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The Motion was then by leave withdrawn ; and the consideration of the Bill having been postponed, the Council resumed its sitting.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

appeals, and proposed to the Council a fortnight ago by himself (Mr. Erskine), contained some proposal for enhancing the powers of certain Courts in dealing with contempts committed by certain classes of persons; and that the Section for that reason had been strenuously opposed by some Honorable Members of the Council. He need hardly remind any Honorable Member then present, or, indeed, any one who had read the Section referred to, that this supposition was altogether erroneous; that the Section did not relate to the original jurisdiction of any Court, or propose to extend the powers of punishment of any Court in respect to contempts; that, on the contrary, it was expressly intended to provide a remedy against possible abuses of the powers assigned in a former Chapter to different classes of Civil Courts, by opening up a way of appeal in all cases; and that, in this view, the Section had been adopted by the Council without a division. He was not aware that any other new Section, which could be supposed to have the effect described in the Petition, had been recently introduced by any other Honorable Member. The general discussion which took place about a fortnight ago, when the Section moved by him (Mr. Erskine) was agreed to, had certainly convinced him—and, he believed, had convinced most Members of the Council—that the Chapter relating to contempts, which had been passed some weeks before, required to be thoroughly revised and re-cast. But the Honorable Member for the North-Western Provinces had already undertaken to submit to the Council an amended Chapter X; and he trusted that, when those amendments should have been carefully considered and discussed, the result would be the enactment of provisions relating to contempts, to which no reasonable objection could be made.

SIR BARTLE FRERE said, he greatly regretted that the Honorable and learned Vice-President was prevented by illness from being in his place to-day. