

stitute's findings. In order to arrive at this rational interpretation, it seems to me that the purpose for which the bye-law was passed must be kept in view. That purpose is distinctly set forth both in the statutes and in the bye-law. In the Act of 1862, section 6, the Commissioners are empowered (sub-section 6) to make general regulations with respect to the due observance of the weekly close time. Reference was made by the appellant's counsel to section 24 of the Act of 1868, but it is to be noted that that section enjoins obedience to bye-laws which are in force within the district "for the due observance of the weekly close time." The bye-law with which this case is concerned was passed by the Commissioners in 1868, and is to be found, with two other bye-laws relating to the weekly close-time, in Schedule D of the Act of 1868. The preamble to these bye-laws bears that the Commissioners "make the following regulations with respect to the due observance of the weekly close time." The object of providing a weekly close time was to give fish a free run of thirty-six hours every week, and the purpose of the bye-laws was to ensure that no obstructions should be present to prevent the fish having this free course. On the facts found by the Sheriff-Substitute it is obvious that nets on dry land could not affect the fish one way or the other, or have any influence on the due observance of the weekly close time. It is clear, therefore, that the bye-law in question, rationally read, applies to nets in water, and that this qualification of the exact terms of the bye-law must be read into it. This construction seems to obtain justification from a consideration of the terms of the two other bye-laws contained in Schedule D of the 1868 Act, which deal with other kinds of nets than stake nets.

It was suggested that the present case was of the nature of a test case, but I think it should be clearly understood that we are deciding the present question on the special facts set forth in the stated case, and are determining nothing more than that the bye-law does not apply to nets on dry land.

I therefore agree that the questions should be answered in the manner suggested by your Lordship.

The Court answered both questions in the negative and dismissed the appeal.

Counsel for Appellant—Constable, K.C.—Burns. Agents—Cowan & Stewart, W.S.

Counsel for Respondent—Jameson. Agents—Scott & Glover, W.S.

Monday, March 2.

(Before the Lord Justice-General, Lord Ormidale, and Lord Anderson.)

TOWNSEND v. H. M. ADVOCATE.

*Justiciary Cases—Crimes—Criminal Law Amendment Act 1885 (48 and 49 Vict. cap. 69), sec. 9—Scope and Procedure.*

An indictment, which contained no reference to the Criminal Law Amendment Act, charged an "attempt to ravish" a girl of fifteen years of age. After evidence had been led at the trial the prosecutor withdrew the charge in the indictment, and the jury, on the invitation of the prosecutor, convicted the accused of a contravention of section 5 of that Act.

*Held*, in a suspension, that although it was unnecessary to libel the Criminal Law Amendment Act 1885 where under section 9 it applied, yet the conviction in question was bad, in respect that (1) the power conferred by section 9 with regard to rape did not extend to a charge of attempt to ravish, and (2) procedure under that section could not be invoked after the prosecutor had withdrawn the main charge.

*Justiciary Cases—Conviction—Criminal Law Amendment Act 1885 (48 and 49 Vict. cap. 69), sec. 5.*

*Held* that a conviction of "an offence against the Criminal Law Amendment Act 1885, section 5," was bad, inasmuch as the section set forth two separate offences.

The Criminal Law Amendment Act 1885 (48 and 49 Vict. cap. 69) enacts—Section 5—"Any person who (1) unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl, being of or above the age of thirteen years and under the age of sixteen years, or (2) unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any female idiot or imbecile woman or girl, under circumstances which do not amount to rape, but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labour. . . ." Section 9—"If upon the trial of any indictment for rape . . . the jury shall be satisfied that the defendant is guilty of an offence under section . . . 5 of this Act, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in such indictment, or of an attempt to commit the same, then, and in every such case, the jury may acquit the defendant of such felony, and find him guilty of such offence as aforesaid, or of an indecent assault, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such offence as aforesaid, or for the misdemeanour of indecent assault."

John Townsend, *complainer*, was indicted at the instance of His Majesty's Advocate, *respondent*, on a charge stated in the indictment as follows—“That you did, on 30th November 1913, enter the house of James Gibson, then at 6 Union Street, Calton, Glasgow, and in a bed there did attempt to ravish Sarah Jane M'Gowan Gibson, aged fifteen years, daughter of and residing with the said James Gibson, now at 48 Green Street, Calton aforesaid, she being then asleep in said bed; and you have been previously convicted of assault.”

The accused pleaded not guilty, and was tried on 20th January 1914, in Glasgow, before Sheriff-Substitute Boyd and a jury.

The jury unanimously found the panel guilty of a contravention of the Criminal Law Amendment Act 1885, section 5, and he was sentenced by the Sheriff-Substitute to two years' imprisonment with hard labour.

The accused brought a bill of suspension, in which he, *inter alia*, stated—“(Stat. 3) . . . The Deputy Procurator-Fiscal, on declaring his case closed, thereupon withdrew the charge of attempt to ravish, and without any amendment of the indictment or prior notice to the accused asked for a verdict of a contravention of the Criminal Law Amendment Act 1885, section 5. An objection was taken on behalf of the complainer to the request for a verdict of said contravention, and the Court was moved to withdraw the charge entirely from the jury, and to dismiss the complainer, in respect that the prosecutor had departed from the charge libelled, and there was nothing remaining for the jury to determine; and further, that section 9 of the Criminal Law Amendment Act, which was also founded on by the prosecutor without any prior notice whatever to the accused, applied to a charge of rape, and not to a charge of attempt to ravish. It was also maintained that the charge in the indictment was really not a charge of attempt to ravish, but set forth an innominate offence, which could not in any way be regarded as an attempt to ravish. It was further maintained that as said section 9 was an innovation of the common law it fell to be read strictly and literally, and that the charge originally libelled did not fall within either of the two classes of cases referred to in the section. The Sheriff, however, repelled the objections, and refused to withdraw the case, although the prosecutor stated, and the record of the proceedings bears, that he, the prosecutor, had actually withdrawn the only charge in the indictment. (Stat. 4) The said indictment was founded on a common law charge. On its being withdrawn at the close of the evidence for the prosecution, and a request made for a conviction of an offence under section 5 of said Act, the charge submitted to the jury became an alternative one, there being two offences specified in said section. . . . Further, the prosecutor in seeking to avail himself of statutory provisions did not comply with said provisions, which require that it is for the jury to exercise the option of acquitting the prisoner of the original charge against

him, and of thereafter finding him guilty of a specific offence in terms of section 9, which the jury did not do. They found him guilty of an offence under section 5, which section contains two offences, and the complainer is thus not informed of the offence of which he is alleged to have been convicted. (Stat. 5) Further, the complainer suffered great prejudice in his defence by the failure in the indictment to libel said Act of 1885 and the sections founded on.”

Argued for the complainer—(1) The statement in the indictment that the woman was “asleep” rendered it irrelevant—*Macdonald on Criminal Law*, p. 166; *H. M. Advocate v. Sweetie*, June 18, 1858, 3 *Irv.* 109; *H. M. Advocate v. Palmer*, September 26, 1862, 4 *Irv.* 227; *H. M. Advocate v. Thomson*, October 28, 1872, 2 *Coup.* 346, 10 *S.L.R.* 23. The inclusion of unnecessary words in a complaint which was otherwise good might render it irrelevant—*Smith v. Sempill*, 6 *Ad.* 348, 1911 *S.C. (J.)* 30, 48 *S.L.R.* 64. (2) The indictment was defective in respect that it did not libel the Criminal Law Amendment Act 1885 (48 and 49 *Vict. cap.* 69) and thus did not afford the accused fair notice of the charge to be met—*H. M. Advocate v. Henderson*, December 27, 1888, 2 *W.* 157, 26 *S.L.R.* 198. (The Court referred to *H. M. Advocate v. M'Laren*, November 15, 1897, 2 *Ad.* 395, 25 *R. (J.)* 25, 35 *S.L.R.* 52.) Even if that were unnecessary in a case of rape owing to section 9 of the Act, that section could not be held to apply to a charge of “attempt to ravish.” (3) Further, the conviction was rendered bad (a) by the withdrawal by the prosecutor of the charge in the indictment, which left nothing before the jury on which they could proceed to convict, and (b) because the accused was convicted generally of a contravention of section 5 of the Act, which contained two sub-sections, each constituting a separate and distinct offence—*Hastie v. Macdonald*, November 23, 1894, 1 *Ad.* 505, 22 *R. (J.)* 18, 32 *S.L.R.* 72; *De Banzie v. Peebles*, March 16, 1875, 3 *Coup.* 89, 2 *R. (J.)* 22. Where statutory procedure was adopted, exact compliance with the Act was necessary—*Johnston v. Pettigrew*, June 16, 1865, 3 *Macph.* 954.

Argued for the respondent—(1) Even if it was admitted that the word “asleep” would have rendered a charge of rape irrelevant, it did not follow that it did so in the case of a charge of attempt to ravish. (2) The prosecution was entitled to the benefit of section 9 of the Act both in the case of rape and also of attempt. The latter case was specifically dealt with in the section. (3) The prosecutor did not in substance withdraw the original charge from the jury. The word withdraw had crept into the record of proceedings inadvertently, and in any case was there used in a popular and not a legal sense. The verdict of the jury made sufficiently clear to the accused the exact nature of the offence of which he was convicted.

LORD JUSTICE-GENERAL—I am of opinion that this conviction cannot stand. I shall state shortly the grounds on which I reach this conclusion. The complainer was charged with the crime of attempting to ravish a

girl of fifteen years of age. I proceed no further with the complaint, because I propose to offer no opinion whatever upon the relevancy of the indictment here. I assume for the purposes of this present judgment that the complainer was relevantly indicted on a charge of an attempt to commit rape.

The course the case took was as follows: At the conclusion of the evidence for the prosecution, the prosecutor, we are told, intimated to the Court that he withdrew the common law charge of attempt to ravish, and he thereupon proceeded to take advantage of the procedure prescribed and powers conferred by the 9th section of the Criminal Law Amendment Act 1885.

Three objections have been urged against the course which the public prosecutor thought fit to take. In the first place, it is said that in this complaint there is nothing but the common law charge of attempt to ravish, and no reference whatever is made to the Criminal Law Amendment Act 1885, and no suggestion that any charge is to be preferred against the prisoner under that Act.

I am of opinion that this objection is not well founded, and that the procedure, novel and in some respects very foreign to the views of a Scottish criminal lawyer, laid down under this section is available where in the charge there is no reference whatever to the statute. If authority is needed for the proposition, it is to be found in the judgment of Lord M'Laren in *H. M. Advocate v. M'Laren*, November 15, 1897, 25 R. (J.) 25, 2 Ad. 395, 35 S.L.R. 52, in which I observe his Lordship says—"Now as a lawyer I should have thought that where it was intended to charge an accused with this offence created by the statute, it would be a right thing to libel it expressly in the indictment, so as to give due notice to the accused that this statutory charge also was to be preferred against him. I say I should as a lawyer have expected this. But the question with which we have to deal is not what might have been or should have been, but what the Legislature has, expressly enacted."

And he then goes on to construe the terms of section 9, and comes to the conclusion, with which I entirely agree, that no other construction of that section is possible than the one his Lordship there put upon it, namely, that no reference to the section need be made in the libel. I am of opinion, therefore, that the first objection is not well founded.

The second objection is grave. It is that this is not an indictment charging the prisoner with the crime of rape, but with the crime of attempt to ravish, and accordingly that the procedure prescribed in the 9th section cannot be made available. I am of opinion that that objection is well founded, for the reasons which Lord M'Laren has given in the opinion to which I have just referred. I think we must construe this clause strictly. I think we must follow closely the very words of the statute, and hold that the procedure therein prescribed is only available in the case where the prisoner is charged on an indictment for rape

and not for some other offence, such as an attempt to ravish.

It has been pointed out to us that in 1855 it may have been, and probably was, possible to secure a conviction of an attempt to commit a crime where the crime alone was charged, but that could only be competent where the panel was charged on an indictment with the crime itself, *e.g.*, rape. It seems to me that, although you have in section 9 the words "or of an attempt to commit the same," it will not do where you are construing a section like this, which in effect involves a departure from the rule of our criminal Court, that a prisoner must be given due and ample notice of what he is charged with, to do anything more than give a literal construction to the section. On an indictment charging the prisoner, not with rape, but only with an attempt to ravish, we cannot allow to be introduced a charge of a misdemeanour or of committing an offence against section 5 of the Criminal Law Amendment Act.

But a third objection was urged against the procedure followed. It was this, that at the close of the evidence the prosecutor withdrew the charge, and that, having withdrawn the charge, it was impossible for him then to invoke the procedure under the clause to which I have referred. I am of opinion that that objection is well founded, for it appears to me that, under the plain terms of section 9, it is for the jury alone to decide whether the prisoner is guilty of the crime charged in the complaint or is only guilty of an offence under sections 3, 4, or 5 of the Statute of 1885; and if the jury come to the conclusion, in considering the whole evidence in the case, the charge being still before them, that the prisoner is not guilty of the crime charged, but is guilty of an offence under other sections of the Criminal Law Amendment Act, they are entitled so to find. But in so finding the statute expressly provides that they are to acquit the prisoner of the charge against him and find him guilty of the offence of which they think him guilty under the Statute of 1885. Now that is the province of the jury and the jury only, and in this case they seem to have had no opportunity afforded them of acquitting the prisoner of the charge preferred against him, but were simply told that they could, if they wished, find that he had committed an offence against one or other of these sections, although the charge against him was withdrawn. In this respect I think the prosecutor erred, and that the procedure under the clause in question could not, after the charge was withdrawn, be made available.

On these two grounds, separate and distinct, I come to the conclusion that this conviction cannot stand. But there is a third ground on which I think it cannot be disputed that the conviction is bad. It bears to be a conviction of the offence of having contravened the provisions of section 5 of the Criminal Law Amendment Act 1885. Now when we turn to that section we find, as was very clearly pointed out by Mr Garson, that there are several offences described in the section of which he might have been guilty, and we are left entirely

in the dark as to which of them the jury thought he had been guilty of. That, it seems to me, is a fatal defect, and sufficient in itself to warrant us in suspending the conviction.

LORD ORMDALE—I entirely concur in the opinion which your Lordship has delivered.

With regard to the objection which your Lordship dealt with in the second place, I agree with all that your Lordship has said. The power conferred by section 9 of the Criminal Law Amendment Act 1885 to convict of an offence under sections 3, 4, or 5 of that Act or of an indecent assault, is conferred only where the panel is charged on an indictment for rape or any offences made felony by section 4. An attempt to ravish is not made felony by section 4. Now it is true that the section contains the words “or of an attempt to commit the same,” which indicate that the accused may be found guilty of an attempt to commit a rape under an indictment which charges him with the completed crime. But the presence of these words where they occur in the section does not in my opinion justify us in reading the section as though it had commenced—“If upon the trial of any indictment for rape or attempted rape or any offence or attempted offence,” and unless the section is so read it appears to me that the contention of the Crown must fail. The section, it must be remembered, has a novel and far-reaching effect, and involves a departure—a grave departure—from a salutary rule of our criminal law that a prisoner must have the amplest notice of the particular offence and all the offences with which he is charged. That being so, the section must be construed strictly, and so construed it seems to me that where an indictment charges the prisoner, not with rape, but only with an attempt to ravish, it is not permissible to substitute a charge or a right to convict of an offence under section 5 of the Act or of an indecent assault.

On the last point dealt with by your Lordship I also agree. According to the record of the proceedings, the prosecutor asked for a verdict of a contravention of section 5 of the Criminal Law Amendment Act 1885, and the jury found “the panel guilty of a contravention of the Criminal Law Amendment Act 1885, sec. 5.”

But section 5 deals with two separate crimes, one by sub-section 1 and the other by sub-section 2, and we accordingly are left in complete ignorance of what was the crime of which the prosecutor asked a conviction, and what was the crime of which the jury found the prisoner guilty.

LORD ANDERSON—I agree. It is regrettable that the result of our judgment will be that the complainer will be liberated, because, undoubtedly, he has committed a serious offence; but it seems to me that, in view of the argument that has been submitted to us on his behalf, we have no option save to grant the prayer of the bill.

The first point the complainer took had reference to the form of the charge as it is laid at common law. I agree with your

Lordship that it is not necessary for us to determine whether or not that is a relevant charge at common law. But when we come to the points which were made on the 9th section of the Criminal Law Amendment Act 1885, it seems to me that the complainer presented a formidable case, and raised an important question for our decision under that section.

It must be kept in mind that it is a fundamental and salutary rule of our criminal procedure that fair notice should be given by the prosecutor to the accused of the offence or offences which are to be proved against him. The 9th section of the Act of 1885 sanctions a deviation from or exception to that general and fundamental rule, and when we are dealing with a deviation from well-established practice it is our duty to construe strictly the statutory provision which authorises that deviation. When I look at section 9 I find that the only condition under which the Crown is authorised to crave a verdict under the provisions of the section is where the Crown is conducting a prosecution under an indictment for rape, or for any offences made felonies by section 4 of the Act, among which attempt to ravish does not appear.

The two points which the complainer took under this section were these—He said, first of all, this is not an indictment for rape but an indictment for an attempt to ravish, and therefore it cannot form the foundation of a conviction for an offence under sections 3, 4, or 5 of the Act of 1885, in respect that, firstly, no notice was given in the indictment that such an offence was charged, and that, secondly, the statutory provision in section 9, which allows a conviction of a minor offence, is only applicable on an indictment for rape or an offence made felony by section 4, and not on an indictment libelling merely an attempt to ravish. I am of opinion that that proposition is well founded. If the section is looked at, it will be seen that the jury may take the alternative course if they “are not satisfied that the defendant is guilty of the felony charged in such indictment.” Accordingly, the exception is allowed where an indictment has been presented charging a felony. Now, undoubtedly, rape is a felony at common law, although we do not use that term in Scotland. In the first part of section 4 of the 1885 Act it is declared to be a felony. An attempt is made in the application clause to reduce the expressions “felony” and “misdemeanour” to terms of Scots law, because when that application clause is looked at I find that in Scotland “the expression misdemeanour shall mean a crime and offence,” and “the expression felony shall mean a high crime and offence.” Well, there is no warrant under the common law of Scotland for such a division of crimes as is suggested in that interpretation clause. But I find that in section 9 indecent assault is described as a misdemeanour, and my view is that attempt to ravish is just a species of crime which may be brought under that heading of indecent assault. Accordingly, if I am right in that view, this is not an indictment for a felony but for a misde-

