person by vessel.\textsuperscript{107} In all there are thirteen sections\textsuperscript{108} which deal with cases of criminal negligence.

Negligence as opposed to intention indicates a state of mind where there is an absence of a desire to cause a particular consequence. It means carelessness or inadvertence. In case of an intention the person intends those consequences which he foresees and desires, while in negligence he does not desire the consequences and does not act in order to produce them, but is, nevertheless, indifferent and careless whether they happen or not, and therefore does not refrain from the act notwithstanding that they may happen. In short, negligence thus means blameworthy inadvertence.

Negligence means a non-intentional failure to conform to the conduct of the reasonable man in respect of the consequence in question, and it really involves both subjective and objective inquiry.

\textsuperscript{105} Section 279.
\textsuperscript{106} Section 280.
\textsuperscript{107} Section 283.
\textsuperscript{108} Sections 279, 280, 283, 284, 285, 286, 287, 288, 289, 304A, 336, 337 and 338.
The gross inadvertent negligence, which suffices as a ground of liability, is often spoken of as recklessness, a term, which is also used in some other branches of the law in the objective sense of carelessness.\textsuperscript{109} Criminal negligence is sometimes spoken of as gross inadvertent negligence as well as recklessness in the subjective sense of the conscious assumption of a foreseen risk. Here there is a trouble about the terminology. We may, however, generally use recklessness in the subjective sense of the acceptance of a foreseen risk which is unreasonable in the circumstances, and criminal negligence in the sense of that degree of negligence which is sufficiently high to found a liability in manslaughter as gross negligence. Criminal negligence will, therefore, include recklessness and gross negligence.

Negligence must be carefully distinguished from neglect. The latter does not indicate any particular attitude of mind but is an objective fact which may be produced either by intention or by negligence. Thus a man who has neglected to feed his animal may have neglected it consciously or purposely because, for example, he did not want to take the trouble; or, on the other hand, he may simply have forgotten to feed it. One who knows that the breaks or wheels of his motor car are defective may willfully (i. e. intentionally) neglect to have them put right; if he drives the car on the road while it is still in that condition and in consequence does bodily harm to some person this harm is caused not by his negligence but by his willful neglect\textsuperscript{110} and recklessness.\textsuperscript{111}

**Recklessness:** We have already studied that to intend is to have in mind a fixed purpose to produce a particular result. It indicates the state of mind of a


\textsuperscript{110} Gibbons and Proctor (1918) 13 G. App. R. 134.

\textsuperscript{111} Kenny, Outlines of Criminal Law, p. 35.
man who not only foresees but also desires the possible consequences of his conduct. For example, if I throw a stone straight towards a man at his body with the desire that it should hit him, I have intentionally thrown the stone at him. Desire for particular consequence is the distinguishing element of intention from negligence. When I carelessly throw a stone on the public road through the window of my house, I am negligent in throwing it, but I have no desire to injure any passerby. If I throw the stone in the midst of a crowd, I am reckless in my conduct, for although I have no intention or desire to cause injury to any particular person or persons, still I was so indifferent as to the consequences of my conduct that I behaved in such a manner as would undoubtedly have caused an injury to some. I knew or ought to have known as a reasonable man that the result of my throwing the stone into the crowd.

Knowledge: To know a thing means to have a mental cognition of it. To believe a thing is to assent to a proposition of affirmation or to accept a fact as real or certain without immediate personal knowledge. Thus knowledge and “reason to believe” are to be clearly distinguished. For example, a man you know to be poor brings to you for sale a valuable gold ornament and offers it to you for one-tenth of the real price. He comes to you at night under suspicious circumstances. Here you may not know that the article is stolen, but you have reason to believe that it is stolen. Thus belief is somewhat weaker than knowledge but a well-grounded belief that certain consequences will follow a certain act is ordinarily as good as knowledge.

Section 26 of the Indian Penal Code states that “a person is said to have reason to believe a thing if he has sufficient cause to believe that thing, but not otherwise.” Thus, for example, A set fire during the night to an inhabited house in a large town for the purpose of facilitating robbery and thus causes the death of a person. Here in this case, the person had not the knowledge that the house was inhabited, but he had reason to believe that it was inhabited.
Belief is somewhat weaker than knowledge. "knowledge," says Locke, "is the highest degree of the speculative faculties and consists in the perception of the truth of the affirmative of negative proposition".

Knowledge and reasonable grounds of belief in most cases supply the place of intention. Intention is purely an operation of the mind and is often difficult to prove. Therefore, it is inferred from the surrounding circumstances and the acts of the person. Every man is supposed to intend the natural consequences of his act. Such inferences are sometimes based on certainty, sometimes on different degrees of probability. Where an inference is more or less certain, we say it is based on knowledge; where it is only probable, it is based on belief. In many cases, however, reasonable ground of belief for all practical purposes is as good as knowledge.

In some cases, the knowledge of the consequences is in no way inferable from the act itself. It has got to be positively proved and in such cases it is enough to prove intention. For example, if a man shoots his enemy, it is presumed that he intended to kill him. If the knowledge of a particular fact is essential.

Principles of Criminal Liability

Criminal guilt would attach to a man for violations of criminal law. However, the rule is not absolute and is subject to limitations indicated in the Latin maxim, actus non facit reum, nisi mens sit rea. It signifies that there can be no crime without a guilty mind. To make a person criminally accountable, it must be proved that an act, which is forbidden by law, has been

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112 The act itself does not make a man guilt unless his intentions were so. The earliest trace of the maxim is to be found in St Augustine's Sermon No 118.02, where it is stated as reum linguam non facit, nisi mens sit rea cited in Pollock and Maitland, II, 476n; see Jerome Hall, General Principles of Criminal Law, second edn, 1960, pp 77-83. For historical analysis of the origin of the doctrine of mens rea, see Fowler v. Padget (1789) TR 509; 'The intent and the act must concur to constitute a crime', per Lord Keyon CJ in Younghusband v. Luffing [1949]2 KB 354.

113 Russell on Crime, vol I, twelfth edn, 1964, pp 22-60. In the past, criminal liability as absolute. A man was responsible for doing an act prohibited by law irrespective of the mental attitude. However, in case of self-defence (defendendo) and accident (per infortunium), the King used to pardon the accused.
caused by his conduct, and that the conduct was accompanied by legally blameworthy attitude of mind. Thus, there are two components of every crime, a physical element and a mental element, usually called *actus reus* and *mens rea* respectively.

**Actus Reus**

The word actus connotes a ‘deed’, a physical result of human conduct. The word reus means ‘forbidden by law’. The word actus reus, may, therefore, be defined as ‘such result of human conduct as the law seeks to prevent.’

The actus reus is made up of three constituent parts, namely:

(i) human action which is usually termed as ‘conduct’;

(ii) the result of such act in the specified circumstances, which is designated as ‘injury’; and

(iii) such act as is ‘prohibited by law’.

**Conduct**

An act is defined as ‘an event subject to the control of the will’. In other words, an act means something voluntarily done by a human being, for example, giving a blow, walking, speaking, or any external manifestation of one’s mind. Broadly speaking, human action includes acts of commission as well as acts of omission. For the purpose of fixing criminal liability, an act may be analysed as consisting of three parts:

(a) its origin in some mental or bodily activity or passivity of the doer, that is, a willed movement or omission;

(b) its circumstances; and

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114 Keny’s Outlines of Criminal Law, nineteenth edn. JWC Turner, p. 17.
116 SS Huda, Principles of Law of Crimes in British India, TLI., 1902, pp 14-16. Examples may be found in old legal institutions of punishment inflicted on animals as well. See also Russell on Crime, vol I, twelfth edn., 1964, pp 22-60.
117 See Indian Penal Code 1860, s. 32.
(c) its consequences.\textsuperscript{118}

If A shoots B to death with a rifle, the material elements of the act are: first, its origin or the primary stage, namely, a series of muscular contractions by which the rifle is raised and the trigger pulled; secondly, the circumstances, the fact that the rifle is loaded and is in working order, and that the person killed is within range; thirdly, the consequences, the fall of the trigger, explosion of the powder, the discharge of the bullet, striking of the body of the victim resulting in his death. All these factors are implied in the statement ‘A killed B’ and they constitute ‘an act’\textsuperscript{119} for which he will be criminally liable.

However, if A, while in a fit of epilepsy strikes and hurts B, A is not liable for causing injury to B, because at that time he had no control over his actions. The movement of his arms and legs were not the result of his voluntary actions. Similarly, if A, suffering from somnambulism, (a disorder in which sleep-walking is the major symptom) steps on B, who was sleeping on the floor and hurts him, A is not liable for causing hurt to B. A’s actions were not conscious or willed actions, and so it would not amount to ‘an act’ at law for the purpose of holding A criminally liable for causing injury to B.

Result of Conduct

To constitute a crime, there must always be a result brought about by human conduct; a physical event, which the law prohibits. Actus reus, therefore, is the result of a human conduct and is an event. However, an event is distinguishable from the conduct that produces the result. For example, in the case of a murder, it is the victim’s death brought about by the conduct of the accused which is the actus reus. In other words, a crime is constituted by the event, and not by the activity which causes the event. For example, the

\textsuperscript{118}See Monard and Kadish, Criminal Law and its Process, p. 213.

