was sustained, *Lalli v State of West Bengal*, AIR 1986 SC 990 : 1986 Cr LJ 1083 : 1986 All LJ 768 : (1986) 2 SCC 409 , pre-planned dacoity, cold- blooded murder, concealment of bodies, the Supreme Court did not reduce life sentence and six-year *R I Sheodan v State of UP*, 1988 Cr LJ 479 (All), R I for five years to persons robbing and injuring bus passengers disrupting social life of the area. *State of UP v Hardeo*, AIR 1992 SC 1854 : 1992 Cr LJ 3160 , evidence not reliable, acquittal.

195. To bring an offence under section 396, the prosecution has to establish that murder was committed during dacoity. Hence, when prosecution alleges commission of murder during dacoity, the offence traverses from section 395 to section 396. Any person committing the offence of dacoity with murder cannot be convicted and sentenced under both the sections, *Rahimal v State of UP*, 1992 Cr LJ 3819 (All).

196. *Rafiq Ahmed @ Rafi v State of UP*, AIR 2011 SC 3114 [LNIND 2011 SC 726] : (2011) 8 SCC 300 [LNIND 2011 SC 726] .

197. *Deepak @ Wireless v State of Maharashtra*, 2012 Cr LJ 4643 : (2012) 8 SCC 785 [LNIND 2012 SC 558] .

198. *Rafiq Ahmed @ Rafi v State of UP*, AIR 2011 SC 3114 [LNIND 2011 SC 726] : (2011) 8 SCC 300 [LNIND 2011 SC 726] .

199. *Raj Kumar v State of Uttaranchal*, (2008) 11 SCC 709 [LNIND 2008 SC 849] : (2008) 3 SCC (Cr) 888 : (2008) 5 All LJ 637 : AIR 2008 SC 3248 [LNIND 2008 SC 849] .

200. *Teja*, (1895) 17 All 86 ; *Umrao v State*, (1894) 16 All 437 , **dissented** from; *Chittu*, (1900) PR No. 4 of 1900. *Sunil v State of Rajasthan*, 2001 Cr LJ 3063 (Raj), it was not material that all the five dacoits were not arrested. Miscreants entered the house of victim, caused one death, injured others and looted property. Crime against them proved. Conviction. *Shobit Chamar v State of Bihar*, 1998 Cr LJ 2259 (SC) six members of family killed in the process of dacoity, trustworthy eye-witnesses, conviction. *Anthony De Souza v State of Karnataka*, AIR 2003 SC 258 [LNIND 2002 SC 674] , all the five accused proved to have participated in murder, the trial of juvenile delinquent was split, High Court converting conviction from under sections 396/149 to that under sections 396/34, improper.

201. *Samunder Singh*, AIR 1965 Cal 598 [LNIND 1963 CAL 83] .

202. *Shyam Behari*, 1957 Cr LJ 416 (SC-Para 5) : AIR 1956 SC 320 . See *Suryamurthy v Govindaswamy*, AIR 1989 SC 1410 [LNIND 1989 SC 232] : 1989 Cr LJ 1451 : (1989) 3 SCC 24 [LNIND 1989 SC 232] , where some of the accused were acquitted because evidence of their identity was not dependable. *Ajab v State of Maharashtra*, 1989 Cr LJ 954 : AIR 1989 SC 827 : 1989 Supp (1) SCC 601 , appeal on the matter of sentence; *Hari Nath v State of UP*, 1988 Cr LJ 422 : (1988) 1 SCC 14 [LNIND 1987 SC 743] : AIR 1988 SC 345 [LNIND 1987 SC 743] , dacoity at night, identification not dependable. *Sheonath Bhar v State of UP*, 1990 Cr LJ 2423 (All), no conviction on the basis only of identification. *Ramdeo Rai Yadav v State of Bihar*, AIR 1990 SC 1180 [LNIND 1990 SC 126] : 1990 Cr LJ 1183 the High Court finding that the appellant alone was guilty of the murder shifted the conviction to under section 302 with no prejudice to the accused, upheld by the Supreme Court.

203. *Ram Lakhan v State of UP*, (1983) 2 SCC 65 .

204. *Raj Kumar Alias Raju v State of Uttranchal*, (2008) 11 SCC 709 [LNIND 2008 SC 849] ; *Saktu v State of UP*, (1973) 1 SCC 202 **distinguished**.

205. *Geejaganda Somaiah v State of Karnataka*, AIR 2007 SC 1355 [LNIND 2007 SC 312] ; *Gulab Chand*, AIR 1995 SC 1598 [LNIND 1995 SC 440] ; *Tulsiram Kanu v State*, AIR 1954 SC 1 : 1954 Cr LJ 225 - the presumption permitted to be drawn under Section 114, Illustration (a) of the Evidence Act, 1872 has to be drawn under the 'important time factor'. If the ornaments in possession of the deceased are found in possession of a person soon after the murder, a

presumption of guilt may be permitted. But if a long period has expired in the interval, the presumption cannot be drawn having regard to the circumstances of the case.

206. *Earabhadrappa v State of Karnataka*, AIR 1983 SC 446 [LNIND 1983 SC 83] : 1983 Cr LJ 846 .

207. *Rafiq Ahmed @ Rafi v State of UP*, AIR 2011 SC 3114 [LNIND 2011 SC 726] : (2011) 8 SCC 300 [LNIND 2011 SC 726] ; *Iman Ali v State of Assam*, AIR 1968 SC 1464 [LNIND 1968 SC 92] : 1968 (3) SCR 610 [LNIND 1968 SC 92] .

208. *Rafiq Ahmed @ Rafi v State of UP*, AIR 2011 SC 3114 [LNIND 2011 SC 726] : (2011) 8 SCC 300 [LNIND 2011 SC 726] .

209. *Rafiq Ahmed @ Rafi v State of UP*, AIR 2011 SC 3114 [LNIND 2011 SC 726] : (2011) 8 SCC 300 [LNIND 2011 SC 726] ; *State of UP v Sukhpal Singh*, (2009) 4 SCC 385 [LNIND 2009 SC 339] : AIR 2009 SC 1729 [LNIND 2009 SC 339] - Accused persons entered premises, looted licensed gun and other articles and also killed two persons and injured others. Supreme Court held that charging accused under section 396 and instead of sub-section 302 is proper.

210. *Sonu Sardar v State of Chhattisgarh*, (2012) 4 SCC 97 [LNIND 2012 SC 909] : AIR 2012 SC 1480 [LNIND 2012 SC 909] ; *Ankush Maruti Shinde v State of Maharashtra* [(2009) 6 SCC 667 [LNIND 2009 SC 1056] : AIR 2009 SC 2609 [LNIND 2009 SC 1056] .

211. *State of Karnataka v Rajan*, 1994 Cr LJ 1042 (Kant).

THE INDIAN PENAL CODE

CHAPTER XVII OF OFFENCES AGAINST PROPERTY

Of Theft

Of Robbery and Dacoity

[s 397] Robbery or dacoity, with attempt to cause death or grievous hurt.

If, at the time of committing robbery or dacoity, the offender uses any deadly weapon,[1] or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

COMMENT—

Sections 397 and 398 do not create any offence but merely regulate the punishment already provided for robbery and dacoity.[212.] This section fixes a minimum term of imprisonment when the commission of robbery and dacoity has been attended with certain aggravating circumstances, viz., (1) the use of a deadly weapon, or (2) the causing of grievous hurt, or (3) attempting to cause death or grievous hurt.

Section 34 of the Code has no application in the construction of this section.[213.]

[s 397.1] Accused must be armed with deadly weapon.—

It is necessary to prove that at the time of committing robbery, the accused was armed with a deadly weapon and not merely that one of the robbers who was with him at the time carried one.[214.] The liability to enhanced punishment is limited to the offender who actually uses the weapon himself and causes grievous hurt and not to others who in combination with such person have committed robbery or dacoity.[215.] The expression 'the offender' occurring in this section pertains to actual offender. It does not include all persons who participate in robbery or dacoity.[216.] The section does not provide for constructive liability as in section 149.[217.]

1. 'Uses any deadly weapon'.—These words are wide enough to include a case in which a person levels his revolver against another person in order to overawe him. It is not correct to say that a person does not use a revolver unless he fires it.[218.] Where the accused carried knife open to the view of the victims, it is sufficient use of a deadly weapon to terrorise them within the meaning of this section and no other overt act as brandishing of the knife is necessary to apply this section.[219.] In reference to the word "uses" as it occurs in the section, it has been held that if the weapon carried by the offender was within the vision of the victim so as to be capable of creating terror in his mind that is sufficient to satisfy the requirement of use of deadly weapon. It is not necessary to show further any hurt caused by the use of the weapon.[220.]

The section postulates only the individual act of the accused to be relevant. It thus negates the application of the principle of constructive or vicarious liability as provided in section 34. Where all the accused persons carried their respective deadly weapons, it

was held that each one of them satisfy the requirement of section 397. Conviction could be only under section 397 and not section 397 read with section 34.[221.]

[s 397.2] Comparison with section 394.—

The section relates itself only to an offender who actually uses the weapon himself. It has no scope for constructive liability. The accused in this case had not himself caused any grievous hurt in the commission of the robbery. His conviction under this section read with section 34 was not proper.[222.] The liability under section 397 is only individual, whereas liability under section 394 is both individual and vicarious.[223.]

[s 397.3] Deadly weapon.—

In *Babulal Jairam Maurya v State of Maharashtra*,[224.] it was held that the word "deadly weapon" as used here has to be a real deadly weapon and not just assumed or mistaken to be a deadly weapon. A toy-pistol cannot be said to be a deadly weapon whatever be its impact on persons who were frightened with it. Bamboo sticks or *lathis*, which were possessed and held by the accused, were held by the Supreme Court to be not deadly weapons. There was no evidence of any grievous hurt or attempt to inflict it.[225.]

[s 397.4] Grievous hurt.—

Any hurt which endangers life is a grievous hurt. It would be seen that one of the injuries was caused just below the nipple. The term 'endangers life' is much stronger than the expression 'dangerous to life'. Apart from that in the provision, attempt to cause grievous hurt attracts its application.[226.]

[s 397.5] Recovery of property.—

The Supreme Court observed in *Lachhman Ram v State of Orissa*:[227.] "The factum of recovery of articles at the instance of the accused persons in the presence of police officers and *panch* witnesses is itself sufficient to bring the case not only under section 412 but also under section 391".

[s 397.6] Death sentence.—

In a robbery and double murder case, it was found that the acts of the accused persons were heinous and they had committed murder brutally and showed no regard for human lives. They were hardened criminals with previous criminal records. It was held that life imprisonment could not serve any reformative treatment to the accused. The sentence was enhanced to capital punishment.[228.]

The accused was convicted for the offence of robbery and murder of five persons; murders were premeditated and carried out for gain. The entire family was

exterminated in a cruel manner. The accused was a young person but not the breadwinner of anyone. The imposition of death sentence was confirmed.[229.]

[s 397.7] Probation.—

The Supreme Court had granted the benefit of probation to the appellant who was less than 21 years of age as on the date of the offence. The report of the Probation officer had been called and keeping in view the circumstances as had been detailed in the report of the Probation officer coupled with the fact that the appellant being less than 21 years of age on the date of offence, he had been granted benefit of probation.[230.]

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212. *Gaya Bhakta v State of Orissa*, 1988 Cr LJ 1576 (Ori), the charge should, therefore be under section 395 read with section 397. *Kallu v State of MP*, 1992 Cr LJ 238 (MP).

213. *Ali Mirza*, (1923) 51 Cal 265 ; *Dulli*, (1924) 47 All 59 .

