INDIAN LEG. COUNCIL DEBATES

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1861

the Council divided upon it as follows :—

Ayes 2.	*Noes* 6.
Sir Charles Jackson.	Mr. Seton-Karr.
The Chairman.	Mr. Erskine.
	Mr. Forbes.
	Mr. Harington.
	Sir Robert Napier.
	Sir Bartle Frere.

So the Motion was lost.

The consideration of the Bill was then postponed, and the Council resumed its sitting.

HOUSE OF CORRECTION (CALCUTTA).

MR. SETON-KARR moved that the Bill "for the better enforcement of discipline in the House of Correction at Calcutta" be referred to a Select Committee consisting of the Vice-President, Sir Charles Jackson, and the Mover, with an instruction to submit a preliminary Report under the 62nd Standing Order.

Agreed to.

The Council adjourned.

Saturday, August 3, 1861.

PRESENT :

The Hon'ble the Chief Justice, *Vice-President*, in the Chair.

Hon'ble Sir H. B. E. Frere,	C. J. Erskine, Esq.,
Hon'ble Major-General Sir R. Napier,	Hon'ble Sir C. R. M. Jackson, and
H. B. Harington, Esq.,	W. S. Seton-Karr, Esq.
H. Forbes, Esq.,	

INCOME TAX.

THE VICE-PRESIDENT read a Message, informing the Legislative Council that the Governor-General had assented to the Bill "for limiting in certain cases for the year commencing from the 31st day of July 1861, the amount of assessment to the Duties chargeable under Act XXXII of 1860 (for imposing Duties on Profits arising from Property, Professions, Trades, and Offices), and Act XXXIX of 1860 (to amend Act XXXII of 1860)."

LIMITATION OF SUITS.

THE CLERK presented to the Council a Petition from the Calcutta Trades' Association, praying for an amendment of Act XIV of 1859 (to provide for the limitation of suits.)

Also a similar Petition from Bankers, Merchants, and Traders, carrying on business in Benares in the North-Western Provinces.

THE VICE-PRESIDENT moved that the above Petitions be printed.

Agreed to.

THE VICE-PRESIDENT also gave notice that he would, on Saturday next, move the first reading of a Bill to amend the above Act.

SALTPETRE.

THE CLERK reported to the Council that he had received a communication from the Government of the North-Western Provinces, relative to the necessity of confining the eduction and purification of Salt to Saltpetre Refineries absolutely.

MR. HARINGTON moved that the communication be printed and referred to the Select Committee on the Bill "to regulate the manufacture of Saltpetre and of Salt educed therefrom."

Agreed to.

EXECUTION OF MOFUSSIL PROCESS (STRAITS' SETTLEMENTS).

MR. FORBES presented the Report of the Select Committee on the Bill "to extend to the Straits' Settlement Act XXIII of 1840 (for executing within the local limits of the jurisdiction of Her Majesty's Courts legal process issued by authorities in the Mofussil)."

PARSEES.

SIR BARTLE FRERE presented the Report of the Select Committee on the Petition from the Parsees of Bombay, with the Draft of a Code of laws adapted to the Parsee community.

REGISTRATION OF NIJ-JOTE AND KHAMAR LANDS, &c.

The Order of the Day being read for the first reading of a Bill for the registration of Nij-jote and Khamar Lands, as well as of Ryotty tenures, involving the immediate possession of the soil for the purposes of cultivation, or for other purposes—

MR. SETON-KARR rose and said—Sir, in moving the first reading of this Bill, I have no intention of promoting any animated discussion on that much vexed question, "the ownership of the soil." I have always thought that there was much truth in a remark made by the able author of "Modern India," to the effect that many rights, seemingly incompatible, could co-exist in one and the same property. I believe that, however undefined and inconsistent with each other such rights may appear on a cursory investigation, yet to one who will take the trouble to enquire patiently into the subject, they come out clear of entanglement, not inconsistent with each other, and capable of well defined and distinct identification. I shall not touch therefore on the subject of ownership, except so far as is absolutely necessary to illustrate the scope and object of this Bill. Honorable Members must be aware that whatever be the character of the superior tenure, certain inferior rights are valuable and are prized, because they place their possessor in direct connection with the soil. Such connection is obtained by Zemindars either by their holding Nij-jote or Khamar lands, which correspond, on the whole, with our Home Farms in England; or by lapsed ryotty tenures which, under the statute and the common law of the country, revert to the Zemindar whenever ryots die or abscond; or by their leasing or purchasing similar tenures from the ryots themselves. It is also a fact beyond dispute that Zemindars are in the habit of purchasing such inferior tenures when put up for sale even within their own Zemindaries, in order to the cancelment of the lower tenure; and it is equally certain that Zemindars, even the most powerful and influential in the whole country, are accustomed to purchase the holdings of ryots within the estates of other persons, sometimes for the attainment of their own legitimate ends, sometimes for purposes of annoyance and retaliation. In such cases the Zemindar, whatever be his means or influence, assumes literally the status of a ryot, and is subject to the same conditions as a ryot with regard to measurement of the land, and to the enhancement and payment of rents. I have known a case within the last year where Europeans, amongst the most powerful landholders in Bengal, have been found, on the expiry of the lease of the superior tenure which they held from natives, to be in possession of some score of ryots' holdings, which were not terminated with the expiry of the above lease. Not that I mean, in saying this, to impute the slightest blame. They did nothing but what is ratified by universal custom, and is hourly practised by Natives and Europeans all over the country, without being opposed to the statute law. On the other hand, some questions do constantly arise regarding the power of the ryot to alienate or transfer such tenures without the consent of the Zemindar, and such questions must be decided on the facts with reference to their merits in each particular case; but on the other hand, many of such ryots' holdings are transferable, and are transferred, have a marketable value, and are constantly put up to sale and execution on decrees. These, then, are the kind of tenures to which I would draw attention, as conferring on their possessor the dominion of the soil. What then is the difficulty which has arisen concerning them? Why, in the autumn of last year, consequent on the unhappy dissensions between Planters and ryots, disputes arose which took the form, not of Planters maintaining that ryots under contract were bound to sow certain lands with Indigo, but that certain lands belonged to the factory, and were to be cultivated by factory servants or by hired labor. On the other hand, the Ryots contended that the said lands were their own holdings, and were never leased to or held by

the factory at all. Now, on these lands the Planters carried on a cultivation well known as Nijabad, which was a very legitimate field for mercantile enterprise, and against which not a single complaint had ever been made. On this there were numerous claims to possession which involved the adjudication of several intricate questions, both of fact and of law. However summary might be the procedure under Act IV of 1840, something more summary still was seen to be required. There were documents to be produced and witnesses to be summoned: the number of cases were considerable; and though extra officials and Appellate Courts were appointed to decide such cases, the critical time for sowing had passed away before adjudication could be made to one party or another. Moreover, the eventual issue of these pending cases was, in many instances, in favor of the Planter. This being the case, the Lieutenant-Governor had thought it desirable that some plan should be introduced to meet the difficulty, and this is the object of the present Bill. I have explained the nature of tenures. I have stated the difficulties regarding them, and I now come to the remedy which it is proposed to apply. The object of the law will be to settle objections in regard to possession before the sowing season passes away; to enable the police to interfere summarily and maintain the holder of such lands in possession; and to secure lawful holders against unjust and frivolous claims. With this view we propose to allow Collectors, and Sub-Divisional Officers having the powers of a Collector, to receive Petitions on eight annas Stamp Paper for the registry of all tenures which involve the dominion or the possession of the soil. The Petition must state the area and the boundaries of the land to be registered, as well as the village in which the tenure is situated. On this the Collector will issue a notice at the village in question, and also at the Thannah or local Police Station, calling on any objectors to prefer their objections within fourteen days; if no one appears, the certificate will be granted. If any objector appear within the time stipulated, the Collector or other Officer shall hold a summary enquiry. If the objection seems captious, or vexatious, the registry will be allowed. If, on the other hand, it is shown that the title and the mere right to alienate, or any share in the holding, is in dispute, the Collector will refuse to register, and will refer the parties to the Civil Court. The certificate, when granted, should contain the same particulars as the Petition, namely, the area and boundaries, the position of the land in the village, and the name of the person from whom it is derived. A registry book would be maintained in each office, and a registration fee of not more than two Rupees would be demanded in each case. Then we propose to empower the Police, on the production of any such certificate, to maintain the person producing it *in possession* against all the world. It is not proposed by this enactment to alter any title, or to confer any title. It is merely intended to enable the Planters, European or Native, not to lose the critical moment for sowing. I am fully prepared to hear objections started against this Bill; and it will be said, no doubt, that there are already two modes of registration in force, namely, the law for the Registration of Deeds and Act XI of 1859. But the Registration of Deeds regards titles only, and even here no enquiry is made, as to the title, still less as to the party in possession. As to Act XI of 1859, Section 43 provides that—

"Leases of lands of the description specified in the fourth exceptional class in Section 37 may be registered at the option of the holders in the manner and under the rules hereinbefore provided for the registry of Talookdarry and other similar tenures."

Now, Sir, what are the lands of the exceptional class alluded to? They are those mentioned in the fourth Clause of Section 37, namely,

"Leases of lands whereon dwelling-houses, manufactories, and other permanent buildings have been erected, or whereon gardens, plantations, tanks, wells, canals, places of worship, or burning or burying grounds have been made, or wherein mines have been sunk."

But the Registration under this Act is merely intended for security of title. It guards the under-tenure from extinction when the superior tenure is put up for sale for arrears of revenue; but it guarantees no sort of possession to any one, nor does it afford the means of settling disputes as to possession between eventual rival claimants. The registration of a lease to A. is no evidence for or against B, who may claim, at a future time, to be in possession of the tenure. Nor is it of any use in determining subsequent transfers. Indeed, it is of no use to determine the rights of rival claimants, even at the very time when the registration is made. It is, in short, a registration of *things*, and, what is wanted, is a registration of *persons* in possession. Again, it will be said that this Bill will increase litigation and promote collusion between one Zemindar and a Ryot to the prejudice of another Zemindar under whom the Ryot holds: but I maintain that, so far from secretly tripping up the Zemindar, it will afford him additional security; transfers of tenures, whether transferable or not by the common law of the country, are of daily occurrence, and this enactment will have the effect of giving notice to the Zemindar's local agents; will excite their vigilance, and place them on their guard. In fact, there will really be less chance of collusion with this law than without it. Again, I have been told that this law will be a dead letter, but, considering how little we really know of the tendency of natives or Europeans to avail themselves of any such facilities, I do not see how we can pronounce on the failure of an experiment until the experiment has been tried and failed.

I have also been told, as the Council will see in the papers which I shall append to this Bill, that the present law is amply sufficient; but I maintain that the experience of the past year has fully proved that it is not sufficient at all; and in a case like this, one series of facts, one solid obstruction, one good, honest, stubborn difficulty is worth all the theories and speculative arguments in the world.

Other persons, besides the Planters may find this enactment advantageous and it may be resorted to by native Zemindars and by Europeans for the cultivation of Cotton.

Lastly, Sir, I may be reminded that I am legislating for a class; but I would observe that one-half our legislation, and some of the best laws in our statute books, have sprung from hardships inflicted on, and difficulties experienced by, particular classes in society or even individuals. I need only instance the enactment of the law embracing *putnee* tenures, or Regulation VIII of 1819, which is due to the late Mr. Butterworth Bayley, and that Act which is now of general adaptation throughout a large part of lower Bengal, may be said to have originated, at the commencement of this century, by the act of a single individual, the Maharajah of Burdwan. When then serious difficulties have been experienced during the past season, when hardships have been found to be beyond the pale of the existing laws, when there is a state of things which tends to increase disputes, to perpetuate excitement, and to entail pecuniary loss on an important section of the community, I think that it is the duty of the Government and the Legislature to interpose and to endeavor to remedy such a state of things by enactments which, like the present, purpose to provide a cheap, practical, and easy remedy for a want that is admitted, for a difficulty that has been felt, and which no one can contend is really inconsistent with either sound policy or good faith.

The Bill was read a first time.

CRIMINAL PROCEDURE.

The Order of the Day being read for the adjourned Committee of the whole Council on the Bill "for simplifying the Procedure of the Courts of Criminal Judicature not established by Royal Charter," the Council resolved itself into a Committee for the further consideration of the Bill.

The consideration of Section 337, and the following Sections of Chapter XXV relating to appeals, was post-

poned (on the Motion of Mr. Seton-Karr) till after the consideration of the new miscellaneous Chapters proposed by Mr. Harington.

MR. HARINGTON said that on Saturday last he had undertaken to revise the Chapter relating to local nuisances, which he had done, and he trusted that the Sections which he was now about to propose for adoption in lieu of the Chapter, as it was first framed, would be found to be in accordance with the views of the Committee. The Chapter was as follows:—

"CHAPTER XIX*a*.

Of Local Nuisances.

1. Whenever the Magistrate of a District or of a division of a District may consider that any unlawful obstruction or nuisance should be removed from any thoroughfare or public place, or that any trade or occupation, by reason of its being injurious to the health or comfort of the community, should be suppressed or should be removed to a different place, or that the construction of any building or the disposal of any combustible substance, as likely to occasion conflagration, should be prevented, or that any building is in such a state of weakness that it is likely to fall and thereby cause injury to persons passing by, and that its removal in consequence is necessary, or that any tank or well adjacent to any public thoroughfare should be fenced in such a manner as to prevent danger arising to the public, he may issue an order to the person causing such obstruction or nuisance, or carrying on such trade or occupation, or being the owner or in possession of or having control over such building, substance, tank, or well as aforesaid, calling on such person within a time to be fixed in the order to remove such obstruction or nuisance, or to suppress or remove such trade or occupation, or to stop the construction of, or to remove such building, or to alter the disposal of such substance, or to fence such tank or well, (as the case may be), or to appear before such Magistrate within the time mentioned in the order, and show cause why such order should not be enforced.

2. Such order shall, if practicable, be served personally on the person to whom it is issued; but if personal service is found to be not practicable, the order shall be notified by proclamation, and a written notice thereof shall be set up at such place or places as may be best adapted for conveying the information to such person.

3. The person to whom such order is issued, shall be bound within the time specified in the order to obey the same, or to appear before the Magistrate, to show cause as aforesaid, or he may apply to the Magistrate by Petition for an order for a Jury to be appointed to try whether the order is reasonable and proper. On receiving such Petition, the Magistrate shall forthwith appoint a Jury, which shall consist of not less than five persons, whereof the President and one-half of the Members shall be nominated by such Magistrate, and the remaining Members by the party petitioning. The Magistrate shall suspend the execution of the order pending such enquiry, and be guided by the decision of the Jury, which shall be according to the opinion of the majority. If the Petitioner shall by neglect or in any other way prevent the appointment of a Jury, or, if from any cause, the Jury so appointed shall not decide and report within a reasonable time to be fixed in the order for their appointment, their functions shall cease from the date of the expiration of such period, unless they be continued by special order of the Magistrate, and if from any of the above causes no decision be made by the Jury, the order of the Magistrate shall be carried into effect as hereinafter provided.

4. If the person to whom the order mentioned in Section 1 is issued shall not obey such order, or show cause against the same as hereininafter provided, or petition for a Jury within the time specified in such order, he shall be liable to the penalty prescribed in that behalf in Section 188 of the Indian Penal Code, and the Magistrate who issued such order may proceed to carry such order into execution at the expense of such person, and may realize such expenses either by the sale of any building, goods, or other property removed by his order or by the distress and sale of the personal property of the person aforesaid, and no suit or action shall be entertained in any Court in respect of any thing necessarily or reasonably done to give effect to such order.

5. If, in a case referred to a Jury, the Jury shall find that the order of the Magistrate is reasonable and proper, the Magistrate shall give notice thereof to the person to whom the order was issued, and shall add to such notice an order to obey the order first mentioned within a time to be fixed therein under the penalty provided by the Indian Penal Code as aforesaid. If such latter order shall not be obeyed, the Magistrate may proceed as in the last preceding Section.

6. If the person to whom the order of the Magistrate is issued shall appear and show cause against the same, and shall satisfy the Magistrate that the order is not reasonable and proper, no further proceedings shall be taken in the case.

7. If, pending the enquiry by a Jury, the Magistrate shall consider that immediate measures are necessary to be taken to prevent imminent danger or injury of a serious kind to the public, it shall be lawful for such Magistrate to issue such an injunction and order to the person mentioned in that behalf in Section 1 as shall be required to obviate or prevent such danger or injury, and in default of such person forthwith taking all necessary measures ordered to be taken by such injunction or order, the Magistrate may himself use or cause to be used such means as may be necessary to obviate such danger or to prevent such injury, and no suit or action shall be entertained in respect of any thing necessarily or reasonably done for that purpose.

8. Nothing in this Chapter shall interfere with the provision of Section XXXIV of Act V of 1861 (for the regulation of Police.)"

The Chapter was passed after the insertion of the following words before the words "Section XXXIV" in Section 8, on the Motion of Mr. Forbes :—

"Section XLVIII of Act XXIV of 1859 (for the better regulation of the Police within the Territories subject to the Presidency of Fort St. George) or of"

MR. HARINGTON said that, in moving the introduction of the following as a separate Chapter after the Chapter relating to Local Nuisances which had just been adopted, he deemed it sufficient to remark that the Chapter would merely extend to the Mofussil what was already the law in the Presidency Towns under the Act passed last year :—

"CHAPTER XIX*b*.

Of the maintenance of Wives and Children.

1. If any person, having sufficient means neglects or refuses to maintain his wife or any legitimate or illegitimate child unable to maintain himself, it shall be lawful for the Magistrate of the District or other Officer exercising the powers of a Magistrate, upon due proof thereof, to order such person to make a monthly allowance for the maintenance of his wife or such child at such monthly rate, not exceeding fifty Rupees in the whole, as to the Magistrate or other Officer as aforesaid shall seem reasonable; and if such person shall wilfully neglect to comply with the order, the Magistrate or other Officer as aforesaid may, by warrant, direct the amount due to be levied in the manner provided for levying fines; or may order such person to be imprisoned, with or without hard labor, for any term not exceeding one month. Provided that if such person offer to maintain his wife on condition of her living with him, and his wife shall refuse to live with him, it shall be lawful for the Magistrate or other Officer as aforesaid to consider any grounds of refusal stated by such wife; and he may make the order allowed by this Section notwithstanding such offer, if he shall be satisfied that such person is living in adultery, or that he has habitually treated his wife with cruelty. No wife shall be entitled to receive an allowance from her husband under this Section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband.

2. Any person ordered to pay a monthly allowance for the maintenance of his wife or child, or both, under the provisions of the last preceding Section, may apply to the Magistrate, from time to time, for the reduction of such allowance on proof of an alteration in the circumstances of himself, his wife, or child justifying such reduction."

The Chapter was passed after the insertion of the words "for every breach of the order" after the words "the Magistrate or other Officer as aforesaid may" and before the words "by warrant" in Section 1, on the Motion of Sir Charles Jackson.

MR. HARINGTON moved that the following be added to the Bill as a new Chapter, to follow the two Chapters which had just been ordered to be inserted :—

"CHAPTER XIX*c*.

Of Disputes relating to the possession of land, or the right of use of any land or water.

1. Whenever the Magistrate of the District or other Officer exercising the powers of a Magistrate shall be satisfied that a dispute, likely to induce a breach of the peace, exists concerning any land, premises, water, fisheries, crops, or other produce of land, within the limits of his jurisdiction, he shall record a proceeding, stating the grounds of his being so satisfied, and shall call on all parties concerned in such dispute to attend his Court in person, or by agent, within a time to be fixed by the Magistrate or other Officer as aforesaid, and to give in a written statement of their respective claims, as respects the fact of actual possession of the subject of dispute. The Magistrate or other Officer as aforesaid shall, without reference to the merits of the claims of any party to a right of possession, proceed to inquire which party is in possession of the subject of dispute, and after satisfying himself upon that point, shall record a proceeding, declaring the party whom he may decide to be in such possession to be entitled to retain possession, until ousted by due course of law, and forbidding all disturbance of possession until such time.

2. If the Magistrate or other Officer as aforesaid shall decide that neither of the parties is in possession, or shall be unable to satisfy himself as to which person is in possession of the subject of dispute, he may attach the subject of dispute until a competent Civil Court shall have determined the rights of the parties, or who ought to be in possession.

3. If a dispute arise concerning the right of use of any land or water, the Magistrate or other Officer as aforesaid within whose jurisdiction the subject of dispute lies, may enquire into the matter, and if it shall appear to him that the subject of dispute was open to the use of the public, or of any person, or of any class of persons, the Magistrate or other Officer may

order that possession thereof shall not be taken or retained by any party to the exclusion of the public, or of such person, or of such class of persons, as the case may be, until the party claiming such possession shall obtain the decision of a competent Civil Court adjudging him to be entitled to such exclusive possession. Provided that the Magistrate or other Officer as aforesaid shall not pass any such order if the matter be such that the right of use is capable of being exercised at all times of the year, unless that right shall have been ordinarily exercised within three months from the date of the institution of the enquiry, or in cases where the right of use exists at particular seasons, unless such right has been exercised during the last of such seasons before the complaint.

He said he had some hesitation in moving these Sections, because he contemplated the omission of an important Section of the law from which the Sections were taken. That law was Act IV of 1840, and his difficulties had been greatly increased by the praise which had been bestowed on the Section proposed to be omitted, by the Honorable Member for Bengal in the speech with which he had prefaced his motion for the first reading of a Bill introduced by the Honorable Member that day. Notwithstanding what had fallen from the Honorable Member for Bengal, he (Mr. Harington) still thought that Section IV Act IV of 1840 gave a jurisdiction to the Criminal Courts which more properly belonged to the Civil Courts, and that the Criminal Courts should no longer be allowed to possess that jurisdiction. In Madras and Bombay the Magistrates had no such power as was given by the Section in question to the Bengal Magistrates, and he had no reason to believe that the want of such a power was felt by the Magistrates in the other two Presidencies. He thought that in this respect the Bombay Regulations proceeded on the correct principle, namely, that the interference of the Magistrates in respect to disputes relating to land should be restricted to the maintenance of the public peace, which was the duty of every Magistrate. The Bombay law said—

"When a breach of the peace is anticipated in any act calculated to lead thereto, such as the forcible possession of disputed property, the Magistrate may take recognizances or security if necessary."

But the law went on to say—

"The interference of the Magistrate in such cases shall, by no means, affect or confer any proprietary title or ulterior right, it being intended, when such may be disputed, only to preserve the peace until decision and enforcement by the Civil Court."

This was quite proper, and the jurisdiction given was strictly within the province of the Magistrate. He might further observe that whatever reason had existed up to the present time for retaining Section IV Act IV of 1840 as a part of the Criminal Regulations of Bengal, had been removed by the enactment of Section XV Act XIV of 1859, which would come into operation at the same time as the present Bill. That Section said—

"If any person shall, without his consent, have been dispossessed of any immoveable property otherwise than by due course of law, such person or any person claiming through him shall, in a suit brought to recover possession of such property, be entitled to recover possession thereof, notwithstanding any other title that may be set up in such suit, provided that the suit be commenced within six months from the time of such dispossession."

In moving the introduction of this Section in Act XIV of 1859, the Honorable and learned Vice-President observed that the Section would transfer to the Civil Court cases of the description which, under Act IV of 1840, were now heard by the Magistrate. They could not require both laws, and the proper course seemed to be to take away the jurisdiction in such cases from the Criminal Courts and to confine it to the Civil Courts, which was what he proposed to do. The remaining Sections of the proposed new Chapter had been taken almost word for word from the existing law, and they did not appear to call for any particular remark from him.

Section I being proposed by the Chairman—

MR. SETON-KARR said that he should not have objected to the introduction of this amendment had it embodied the whole of Act IV of 1840.

Nor would he have objected had the Honorable Member entirely left out that law. But he objected to the introduction of the Act of 1840 in this mutilated fashion. An important Section (No IV) of the old law had been omitted entirely. That Section allowed any party to complain to a Magistrate, that he had been forcibly dispossessed of any land, premises, water, fisheries, crops, or produce, &c., such party being a proprietor, dependant talookdar, farmer, under-farmer, ryot, or other. The complaint was to be laid within one month. This Section was as valuable as any other part of the excellent law of 1840, and ought not to be omitted, especially in the present circumstances of the country. A great deal of praise and a great deal of abuse, he would observe, had been lavished on this useful enactment, but, he believed that one-half of the mistakes which had been committed in cases adjudicated under it, had been committed, not from ignorance of the language, nor from inexperience in revenue law, or in land tenures, but from young and inexperienced officers shifting the burden of proof to the wrong party. This same mistake as to the proper party to prove any fact was the cause of nine-tenths of the blunders that were made in Mofussil Courts, and no law could be framed which would not perhaps give occasion to them. However, he was of opinion, that if the law of 1840 were repealed, it should be repealed after inquiry from the local Governments, who might call on the Executive Officers for opinions, or it should be repealed under any regular proposal for that end, which might now be under the consideration of the Council. It should not be partly repealed at the close of such a Bill as that of the Criminal Procedure which the Council were considering. He was aware that it had been said that Act IV of 1840 was rendened superfluous, if not actually repealed by Act XIV of 1859, the Act for the Limitation of Suits. But on looking to that Act, he found that the existence of Act IV of 1840 was distctly recognized by Clause 7 of Secon 3 of the Act of 1859, and was not yet repealed. With these views he should deprecate any encroachment on Act IV of 1840. It had been successively worked by a large number of officers. It would occupy a long time to enumerate the disputes it had terminated, and the broken heads it had saved. It was familiar as a household word to hundreds of ryots. It was of great simplicity and strength; of admirable versatility; and of peculiar adaptation to the diversified claims which were likely to be preferred to landed interests and rights in this country, which claims it was necessary that those who were responsible for the peace and security of the country, should have the means promptly and efficiently to decide.

MR. HARINGTON said, the Honorable Member for Bengal considered it scarcely fair that he (Mr. Harington) should have proposed at this late period a motion for the first time to repeal a most important law. But he (Mr. Harington) did not think his motion was open to any charge of unfairness. That motion did not propose to repeal a single Act or Regulation. No doubt, it was intended, as soon as this Bill passed into law, to follow it up with a repealing Bill, and in that Bill he should certainly propose to include the whole of Act IV of 1840. But the Bill would be published for the usual time, and the local Governments and the officers subordinate to them would have ample opportunity of stating to the Council any objections that they might have to any part of the Bill, or to the inclusion therein of any laws with a view to their repeal, which it might be considered desirable to retain. He must also remind the Committee that legislation in respect to Act IV of 1840 was not now proposed for the first time. A Bill for the repeal and amendment of that Act had actually been before the Bill almost from the time the Council was first constituted, and was still pending. The Honorable Member for Bengal having only lately joined the Council, was probably not aware of this fact. Amongst the annexures of the Bill was a report from the Commis-

sioner of the Benares Division, who declared that Act IV of 1840 caused more litigation and reversal of orders than any other law. He went on to say,—

"this class of cases was transferred to the Magistrates on account of the delay in the Civil Courts. Now that civil suits are decided almost as fast as Act IV of 1840 cases, there seems no reason for burdening the Magistrates any longer with any of these cases, except those involving actual violence and breach of the peace punishable as assault."

He (Mr. Harington) entirely concurred in these remarks. He had had a very long and large experience of the working of Act IV of 1840, and he must say he knew no law which had been more perverted from its proper purpose, or in the administration of which the intention of the Legislature had been more grossly departed from. Instead of being restricted in its application, as the law intended, cases without number had been instituted under it, in which the Magistrate had no jurisdiction, and which should have gone to the Civil Courts. He could mention numerous instances. He recollected one case in which a party went round to the ryots of an estate, and warned them, with certain threats as to the consequences if they neglected the warning, against paying their rents any longer to a particular person to whom they had been in the habit of paying them. This was declared to be a forcible dispossession within the meaning of Act IV of 1840, and on complaint lodged, the Magistrate entered into a long investigation. The Magistrates often became in such cases Civil Courts of first instance, quite contrary to the intentions of the law, and much injustice was done in consequence. He had little doubt that if the cases referred to by the Honorable Member for Bengal, as having been decided under Section IV Act IV of 1840, were examined, it would be found that very many of them did not properly fall under that Section, and that they ought to have gone either to the Collector or to the Civil Court. With Section XV Act XIV of 1859 before them, he could see no sufficient reason for their retaining Section IV Act IV of 1840 any longer, and he thought it was rightly omitted from the Chapter now proposed for their adoption.

THE CHAIRMAN said, Act IV of 1840 extended to two subjects, namely, first, retaining a man in possession and preventing a breach of the peace; and, secondly, under Section IV, putting again in possession a man who had been turned out of possession. He thought that the duty of the Magistrate was to prevent a breach of the peace; and if the Magistrate apprehended that a breach of the peace was likely to ensue, he might, in order to prevent such breach, declare who was in actual possession, and, having done so, retain that party in possession until a competent Court decided on the question of the right to possession. That, he (the Chairman) thought, was all that a Magistrate ought to do. If a person should be wrongfully turned out of possession by another party, then, under Section XV of Act XIV of 1859, he might go immediately to a Civil Court, and the Civil Court, without trying the question of right, would restore him to possession until the other party chose to assert his right by instituting a suit to establish his title to the property in dispute and to recover possession thereof.

SIR BARTLE FRERE asked how the Section ran?

THE CHAIRMAN read the Section (already quoted in full in Mr. Harington's speech). You did not want two different proceedings. If the case was to go to a Court of law, you did not want the Magistrate to put the ousted party into possession. The Bombay law was somewhat similar to the Section of Act XIV of 1859 to which he had referred; the only difference being that, instead of going to the Civil Court, the ousted party was required to go to the Collector. The Bombay law was contained in Clause 2 Section 1 of Act XVI of 1838 which enacted as follows:—

"Provided, nevertheless, that it shall be lawful for the Revenue Courts to give immediate

possession of all lands, premises, trees, crops, fisheries, and of all profits arising from the same, to any party dispossessed of the same, or of the profits thereof, provided application be made to them by such party within six months from the date of such dispossession. And, in order to the due execution of such power, it shall be lawful for the Revenue Courts to determine the facts of such possession and dispossession, and the party to whom the Revenue Courts shall so give immediate possession, shall continue in possession, until ejected by a decree of a Court of Adawlut."

It was not now proposed to repeal Section IV of Act IV of 1840, or Clause 2 Section I of Act XVI of 1838. Before either of those provisions was repealed, it would be necessary to prepare a Bill for the repeal of all the laws which might have become unnecessary by the passing of the Penal Code and of the Code of Criminal Procedure. It had been proposed to prepare a repealing Bill after the passing of the Penal Code. But it was found that many laws related both to the substantive penal law and to Procedure, so that it would be very difficult to separate them. It was therefore arranged, when the Code of Criminal Procedure was passed, to bring in a Bill for the repeal of the several laws which might have been superseded by the Penal Code and the Code of Criminal Procedure, and which were now scattered all over the Statute Books. It was not proposed now by the Clause before the Committee to give the Magistrate any greater powers than he now possessed, or to take away from him any powers now vested in him. This Clause only proposed to give the Magistrate a portion of the powers conferred by Act IV of 1840; and when that Act might be repealed, provision could be made in the repealing Bill, expressly keeping alive Section IV of the said Act if it should be found necessary to do so.

After some conversation, the Section was put, and the Council divided as follows :—

Ayes 6.	*Noes* 2.
Mr. Seton-Karr.	Sir Robert Napier.
Sir Charles Jackson.	Sir Bartle Frere.
Mr. Erskine.	
Mr. Forbes.	
Mr. Harington.	
The Chairman.	

So Section 1 was carried.

Sections 2 and 3 were passed as they stood.

MR. SETON-KARR said that there should be a limitation as to appeal in cases of disputed possession. As it had been decided that the question of possession should be determined by the Civil Courts, if suits for the purpose were brought within six months from the time of dispossession, he should be glad to see taken away the power of appeal from the decisions of those Courts; otherwise, if a man were allowed to appeal in such cases from the decisions of the Civil Courts, and also from orders passed in regular suits for the decision of the right or title, he would be entitled to institute six suits instead of one.

MR. HARINGTON said that he had no objection to the proposition not to allow an appeal from orders passed under the Chapter they were now considering. But the question, as to whether an appeal should be allowed in possessory suits falling under Section XV Act XIV of 1859, was one which could not properly be considered in connection with the Code of Criminal Procedure. That question belonged to the Civil Code.

THE CHAIRMAN said that, as regarded this Code, he proposed to move the addition of the following Clause to the Chapter just adopted :—

"Any order made by the Magistrate or other Officer as aforesaid under this Chapter shall be final."

As regarded appeals from decisions or orders regarding possession, however, he was quite willing to propose a finality Clause in the Bill which he intended to introduce next Saturday to amend the law of limitation; or if the Honorable Member for the North-Western Provinces had no objection, such a Clause might be inserted in the Bill brought in by that Honorable Member to amend the Code of Civil Procedure.

MR. HARINGTON said, he would undertake to introduce a Clause to the proposed effect into the Bill to amend the Code of Civil Procedure.

THE CHAIRMAN'S Section was then put and carried.

MR. FORBES proposed to move the addition of the following Section to the same Chapter :—

"Nothing in the foregoing Sections of this Chapter shall affect the provisions of Regulation V. 1822 of the Madras Code."

He said that he did not want to shut out Madras from the benefit of this Chapter. But, owing to the ryotwarry system prevailing in Madras, whereby the revenue was collected direct by the Collector from the ryots, it was necessary to introduce a Clause to the effect proposed by him. The subject of dispute might be an irrigating channel watering 10,000 acres of land, and would be satisfactorily settled by the Collector or other Revenue Officer ; whereas, if the channel were to be attached until the right of the parties were determined by a competent Court as provided for in the second of the Sections now under discussion, the whole land might be thrown out of cultivation pending the decision, and the revenue of the State would materially suffer.

MR. ERSKINE said, that the only doubt he entertained with regard to the proposed Section was, that if one law were expressly kept alive, the natural inference would be that the others which were not so kept alive had been repealed.

The Section was ultimately passed as follows :—

"Nothing in this Chapter shall affect the powers of a Collector, or of a person exercising the powers of a Collector, or of a Revenue Court."

The consideration of the Chapter relating to appeals was then resumed.

Section 337 provided as follows :—

"Unless otherwise provided by any law for the time being in force, *an appeal shall lie from any order in a judicial proceeding other than a criminal trial.* If the order was passed by an Officer not vested with the powers of a Magistrate, the appeal shall lie to the Magistrate of the District or other Officer exercising the powers of a Magistrate, and empowered by the Government to hear such appeals. If the order was passed by the Magistrate of the District or other Officer exercising the powers of a Magistrate, the appeal shall lie to the Court of Session. An appeal on any point of law shall also lie in any such case to the Sudder Court from any order made in appeal by any Court subordinate to such Sudder Court.

MR. SETON-KARR moved the omission of the words in italics, and the substitution of the following :—

"one appeal and no more shall lie from every order in a judicial proceeding other than a criminal trial, or from every order requiring the personal attendance of parties accused of offences before any Court."

In moving this amendment, he said, he was anxious to set a limit to appeals in miscellaneous cases other than criminal trials, but the main object of the Section was to set at rest a question which had always excited considerable discussion and excitement in the Mofussil Courts. As a general rule, every man was bound to show obedience to the established tribunals ; and to assist in the administration of justice was derogatory to no one. Every man was consequently bound to appear to answer to a charge. But there were often cases instituted from a spirit of vindictiveness and apparently of great enormity which, on examination, sunk into nothing. Such cases were merely intended to bring rich and influential men bodily into Court, and when they had so appeared in person, malice was satisfied. On the other hand, rich and powerful Zemindars were often, and not unjustly, accused of offences very distinct from robbery or felony, of offences which conveyed no social degradation whatever, and which, on examination, proved to be well founded. Such were the offences of kidnapping and illegally confining innocent persons. In such cases it was most essential that a man should appear in person : yet the practice had been for an appeal to be allowed from the Magistrate to the Sessions Court, and if the Sessions Court confirmed the order of the Magistrate, then an appeal had often been preferred to the Sudder Court, and cases had come to his knowledge in which a full bench had

sat in order to determine whether a Zemindar, whom the local authorities had called on to appear in person, should or should not appear vicariously by his agent. One case in particular had lasted for three years, because, what he must term an injudicious interference had been exercised with the acts of the lowest authorities, and the recurrence of these proceedings weakened the hands of the executive and did not promote the administration of justice. Thus, on the one hand, against the exercise of this power was set up the haste and inexperience of the Magistrates and the necessity for some speedy redress; while on the other, it was expedient to strengthen or not to weaken the legitimate power of the Magistrate. He proposed to steer a middle course, and to allow one appeal and no more from all orders requiring personal attendance, and that to the Sessions Court. When the subject was last before the Council, the Honorable Member for Bombay suggested that the appeal should lie to the Commissioner, but he (Mr. Seton-Karr) thought that the Judge over one or two Districts was the person to whom the appeal should be preferred, rather than the Commissioner who had four or five Districts to look after, and who, like the Magistrate, might be prejudiced against powerful natives. The Judge would be able to inform himself of the circumstances in each case without bias or prejudice, and to him the appeal should lie.

MR. HARINGTON said, he thought there was much force in the arguments which had been made use of by the Honorable Member for Bengal to show that when an order was passed by a Magistrate refusing to permit a person, for whose attendance a summons had issued on complaint, to appear and answer by agent, some appeal should be allowed from the order; but if they were to take the case which had been cited by the Honorable Member for Bengal in support of his Motion, and base their legislation upon it, he very much doubted whether a single appeal, which was all that was proposed by the Honorable Member, would be found sufficient to secure the object aimed at. If they were to attempt to do justice in such cases by means of an appeal, he feared they must go farther than was contemplated in the motion of the Honorable Member, and continue the present practice, which allowed cases of this nature to be carried up to the Sudder Court by a second or special appeal. He understood the Honorable Member to say that the order of the Magistrate in the case mentioned by him was confirmed by the Sessions Judge, but that both the order of the Magistrate and the order of the Session Judge were reversed in appeal by the Sudder Court. The result therefore seemed to show that the Session Judge was as much in fault as the Magistrate. It appeared, however, to him that all that was necessary to be done in the way of precaution might be accomplished without giving an appeal as of right from the order of the Magistrate. What he would propose was that in cases in which a summons should ordinarily issue in the first instance, the summons should give the party named therein, the option of appearing either in person or by agent. Appearance by agent in such cases would thus be made the rule, though, of course, it would be right that the Magistrate should retain the power which he possessed under the Code, as it now stood, of substituting a warrant of arrest for a summons whenever he had reasonable ground to suspect that the party complained against intended to abscond. He would also make a slight addition to Section 353, and insert after the word "bail," in the third line, these words, namely, "or to appear by agent." If these alterations were made, he thought they would have done all that was required to prevent parties from being improperly made to appear in person in the Magistrate's Court instead of by agent, and that they might then safely dispense with an appeal as of right in cases such as those to which the amendment of the Honorable Member for Bengal was intended to apply.

MR. ERSKINE said, he was doubtful as to the very matter on which the

Honorable Member for Bengal seemed to lay the greatest stress; namely, the recognition of a right of appeal to the Sessions Judge from orders by the Magistrate requiring the personal attendance, in his Court, of persons accused of criminal offences. The Magistrate might, at his discretion, exempt an accused person from personal attendance under Sections 149 and 223; but if in any case a Magistrate felt that he could not rightly exercise the power of exemption which he thus possessed, he (Mr. Erskine) was not prepared to say that it would be either expedient or fair to the Magistrate that the Sessions Judge should be allowed to interpose authoritatively between that Officer and a criminal, by ordering the Magistrate not to require his attendance. Such a course seemed especially open to objection, since they had provided that an accused person might be questioned by the Magistrate, and that the record of his answer should be evidence. No authority should be enabled to prevent a Magistrate from getting at evidence connected with a criminal charge. He (Mr. Erskine) would therefore leave the entire discretion and throw the entire responsibility in these cases on the Magistrate personally, leaving it to his superiors to notice any gross indiscretions which he might commit.

THE CHAIRMAN said, there was another objection to the proposed amendment. Was it intended to allow an appeal from an order requiring the personal attendance of the accused in a non-bailable offence, a case of murder for instance? He did not think that an appeal should be allowed in such a case.

After some conversation, the following new Section was substituted, on the Motion of Mr. Harington, for Section 337, Mr. Harington at the same time undertaking to prepare before Saturday next, in communication with the Honorable Members for Madras, Bombay, and Bengal, a Section showing the cases in which an appeal should be allowed, but in which no provision for an appeal had as yet been made:—

"Unless otherwise provided by this Code, or by any law for the time being in force, no appeal shall lie from any order or sentence of a Criminal Court."

Section 338 was passed after a verbal amendment, (on the Motion of Mr. Erskine), and after the substitution of *sixty* for *ninety* days as the period within which Petitions of appeal to the Sudder Court must be presented (on the Motion of Sir Charles Jackson).

Section 339 was passed as it stood, after the addition of the following words to Section 357 :—

"or unless the Court shall for any special reason see fit to grant such copy free of expense."

Section 340 provided as follows :—

"It shall be competent to the Appellate Court to reject the appeal if, on a perusal of the petition of appeal and the copy of the sentence or order appealed against, there appears no sufficient ground for questioning the correctness of the decision, or for interfering with the sentence or order appealed against."

SIR CHARLES JACKSON moved the omission of the words "there appears," and the substitution of the words "and after hearing the appellant or his Counsel or Agent, if they appear, the Court shall consider that there is."

Agreed to.

THE CHAIRMAN moved the addition of the following words :—

"Before rejecting the appeal, the Court may call for and peruse any part of the proceedings of the Lower Court, but shall not be bound so to do."

The Motion was carried, and the Section as amended then passed.

Section 341 was passed as it stood.

Section 342 provided as follows :—

"The Appellate Court may call for the proceedings of the Lower Court, and may confirm, alter, or reverse the finding and sentence or order of such Court, but not so as to enhance any punishment that shall have been awarded."

The Section was amended as follows :—

"The Appellate Court, after perusing the proceedings of the Lower Court, and after hearing the appellant or his Counsel or Agent if they appear, may alter or reverse the finding," &c.

Section 343 was passed as it stood.

Section 344 was passed after a verbal amendment.

Section 345 was passed as it stood.

Section 346 was passed after the omission of the reference to Section 337, a blank being kept to be filled up afterwards.

Section 353 provided as follows:—

"The Court of Session may direct that any accused person shall be admitted to bail before a Magistrate, or that the bail required by a Magistrate be reduced ; and may also direct that a party not in custody be admitted to bail on his surrendering to a warrant."

MR. HARINGTON, with reference to what took place on the amendment proposed by the Honorable Member for Bengal in Section 337, asked leave to go back to Section 353, for the purpose of moving the omission of the words "accused person shall be admitted to bail" and the substitution of the words "person accused of a bailable offence shall be admitted to bail or permitted to appear by Agent." In doing so he said, he would content himself with remarking that although he was not anxious that an appeal should be given as of right from an order of a Magistrate refusing to allow a party, against whom a summons had issued on complaint, to appear by Agent instead of in person, he still thought it right, after what had been stated to-day by the Honorable Member for Bengal on an earlier Section, that a power of interference with the Magistrate's order to prevent it from being final in all cases, should rest somewhere. It appeared to him that this power might be unobjectionably exercised in the manner which he had suggested, and that the power proposed to be given to the Court of Session would not, if judiciously exercised, improperly interfere with the discretion vested by the Code in the Magistrates in regard to allowing or not allowing persons accused of criminal offences to appear and defend themselves by Agent. He was quite willing that the application of the words, which he wished to see inserted, should be restricted to cases in which persons were accused of bailable offences.

THE CHAIRMAN said, he was not sure if the Section should apply to bailable cases only, as would be the effect of the proposed amendment. He thought that there might be cases of homicide or manslaughter in which the Sessions Court ought to have the power of admitting the accused to bail. For instance, there was the case of a man who lately killed another by running over him with his buggy, in which the Supreme Court admitted the accused to bail, although the Coroner could not do so. Then there might be cases of theft, like that of the lady who was lately tried for stealing bank notes at the house of a lady friend in the course of a visit, and who was acquitted. Was it intended not to admit to bail in such a case?

After some conversation, Mr. Harington's amendment was, by leave, withdrawn.

THE CHAIRMAN moved the omission of the words "before a Magistrate," as being an unnecessary restriction on the power of a Court of Session.

Agreed to.

THE CHAIRMAN also moved the omission of the words "and may also direct that a party not in custody be admitted to bail on his surrendering to a warrant" at the end of the Section, as encouraging compromises with offenders, which he considered very objectionable.

The Motion was carried, and the Section as amended then passed.

MR. HARINGTON moved that the following new Section be introduced after Section 353 :—

"The Court of Session may also direct that the person accused of an offence for which a

Summons may be issued under Chapter XV, may appear before a Magistrate by Agent."

MR. SETON-KARR said, that he feared very much that the want of some check like that contained in the proposed Section, would give rise to great injustice being done, and be a source of dissatisfaction to a large number of our native subjects. He was glad that he had in this matter the support of the Honorable Member for the North-Western Provinces, whose judicial experience was ten-fold that to which he (Mr. Seton-Karr) could lay claim. He once more implored the Council to pause before they took away all check and all power of speedy redress, in a matter in which a large number of Magistrates, scattered over the country, might do grievous wrong from haste, inexperience, or prejudice.

MR. ERSKINE said that the amendment of the Honorable Member for the North-Western Provinces would, he believed, introduce an innovation into the practice of the Bombay Presidency ; and, with due deference to the opinion of that Honorable Member and of the Honorable Member for Bengal, he must support the Bill as it stood.

SIR BARTLE FRERE said, it appeared to him that the correct principle was that, unless some very good cause were shown, every man ought to appear in person and answer for a crime of which he was accused. It was only when any substantial ground of exception could be made, that an agent should be allowed to appear for the accused person. As to the possibility of some Magistrates abusing the power unless an appeal were allowed to lie from them to the Sessions Court, he thought that our object ought not to be to lower our law to the standard of incompetent Magistrates, but to raise the Magistrates to our standard of legislation.

SIR CHARLES JACKSON said, he thought that the Honorable Members for Bengal and the North-Western Provinces had misunderstood the question at issue. One would have thought, from what had fallen from those Honorable Members, that this Section compelled the parties to appear in person under all circumstances ; whereas the question really was, whether the Magistrate was a competent person to decide as to the matter of personal attendance in Court, or whether the Sessions Judge should be allowed to interfere with the decision of the Magistrate. He (Sir Charles Jackson) thought that the Magistrate, by reason of his being on the spot and his knowledge of the parties concerned, was a much more competent person to deal with such a matter than the Sessions Judge.

THE CHAIRMAN said, he observed that, under the Code of Civil Procedure, the Judge might at any time summon any party to attend as a witness ; or might, on the application of the plaintiff, summon the defendant to appear in person and produce his witnesses, it being left to the discretion of the Court to determine whether any case had been made out by the plaintiff for summoning the defendant and his witnesses. If that discretion was left to the lowest Court of Civil Judicature, he (the Chairman) thought that in criminal cases the Sudder Court ought to have the same power. The Sudder Court might want a party as a witness.

MR. HARINGTON said, he wished to be allowed to make one observation on the remarks which had been based by the Honorable and learned Vice-President on the Code of Civil Procedure. No doubt, under that Code, any plaintiff or defendant might be summoned to appear in Court in person to give evidence in the case in which he was concerned. This was the rule ; but it had been considered necessary to introduce a Section into the Code which gave the local Governments power to exempt, at their discretion, persons of rank and position from personal appearance in Court, and he thought it would be generally admitted that in some of the cases which came before the Criminal Courts a similar indulgence should be granted to persons of the classes referred to in the Civil Code. The

words proposed by him to be inserted in the Section before the Committee simply aimed at securing to such persons, under proper rules, the indulgence in question. In theory it might be wrong to recognise any such distinctions in criminal legislation, but in practice it was often found necessary to put theory aside and to provide for exceptional cases as had been done in the Section of the Civil Procedure Code to which he had referred. They could not altogether disregard the peculiar habits, ideas, and feelings of the people of this country. Some concession to these habits and feelings, such as that contained in the Civil Procedure Code, was not only proper but necessary. Originally it had appeared to him that in respect of the matter under consideration, they should trust the Magistrates entirely and allow no interference with their orders, the Magistrates being, of course, responsible to the Government for the proper exercise of the discretionary power vested in them; and if he recollected rightly, he had on a former occasion expressed himself to that effect. But he had consulted some old and experienced Judges as to whether this absolute power could properly be given to the Magistrates. He found that their views were in accordance with what had been stated to-day by the Honorable Member for Bengal, and he had been led in consequence to recommend a slight modification of his original proposition.

THE CHAIRMAN said, he should vote against the proposed amendment. He thought that the power of excusing the personal attendance of an accused person before the Magistrate might be safely left to the discretion of the Magistrate.

The question was then put, and the Council divided as follows :—

Ayes 2.	*Noes* 6.
Mr. Seton-Karr.	Sir Charles Jackson.
Mr. Harington.	Mr. Erskine.
	Mr. Forbes.
	Sir Robert Napier.
	Sir Bartle Frere.
	The Chairman.

So the proposed Section was negatived.

The following Section was introduced after Section 350, on the Motion of Mr. Erskine :—

"When any person under the age of 16 years, shall be sentenced by any Magistrate or Sessions Judge to imprisonment for any offence, it shall be lawful for such Magistrate or Judge to direct that such offender, instead of being imprisoned in the Criminal Jail, shall be confined in any reformatory which may be recognised by the local Government as a fit place for confinement, in which there may be means of suitable discipline and of training in some branch of useful industry, and which shall be kept by a person willing to obey such rules as the Government may direct with regard to the discipline and training of persons confined therein. All persons confined under this Section shall be subject to the rules so laid down by Government."

MR. HARINGTON moved that Section 302 be omitted with a view to the following Section being substituted for it :—

"The provisions of Sections 162, 162*a*, 162*b*, 162*c*, 162*d*, and 162*e*, relating to the examination of parties and witnesses, the mode of recording evidence, and the correction, attestation, and interpretation thereof in trials before the Magistrate, shall be applicable to trials before the Court of Session under this Chapter."

He originally proposed to render it obligatory upon the Judges of the Courts of Session to take down the evidence given on trials before them with their own hands and in their own vernacular; but it having been suggested by some Honorable Members that the rule might in practice operate occasionally very inconveniently, he had modified his amendment, and all that he now proposed was to extend to the Courts of Session the rules regarding the recording of evidence which the Committee had already adopted as respected the Courts of the Magistrates. To the amendment, so framed, he thought no reasonable objection could be taken.

MR. ERSKINE said, he had so often troubled the Council with his opinion as to the danger of dispensing with a complete vernacular record in criminal trials in the Mofussil, that he

did not wish to inflict upon them a repetition of all that he had already repeatedly urged on that subject. He must beg them to observe, however, that the amendment now before the Council was the climax of the changes proposed to be effected in this direction by the Honorable Member for the North-Western Provinces. At first, the disuse of a vernacular record had been suggested only in connection with minor cases, which would generally be finally decided by the officer who first enquired into them. Then the grant of a discretional power to substitute an English record was proposed in connection with all cases tried by any Magistrate, and now the proposal was to empower any local Government to dispense entirely with the vernacular record even in Courts of Session. As he (Mr. Erskine) had observed when this question last came before theCouncil, there would apparently be nothing—if such a discretion were allowed—to prevent the local authorities in any Province from ruling that all pleadings in any criminal trial might be in English, and that all the proceedings might be conducted through the medium of anEnglish interpreter. Whether, therefore, the provision now proposed were right or wrong, he (Mr. Erskine) trusted at least that the Council would fully consider the importance of the change which it was calculated to effect in the system of Criminal Procedure throughout the country. He did not know whether the Honorable Member for the North-Western Provinces contemplated the possibility of any local Government, if these Sections were passed, being able to direct—without any infringement of the law—that all pleadings in criminal cases should thenceforth be in English, and that all their proceedings might be conducted through interpreters.

MR. HARINGTON said, he had on a former occasion pointed out that the amendments proposed by him in regard to the recording of evidence in the Criminal Courts had nothing whatever to do with the pleadings or with the language of the pleadings or proceedings. The question as to what should be the language of the pleadings or of the proceedings was altogether a distinct one, and was in no way involved in the amendment of Section 302 now proposed by him.

MR. ERSKINE resumed—The statement of the Honorable Member contained no answer to the question he had asked. And he could not but believe, therefore, that if the Criminal Courts were now relieved of all obligation to keep accurate vernacular records of their proceedings, the plan might soon be introduced into some Provinces of conducting trials by means of interpreters and of hearing all the arguments of Counsel in English. The policy which tended to that comsummation might be wise or might be unwise; but, at all events, the opinions of many able and experienced men, not prejudiced against reforms in general, were so strongly opposed to it, that he hoped all Honorable Members would fully weigh their objections. He could not refrain from reading—in this conviction—one passage from a book which he happened to have at hand. It was as follows :—

"About the year 1835 the Government of India restored to the natives, after six centuries of disuse, their own language in the transaction of their own business ; and, at present, Bengalee is universally employed throughout the Courts in Bengal, and Hindostanee in the Courts in the North-Western Provinces. This innovation has been exceedingly popular among the natives ; perhaps it is a more popular measure than any that we have ever introduced in India ; and I think that any attempt to abolish the use of the Bengalee language, and to introduce English into the Courts, would not only be exceedingly unpopular, but that it would create a degree of disaffection which the Government would be very sorry to encounter. At the same time it would unquestionably impair the administration of justice."

That was the opinion given by a gentleman of large experience in Bengal, Mr. Marshman, before a Committee of the House of Lords. The book also contained the opinion of a gentleman of much ability and experience in Madras, Mr. Norton. He said—in regard to making English the language of the Courts—

"I can scarcely conceive any thing more unfair to the people at large.* * *

* * Every Court should conduct its proceedings in the vernacular of the District ; nor would I permit a Judge, whether Barrister or Civilian, to sit on the Bench, unless he had a good colloquial familiarity with the spoken language of the lower orders. Indeed, I think it very questionable whether a pleader in the Mofussil ought to be allowed to plead in English. I have done it myself, and can see what a disadvantage it places the opponent under."