meanour, and that seems to confirm the view I expressed that section 9 meant to limit this power of deviating from the general rule that a prisoner must obtain full notice of the crimes with which he is charged only where the prosecution is one for rape, or for one of the felonies referred to in section 4 of the Act.

The second point upon this section the complainer took was that the prosecutor had not followed the procedure figured by the section. What the section contemplates is that the accused is to be acquitted of the common law charge, and that thereafter the jury may convict of an offence under one of the sections. But according to the record before us there was no charge upon which they could convict, because before they were asked by the prosecutor to return a verdict under the Act of 1885, he had withdrawn from them altogether the charge as laid at common law. Accordingly it seems to me that on the second point also the complainer's argument is well founded.

The other matter to which we were referred—and on which I agree with your Lordship that the complainer should also succeed—is on the verdict the jury were asked to return under the Statute of 1885. One finds from the record of the proceedings that the prosecutor asked them to return a verdict of a contravention of section 5 of the Act of 1885, and it is recorded that they unanimously did so, and accordingly the accused was found by the jury to have contravened section 5 of the Act of 1885. Now, as has been pointed out, that section consists of two sub-sections, and each sub-section deals with a different offence. It is a fundamental rule that a man whose liberty is at stake should know both what he is being tried for and for what he is being convicted, and it seems to me that as the accused was given no definite information on either of these points he is entitled to succeed on this ground also.

Therefore on the whole matter I agree with your Lordships.

The Court passed the bill of suspension, and quashed the conviction and sentence complained of.

Counsel for the Complainer—Garson.  
 Agent—W. A. Farquharson, S.S.C.

Counsel for the Crown—Mitchell, A.-D.  
 Agent—Sir W. S. Haldane, W.S., Crown Agent.

## COURT OF SESSION.

Tuesday, March 3.

### FIRST DIVISION.

[Lord Cullen, Ordinary.

#### INLAND REVENUE v. MONTGOMERY'S TRUSTEES.

*Revenue—Estate Duty—Succession Duty—Exemption—Finance Act 1894 (57 and 58 Vict. cap. 30), sec. 2 (i) (b)—Finance Act 1896 (59 and 60 Vict. cap. 28), sec. 15 (i)—Succession Duty Act 1853 (16 and 17 Vict. cap. 51), sec. 2.*

By an antenuptial contract of marriage a trust fund was created for payment of the annual revenue thereof to the husband during his life, and thereafter to the wife in the event of her surviving him. The marriage having been dissolved by the divorce of the husband the life interest passed to the wife. The wife died survived by the husband, whereupon the life interest in favour of the husband revived. The Commissioners of Inland Revenue claimed estate duty on the trust fund as "property passing on the death of the deceased" within the meaning of the Finance Act 1894, section 2 (i) (b), and it was admitted that a claim for succession duty under the Succession Duty Act 1853, section 2, would be exigible if that for estate duty were upheld. The trustees under the antenuptial marriage contract, however, maintained that the forfeiture by his divorce of the husband's life interest in the trust fund for the benefit of the wife was a "disposition," and so fell within the exemption granted by the Finance Act 1896, section 15 (i). *Held* (Lord Johnston *diss.*) that the forfeiture by the husband on the divorce was not a "disposition," and accordingly that the claim of the Inland Revenue was well founded.

The Finance Act 1894 (57 and 58 Vict. cap. 30), which by section 1 grants a duty called "Estate Duty" on property "which passes" on the death of any person, in section 2 (i), enacts—"Property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . (b) property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cessor of such interest."

The Finance Act 1896 (59 and 60 Vict. cap. 28), section 15 (i), enacts—"Where, by a disposition of any property, an interest is conferred on any person other than the disponent for the life of such person or determinable on his death, and such person enters into possession of the interest and thenceforward retains possession thereof to the entire exclusion of the disponent or of any benefit to him by contract or otherwise, and the only benefit which the disponent retains in the said property is subject