214. *Bhavjya v State*, (1895) Unrep Cr C 797. *Dhanai Mahto v State of Bihar*, AIR 2000 SC 3602 , bamboo sticks and lathis have been held to be not deadly weapons for the purposes of this section. *KV Chacko v State of Kerala*, 2001 Cr LJ 713 : AIR 2001 SC 537 [LNIND 2000 SC 1797] , circumstance of dacoity with murder not proved. Hence, acquittal.

215. *Deoji Keru*, (1872) Unrep Cr C 65; *Phool Kumar*, 1975 Cr LJ 778 : AIR 1975 SC 905 [LNIND 1975 SC 112] : (1975) 1 SCC 797 [LNIND 1975 SC 112] ; *Komali Viswasam*, (1886) 1 Weir 450; *Nageshwar*, (1906) 28 All 404 ; *Ali Mirza, supra; Dulli, supra*.

216. *Willson v State of Maharashtra*, 1995 Cr LJ 4042 (Bom).

217. *Hazara Singh v State*, (1946) 25 Pat 227.

218. *Chandra Nath*, (1931) 7 Luck 543 . Where the accused, while committing the robbery did not use the Deshi Katta recovered from his possession for threatening the victims nor caused them any grievous injury, it was held that offence under section 397 was not made out against him, *Babu Lal v State of Rajasthan*, 1994 Cr LJ 3531 (Raj). Where the accused was caught red-handed brandishing his knife and demanding money from a man and was convicted under section 397. The sentence being minimum seven years R.I., it was not interfered with. *Sanjay v State of Maharashtra*, 1996 Cr LJ 2172 (Bom).

219. *Phool Kumar*, 1975 Cr LJ 778 : AIR 1975 SC 905 [LNIND 1975 SC 112] ; *Jai Prakash*, 1981 Cr LJ 1340 (Del); *Jang Singh*, 1984 Cr LJ 1135 (Raj).

220. (2004) 3 SCC 116 : AIR 2004 SC 1253 : 2004 Cr LJ 936 : (2004) 3 MPLJ 361 : (2004) 3 Mah LJ 581 .

221. *Ashfaq v State Govt. of NCT of Delhi*, (2004) 3 SCC 116 : AIR 2004 SC 1253 .

222. *Paramjeet Singh v State of Rajasthan*, 2001 Cr LJ 757 (Raj).

223. *Shravan Deshrath v State of Maharashtra*, 1998 Cr LJ 1196 (Bom).

224. *Babulal Jairam Maurya v State of Maharashtra*, 1993 Cr LJ 281 (Bom).

225. *Dhanai Mahto v State of Bihar*, 2001 Cr LJ 147 (SC), the court said that in such a case the maximum punishment provided by section 397 need not be imposed. Four years were held to be sufficient.

226. *Niranjan Singh v State of M.P.*, AIR 2007 SC 2434 [LNIND 2007 SC 796] : (2007) 10 SCC 459 [LNIND 2007 SC 796] .

227. *Lachhman Ram v State of Orissa*, AIR 1985 SC 486 [LNIND 1985 SC 77] : 1985 Cr LJ 753 : (1985) 2 SCC 533 [LNIND 1985 SC 77] . *Mangal Tularam Warkhade v State of Maharashtra* 2012 Cr LJ 510 (Bom) Recovery of cash as booty of dacoity, not proved. Accused acquitted

228. *Prem v State of Maharashtra*, 1993 Cr LJ 1608 (Del).

229. *KV Chacko v State of Kerala*, 2001 Cr LJ 1179 (Ker).

230. *Masarullah v State of Tamil Nadu*, 1983 SCC (Cr) 84 : (1983 Cr LJ 1043).

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CHAPTER XVII OF OFFENCES AGAINST PROPERTY

Of Theft

Of Robbery and Dacoity

[s 398] Attempt to commit robbery or dacoity when armed with deadly weapon.

If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.

COMMENT—

This section can regulate the punishment only in cases of an attempt to commit robbery as distinguished from a case in which the offender has accomplished his purpose and robbery has actually been committed.[231.] It applies to such of the offenders as are armed with deadly weapons though they do not use them in the attempt to rob or commit dacoity. It does not apply to other offenders who in combination with such persons have committed robbery or dacoity.[232.] The words "uses" and "is armed" in sections 397 and 398, IPC, 1860, have to be given identical meaning to resolve apparent anomaly.[233.] Thus, carrying a deadly weapon would be enough to attract the mischief of either section. In the charge-sheet, accused were charged under section 396. Section 398 is referred only for the purpose of sentence. Hence, the argument that when section 398 is attracted, life imprisonment cannot be awarded is untenable. Substantive offence here is section 396. But, if section 398 is attracted, minimum punishment shall be seven years. Sections 397 and 398 cannot be used conjunctively or constructively as held by the Apex Court in *Paramjeet Singh v State of Rajasthan*.[234.] In fact, as held in various Court decisions, a person cannot be convicted under section 398 unless he is armed with a deadly weapon while committing or attempting to commit robbery or dacoity.[235.]

Section 398, IPC, 1860 gets attracted if at the time of attempting to commit robbery or dacoity, the offender is armed with a deadly weapon which will attract an imprisonment not less than seven years. When no robbery or dacoity has been committed as such, in the sense that no property was removed from the house of the complainants and nothing said to be belonging to the complainants was recovered, it would be difficult to hold that there was any attempt in regard to the commission of robbery or dacoity. Scattering of articles in the house may cause a scene as if ransacked, but that does not proved the charge.[236.] For the offence of attempt to commit robbery the maximum punishment prescribed by law is rigorous imprisonment for seven years with fine. However the discretion is left to the Court to quantify the actual sentence to be awarded. However, if at the time of attempting to commit robbery the offender is armed with any deadly weapon, the offence becomes more serious or aggravated and therefore, section 398 provides that in such circumstances the imprisonment with which, the offender shall be punishable, shall not be less than seven years. If at the time of committing robbery the offender is not armed with any deadly weapon the Court may award sentence of imprisonment for a term up to seven years and if he was

armed with deadly weapon the sentence of imprisonment shall not be less than seven years. In such circumstances the maximum sentence of rigorous imprisonment of seven years has to be awarded. It is well settled that section 398 IPC, 1860 does not create any offence but merely regulates the punishment already provided for robbery or dacoity. One cannot be convicted and sentenced separately under sections 393 and 398 of IPC, 1860.[237.]

[s 398.1] Cases.—

The allegation was that appellants entered into the house of complainant, injured her in order to commit robbery but was apprehended by police. They demanded key of *almirah* and ornaments from complainant by overawing her with deadly weapons like knife and *kattas*. High Court held that conviction under section 394 read with section 397 deserves to be converted into one under section 394 read with s, 398 of IPC, 1860.[238.]

[s 398.2] Charge under section 398 conviction under section 458 IPC, 1860.—

The accused was charged under section 398 of IPC, 1860 and section 25(1)(A) and section 27 of the Arms Act, 1959. Trial Court acquitted the accused from both the charges holding that prosecution has failed to prove the charges, however, come to the conclusion that the accused committed an offence under section 458 of IPC, 1860. The High Court held that section 458 of Penal Code in no way was a cognate offence of offence prescribed under section 398, IPC, 1860. Hence, Conviction for offence under section 458 IPC, 1860 without framing charge was set aside.[239.]

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231. *Chandra Nath*, (1931) 7 Luck 543 .

232. *Ali Mirza*, (1923) 51 Cal 265 ; *Nabibux*, (1927) 30 Bom LR 88 ; 52 Bom 168.

233. *Phool Kumar*, 1975 Cr LJ 778 : AIR 1975 SC 905 [LNIND 1975 SC 112] . *Surender @ Babli v State* AIR 2012 SC 1725 [LNINDORD 2011 SC 141] -High Court convicted the accused under sections 393, 398 and 302/34 of IPC, 1860 on the ground that weapon which had been recovered at the instance of appellant proved his involvement in the incident. Supreme Court set aside the conviction

234. *Paramjeet Singh v State of Rajasthan*, 2001 Cr LJ 757 (SC)

235. *Sharafu Alias Sharafudheen v State of Kerala*, 2007 Cr LJ 2908 (Ker).