And in another place Mr. Norton said—

"Perhaps it is intended to limit the use of English to the mere record and pleadings. But here, we should still have to give translations of all proceedings, &c., to the suitors or their pleaders in the Native languages ; and this idea which is now abroad is precisely one of those dangerous innovations which the reformer will do well to resist."

He (Mr. Erskine) had no personal experience of the system of procedure either in Bengal or Madras. But his experience of the system in Bombay led him to entertain a strong conviction in favor of the view supported by the gentlemen whose opinions he had just read. This conviction had been further strengthened by arguments which had been ably urged in Bombay since the question had been raised in the Council in connection with amendments formerly proposed by the Honorable Member, North-Western Provinces. He (Mr. Erskine) therefore could not regard the amendment contained in Section 162*a* without considerable apprehension—and could only trust that, if it should he adopted by the Council, it might not be productive of as much inconvenience and evil as he—in common with many officers of great experience—could not but apprehend.

MR. HARINGTON would ask the Honorable Member for Bombay whether he desired to open the whole question in regard to the taking of evidence in the Criminal Courts including the Courts of the Magistrates, the Sections applicable to which Courts had already been settled by the Committee, or whether his present objections had reference only to the manner in which it was proposed that evidence might be taken in the Courts of Session.

MR. ERSKINE said that his object, as he had already stated, was not to reopen the question as to the inferior Courts, but to explain the reasons of the strong objection he entertained to the proposed change in connection with the Courts of Session.

MR. HARINGTON said, he was anxious to read to the Committee the opinions which had been expressed by the late Honorable Member for Bombay on the question now under discussion, but he could not just now lay his hand upon the report in which those opinions were contained. He must repeat that the Section proposed by him was entirely permissive in its character. It would rest with the local Governments to extend the provisions of the Section to the whole or any part of the Territories subordinate to them, or to take no action upon the Section, according as they might think fit. The Committee had already given this power to the local Governments in regard to the Courts of the Magistrates, and he did not see how they could consistently refuse to give it in respect to the Courts of Session also. The practice proposed would be as proper in the one class of Courts as in the other, and of the two classes of Courts he considered it more suitable to the Courts of Session.

THE CHAIRMAN said, he thought there could be no objectionto the Section now proposed, the others having been passed ; and it appeared to him that no danger need be apprehended. There would be this safeguard, that the evidence must be interpreted in open Court to the witnesses in the presence of the accused. Practically, therefore, the system would be very much that which was adopted in the Supreme Court where, although the language of the Court was English, and the proceedings were recorded in English, the whole of the evidence was interpreted to the witnesses in the presence of the accused ; and there could be no objection to allowing this practice to be followed in places to which the local Government might think fit to extend the provisions of the Sections in question.

MR. ERSKINE said, there were three important points in which the

position of the Mofussil Courts differed greatly from that of the Supreme Court in respect to the use of the English language. The first was this ; that in the Supreme Courts all the evidence was given in the sight and hearing of the very persons—Jurors or Judges—who were to decide finally on the case. In the Mofussil Courts this was not so ; and if the Session Judge's notes were to be the only record, Courts of review would, in his (Mr. Erskine's) opinion, be in a very unsatisfactory position. The second point of difference was, that the Supreme Courts being few in number, of great importance, and located in the Presidency towns were enabled to secure as interpreters men of high ability and uprightness. But it would be impossible to offer salaries to interpreters in Mofussil Courts which would secure the same class of persons there. Moreover, in the third place, the check of publicity would hardly operate at all in the Mofussil. Hardly ever would any one who understood what a witness had said to the interpreter, understand also what the interpreter reported to the Court. Hardly ever would an accused person, or any one connected with him, know what information reached the ears of the Judge or what arguments were addressed to him by Counsel. The check of anything like public opinion would therefore be almost entirely unfelt in the Mofussil by pleaders and interpreters.

MR. FORBES said, with reference to a remark which had fallen from the Honorable Member for Bombay regarding the changes that would follow if the proposed mode of taking evidence were adopted, that one of these supposed changes—namely, that of the Sudder Court no longer having before it in referred trials the actual words spoken at the original trial—would not be so general in its operation as the Honorable Member appeared to suppose. In the Madras Presidency all referred trials were even now sent up to the Sudder in English, and in this respect therefore the proposed amendment would, if adopted, work no change in the South of India.

SIR BARTLE FRERE said, he should support his Honorable friend the Member for Bombay in opposing the proposed Section. But he thought he might have gone further and claimed the Supreme Court as an instance in support of his case. In the Supreme Court, English was the language of the Judge, of the Bar, of the Press, and of the greater and more intelligent portion of the public. If you desired to choose a language which would serve as a most effectual check upon the proceedings and ensure the greatest publicity, you would say that in the Supreme Courts that language was English, whereas in the Mofussil it would be the vernacular of the District. He felt strongly in unison with his Honorable friend, because he had seen two instances of the benefits which resulted from observing the principle laid down by his Honorable friend. One was in the Southern Mahratta country, where Canarese, the language of the people, had been substituted for Mahratta, a comparatively foreign language, which was formerly the official language ; and the other was in Sind, where Persian was abolished as the language of the Courts, and Sindee substituted for it. In both cases it was impossible to overstate the good effect of the change on the feelings of the people with regard to the Courts when they found that the whole of the proceedings were conducted in their own mother-tongue. If, therefore, the Honorable Member for Bombay went to a division, he (Sir Bartle Frere) should vote with him.

MR. HARINGTON said, one of the objections made to the mode in which evidence was now taken in the Criminal Courts was that the duty was left to be performed without any sufficient supervision or check by an inferior and underpaid ministerial officer, who, from ignorance of the language of the witness, or from some other cause, often misrepresented what the witness said, and that consequently little reliance could be placed on the evidence so recorded. The amendment proposed by him contemplated the substitution of the Judge or Magistrate of the Court in which the evidence was taken for

recording the same. This would at once remove all ground of complaint, and it was considered by many that in no other way could an effectual remedy be applied so as to get rid of the objection which he had noticed. He had now found the remarks of the late Honorable Member for Bombay to which he had alluded in an earlier part of this debate, and with the permission of the Committee he would read a portion of them. It must be remembered that Mr. LeGeyt, by whom these remarks were made, was a Judge in the Sudder Court of Bombay for no less a period than 14 years, during which, according to the practice of the Bombay Presidency he made frequent tours or circuits, and what he stated was the result of his own observation. He was sure that after what had fallen to-day from the present Honorable Member for Bombay and the Honorable Member of the Government on his left (Sir Bartle Frere), they would excuse his quoting the opinion of the former Honorable Member for Bombay on the question before the Committee, which differed so materially from their own views upon that question. Mr. LeGeyt said :—

"He had not yet given up all hope of what he considered ought to be the mode of recording evidence in the Criminal Courts at least, if not also in the Civil. What he proposed to have done was that the witness should be brought into Court and examined, that he should orally depose what he knew of the case, and that the Judge should immediately write with his own hand, or, if he should be unable from sickness or any other cause to do so, cause to be written a careful note of what the witness did say. That note should be carefully explained to the witness in his vernacular language and signed by him; and it would then, as he (Mr. LeGeyt) contended, form a much better record than the kind of deposition that was now taken. It had been for many years the practice, he would not say of every Court, but certainly of several Courts in Bombay at least, to take down the evidence of witnesses in a most slovenly manner. When Commissioners went round on their tours of inspection, the subordinate Courts were careful to do everything according to proper form and order; but there was too much reason to believe that, not only in the subordinate but also in the higher Courts, when a witness had a long statement to make, a very imperfect and hasty outline of it was taken down by some sheristadar. He was then asked whether he had stated what appeared on the paper, and in almost every case his answer was 'Yes,' his chief wish being to get away from the irksome state in which he had been during the whole time that his statement was being extracted from him. On such a record it was impossible that any confidence could be placed by any Court of Justice. He (Mr. LeGeyt) contended that, if the appellate Courts had the Judge's own notes before them, they would be a more trust-worthy record of what had been said by the witnesses than any which they now had."

The amendment to which he (Mr. Harington) had asked the Committee to agree, proposed, in whatever District the Sections as framed by him were introduced, to substitute for the slovenly recorded evidence of which Mr. LeGeyt complained and on which he declared it was impossible that any confidence could be placed by any Court of Justice, a record of the evidence so made that it would be entitled to the fullest confidence.

MR. ERSKINE said, he had not the least wish to deprive the Honorable Member for the North-Western Provinces of the full benefit of the testimony which he had just adduced. He could only repeat that his own judgment was very different. In all that had been said indeed regarding the propriety of obliging a Judge to take full notes of the evidence with his own hand, he (Mr. Erskine) heartily concurred with the Honorable Member and had always expressed his concurrence. The point on which they differed was as to the propriety of dispensing with a further complete record in the language of the people. In every case tried by a Judge of ordinary capacity in Bombay, an English record was kept by him; and it was generally as full or nearly as full as its native counterpart. With reference to the opinion quoted by the Honorable Member that the vernacular records in such trials were often very slovenly, he (Mr. Erskine) could only say that this did not accord with his experience, and that there could be no reason why the Judge should not take care that the evidence set forth in the vernacular record should contain the exact words of each witness, just as certainly and carefully as he could provide that his

own notes should contain an exact translation of those words.