\textsuperscript{119}See Indian Penal Code 1860, s 33. The word ‘act’ denotes as well as series of acts as a single act; the word ‘omission’ denotes as well a series of omissions as single emission.
activity that led to the event, namely, shooting, stabbing, strangling or poisoning, etc might have caused the victim's death. It is immaterial to the crime of murder. Once the desired act is accomplished, the actus reus of the crime is complete and how the contemplated event took place is not of much significance except for the purpose of fixing criminal responsibility. If the desired result is not achieved, the person is not responsible for the intended criminal act, which could not materialize.

If A fires at B in order to kill him, but the bullet causes only slight injury in B's leg, A is not liable for murder, unless the actus reus of the crime of murder is complete. Of course, A will be liable for the offence of attempt to murder and for causing simple or grievous hurt, as the case may be.

**Acts Prohibited by Law**

An act, howsoever reprehensible it may be, is not a crime unless prohibited by law. Only those acts that the law has chosen to forbid are crimes. No crime is committed when a soldier, in a battlefield, shoots an enemy. The act being authorised by law, the killing is not the actus reus of crime, for there is a lawful justification for it. Similarly, no crime is committed when a person exercising his lawful right of private defence causes harm to another. Likewise, if an onlooker who happens to be a good swimmer does not rescue a child about to be drowned in a pond he is not liable for any offence because there was no legal duty on his part to rescue a person. An act of omission, to be punishable, must be an illegal omission\(^\text{120}\) or a breach of legal duty. For instance, a jailor who starves the prisoners in his charge to death in guilty of

\(^{120}\text{Indian Penal Code 1860, s 43. Some examples of illegal omissions under the Indian Penal Code 1860, are: omission to produce a document before a public servant by a person legally bound to do so (s 175); omission to assist a public servant when called upon to do so (s. 176); omission to apprehend or to keep in confinement any person charged with an offence by a public servant legally bound to do so (ss. 221, 222).}
murder. The jailor’s act amounts to an illegal omission to discharge his legal obligation to provide meals to the prisoners.\textsuperscript{121}

**Mens Rea**

*Mens rea* is a technical term, generally taken to mean some blameworthy mental condition, whether constituted by intention or knowledge or otherwise, the absence of which on any particular occasion, negatives the contention of a crime.\textsuperscript{122} There must be a mind at fault to constitute a crime. No act is per se criminal; the act becomes criminal when the actor does it with a guilty mind. Causing injury to an assailant in self-defence is not a crime, but the moment injury is caused with an intent to take revenge, the act becomes criminal. Likewise, shooting in air is no crime, but shooting with an intent to kill a man is a crime.

The courts in earlier days in order to fix the accused’s criminal liability were to determine whether the accused behaved in a manner which fell below the ethical norms approved in the society or not.\textsuperscript{123} If the conduct happened to be below the ethical standard, the accused was responsible for his act at law. Later, two tests were evolved to determine *mens rea*. The first was whether the act in question was a voluntary act of the accused and second, whether the accused had the foresight of the consequences of his conduct.\textsuperscript{124}

\textsuperscript{121} See *Om Parkash v. State of Punjab*, AIR 1961 SC 1782. In England, a parent who fails to provide or to take steps to procure to provide adequate food, clothing, medical and or lodging for children or young persons is criminally liable under s 1 of the Children and Young Persons Act 1933. Section 125 of the Code of Criminal Procedure 1973, provides for maintenance of wives, children and parents.


\textsuperscript{123} See *Russel on Crime*, vol I, twelfth, edn, pp. 17-22.

\textsuperscript{124} Jerome Hali, General Principles of Criminal Law, second edn, 1960, pp 70-77; Deylin, ‘Statutory Offence’, (1938) 4 JSPTL 213. Mens rea consists of two elements – first, the intent to do an act and secondly, the knowledge of the circumstance that makes that act a criminal offence.
However, there is no single state of mind that must be present as a pre-requisite for all crimes. *Mens rea* takes on different colours in different surroundings. What is an evil intent for one kind of offence may not be so for another kind. For instance, in the case of murder, it is the intent to cause death; in the case of theft, an intention to steal; in the case of rape, an intention to have forcible sexual intercourse with a woman without her consent; in the case of receiving stolen goods, knowledge that the goods were stolen; and in the case of homicide, by rash or negligent act, recklessness or negligence. To appreciate the meaning of *mens rea*, it is necessary to have a clear conception of words like intention, motive, knowledge, recklessness and negligence etc, which are often used to indicate the different possible mental attitudes constituting the *actus reus* of a particular crime.