236. *Chinnadurai v State of Tamil Nadu*, AIR 1996 SC 546 : (1995) Supp3 SCC 686.

237. *Shahaji Ramanna Nair v State of Maharashtra*, 2007 Cr LJ 4653 (Bom).

238. *Ganesh Singh v State of MP*, 2009 Cr LJ 3691 (MP).

239. *Manik Miah v State of Tripura*, 2013 Cr LJ 1899 (Gau).

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CHAPTER XVII OF OFFENCES AGAINST PROPERTY

Of Theft

Of Robbery and Dacoity

[s 399] Making preparation to commit dacoity.

Whoever makes, any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

COMMENT—

This section makes preparation to commit dacoity punishable. 'Preparation' consists in devising or arranging means necessary for the commission of an offence.[240.]

Under the Code preparation to commit an offence is punishable in three cases:—

(1) Preparation to wage war against the Government of India (section 122).

(2) Preparation to commit depredation on territories of a Power at peace with the Government of India (section 126).

(3) Preparation to commit dacoity.

In a popular sense assembling to commit dacoity may be an act of preparation for it, but a mere assembly, without further preparation, is not 'preparation' within the meaning of this section. Section 402 applies to mere assembling without proof of other preparation. A person may not be guilty of dacoity, yet guilty of preparation, and not guilty of preparation, yet guilty of assembling.[241.]

[s 399.1] Distinction between sections 399 and 402.—

Though the offences falling under both the sections, more or less, involve similar ingredients, the only difference between the two is that while under section 402 mere assemblage without preparation is enough, section 399 require some additional steps by way of preparation. There can be cases where there may be an assembly for the purpose of dacoity without even a fringe of preparation. The mere fact that the appellants are acquitted of the charge under section 399 is no ground to knock off the charge under section 402, IPC, 1860.[242.] In order to establish an offence punishable under section 399, IPC, 1860 some act amounting to preparation must be proved and what must be proved further is an act for which preparation was being made was a dacoity, that is to say, robbery to be committed by five or more persons. The prosecution has to establish under section 402, IPC, 1860 that there had been an assembly of five or more persons constituted for the purpose of committing dacoity and that the accused persons were members of that assembly. If there is no clear and acceptable evidence of any assemblage of the appellants with three or more persons

for the purpose of committing dacoity then the appellants cannot be held liable under section 402, IPC, 1860.[243.]

[s 399.2] Distinction between attempt and preparation.—

A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary Intention, he commences his attempt to commit the offence. The word "attempt" is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of section 511 require. An attempt to commit a crime is to be distinguished from an intention to commit it and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not be taken for the deed unless there be some external act which shows that progress, has been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is punishable only when the preparation is to commit offences under section 122 (waging war against the Government of India) and section 399 (preparation to commit dacoity). The dividing, line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case. There is a greater degree of determination in attempt as compared with preparation.[244.]

[s 399.3] CASES.—

Where it is proved that the accused, who were residents of different villages had gathered with lethal arms at an unearthly hour in a desolate place under a tree with no explanation for their conduct whatsoever much less an acceptable one, the Court found them guilty under sections 399 and 402.[245.]

Where a number of persons were sitting in a Railway waiting hall at about 9.30 at night and a country-made gun without any cartridge, a whistle and a torch of five cells were recovered from their possession, it could not be said without any other evidence that they had made preparation to commit dacoity within the meaning of this section nor would it amount to an offence of assemblage for the purpose of committing dacoity under section 402.[246.] The mere fact that eight persons were found in a school at about 1 a.m. and some of them were armed does not make out a case either under section 399 or under section 402, IPC, 1860, unless it is shown that they assembled there for the purpose of committing dacoity. In such a situation the possibility that they had so assembled there for murdering somebody or committing some other offence cannot be ruled out.[247.] In this connection see also Comments under section 402, IPC, 1860, especially the case of *Naushera* therein.

[s 399.4] Sentence.—