SIR CHARLES JACKSON said, he really thought he must fall a victim to the *cacoëthes loquendi* at this late hour. The Honorable Member for Bombay had put his objection to the proposed Section on three grounds, on which he had drawn a distinction between the Supreme Court and the Mofussil Courts. The first was that in the Supreme Court the Judges decided criminal cases finally. That was not so, for a criminal case might be sent up to the Privy Council; and though such a thing seldom happened, yet it had occurred once since he had been on the Bench in Calcutta, and there had been several appeals from Bombay, and he knew that sentences were occasionally reversed by the Privy Council. The next ground was that an inferior class of interpreters would be employed in the Mofussil Courts, and that in many places it would be impossible to obtain good interpreters. Should that be so, he (Sir Charles Jackson) thought the Government would never extend the system to such places. Then the Honorable Member said that there was greater publicity in the Supreme Court. But he (Sir Charles Jackson) thought that there would be just as much publicity under this Act, for the translation ensured what was said being spoken in two languages, and he thought that secured greater publicity than the use of one language only. Great publicity was given to what was said in the Supreme Court, and it would be the same in the High Court.

The Section was then put, and the Council divided as follows :—

Ayes 5.	*Noes* 3.
Mr. Seton-Karr.	Mr. Erskine.
Sir Charles Jackson.	Sir Robert Napier.
Mr. Forbes.	Sir Bartle Frere.
Mr. Harington.	
The Chairman.	

So the Section was carried.

The postponed Section 315 provided as follows :—

"If the accused person is acquitted the Court shall record a judgment of acquittal. If the accused person is convicted, the Court shall proceed to pass sentence upon him according to law. Provided that if the Court pass sentence of death the sentence shall not be executed without the confirmation of the Sudder Court."

The Section was passed after the addition of the following words, on the Motion of Mr. Harington :—

"If the accused person shall be convicted of an offence which by the Indian Penal Code is punishable with death, and the Court shall sentence such person to any punishment other than death, the Court shall state the grounds upon which it remitted the punishment of death in the statement of trials to be periodically submitted to the Sudder Court, as hereinafter required, under the head of 'Sentences passed upon the accused persons.'"

A verbal amendment was made in Section 323, on the motion of Mr. Harington.

MR. HARINGTON said, after the discussion which had incidentally arisen on Chapter X at the last meeting of the Committee, he thought that whatever views Honorable Members might individually entertain, there must be a general concurrence of opinion that the Chapter could not be allowed to remain as it at present stood, and that some modification was called for. What alterations should be made in the Chapter might, he thought, be better and more conveniently considered in the first instance by a Select Committee, and he begged to move that a Select Committee be appointed consisting of the Honorable and learned Vice-President, the Honorable Members for Madras, Bombay, and Bengal, and the Mover, and that the Committee be instructed to consider and report upon the Chapter and propose any alterations in it which might appear to them advisable. If the Honorable and learned Judge opposite (Sir Charles Jackson) would join the Committee, he (Mr. Harington) would gladly make room for him by withdrawing himself.

THE CHAIRMAN said, he saw no necessity for referring the Chapter to a Select Committee, and thought that it would be better to consider it in a Committee of the whole Council. For his own part, he was so fully occupied with his duties

at the Court that he did not know whether he would be able to attend the Committee except on Saturday, in which case he should be obliged to give up to the Select Committee a portion of his time which would be better devoted to the consideration of the question in Committee of the whole Council.

SIR BARTLE FRERE said, he would much prefer the course suggested by the Honorable Member for the North-Western Provinces. He did not think that at this late hour the Council could go into this question. Since last Saturday he had gone carefully into the question which had been so unexpectedly raised by the Honorable and learned Vice-President, and he found that the view which he had before taken of it was the right one, namely, that the law as regarded contempts committed before Civil Courts should continue as it was laid down in Act XXX of 1841, that there was no necessity for going beyond it as regarded the Civil Courts, and that it would provide for all the objects which we had in view. Any innovation or alteration of the existing law was certainly not of his seeking. All that he wished to see was a continuance of the existing practice, which was in strict accordance with the practice obtaining in the Supreme Court, that is, as nearly as could be in Courts of such different constitution and he did not wish that practice in the least departed from. He believed some Honorable Members who took great interest in the matter had met twice for the purpose of considering how they might best include the provisions of the existing law, Act XXX of 1841, in the present Bill but they had not agreed as to how it had best be done. He (Sir Bartle Frere) entirely concurred in the view taken by the Honorable Member for Bombay, and it appeared to them that probably a very short discussion with one of the Judges of the Supreme Court over the table would enable them to come to a unanimous conclusion sooner than if the matter was considered in Committee of whole Council. He had not the least objection to go into Committee upon it next Saturday, but he thought that considerable time would be saved if the course suggested by the Honorable Member for the North-Western Provinces were followed.

SIR CHARLES JACKSON said, that the Judges were now very busy, and were obliged to sit daily till 6 o'clock, when it was scarcely possible they could be in a fit state for any further business.

SIR BARTLE FRERE said, that other Honorable Members had their work to attend to as well as the Judges. An hour over a table would save what would take five hours in the Council at large, and it was solely with a view to save time that he supported the suggestion of the Honorable Member for the North-Western Provinces.

MR. HARINGTON said, after what had been stated by the Honorable and learned Vice-President, he could not, of course, think of pressing his Motion. The fact was that it was chiefly in consequence of what had fallen from the Honorable and learned Vice-President on Saturday last, that doubts had arisen in the minds of himself and other Honorable Members on the subject of the Chapter in question. Before the discussion to which he had referred arose, he had looked upon the Chapter as finally settled. He thought every Honorable Member must have done the same, and he certainly had no intention of going back to the Chapter and moving any alteration in it. But after the remarks of the Honorable and learned Vice-President, it was felt by himself and other Honorable Members that something must be done to remove what was considered objectionable in the Chapter. Though not appointed a Select Committee, he and the other Honorable Members to whom he had alluded, had met twice during the week to consider and discuss the Chapter. Various propositions were made, but no one of them was unanimously assented to; and it not being found possible to reconcile the differences of opinion that existed on a most material point, no satisfactory result had ensued. Under these circumstances it had oc-

curred to him that, in order to save the time of the Council, it was desirable that a Select Committee should be appointed to reconsider the Chapter. With the assistance and advice of the Honorable and learned Vice-President on such a Committee, he (Mr. Harington) hoped that some Sections would be framed which would be readily agreed to by the Council at large and would satisfy the public. It was for this reason that he had moved for the appointment of a Select Committee. But, as he had already observed, he would not press the motion after what had been stated by the Honorable and learned Vice-President. He had prepared some Sections to take the place of Chapter X, to which he thought no reasonable objection could be urged, and he should do himself the honor of proposing these Sections for adoption on Saturday next.

The Motion was then by leave withdrawn ; and the consideration of the Bill having been postponed, the Council resumed its sitting.

The Council adjourned.

Saturday, August 10, 1861.

PRESENT :

The Hon'ble Sir Henry Bartle Edward Frere, *Senior* Member of the Council of the Governor-General, presiding.

Hon'ble Major-General Sir R. Napier,	Hon'ble Sir C. R. M. Jackson,
H. B. Harington, Esq.,	and
H. Forbes, Esq.,	W. S. Seton-Karr,
C. J. Erskine, Esq.,	Esq.

CRIMINAL PROCEDURE.

THE CLERK presented to the Council, a Petition from the Landholders' and Commercial Association of British India and of the Calcutta Trades Association, praying for a modification of the Clause, which had been inserted in the Bill for simplifying the Procedure of the Courts of Criminal Judicature not established by Royal Charter, giving all the Civil Courts in the Mofussil, in cases when the offence of contempt was committed, power to take cognizance of the same and to adjudge the offender to punishment as authorized by the several Sections of the Penal Code applicable thereto.

SIR CHARLES JACKSON moved that the Petition be read.

MR. HARINGTON said that, having regard to what was the usual practice of the Council, he considered that this was not the proper time for reading this Petition. He would suggest that the reading of the Petition be deferred until they went into Committee on the Criminal Procedure Bill to which the Petition related. That would be the proper time for reading the Petition. He had not read the Petition, but, understanding that it referred to Chapter X of the Code, he begged to remind the Council that he had given notice of some amendments in that Chapter.

SIR CHARLES JACKSON said, he would rather that the Petition were read now.

The Motion was carried, and the Petition read accordingly.

SIR CHARLES JACKSON moved that the Petition be printed.

Agreed to.

MR. ERSKINE said that, as some misconception seemed to prevail with regard to the purport of a Section which he had introduced a fortnight ago, and as the Petition which had just been read contained an expression which, unless he was mistaken, might be intended to refer to that Section; perhaps it might be well that he should at once say one or two words on the subject. It was not his purpose, of course, to enter at that time on the general question as to the manner in which contempts of Court should be punished. That question would be more properly and more satisfactorily discussed when the Honorable Member for the North-Western Provinces should bring the whole Chapter relating to contempts, in an earlier part of the Code, once more under the consideration of the whole Council—as he had engaged to do. But it seemed to be supposed in some quarters that the Section prepared by Mr. Sconce for insertion in the Chapter relative to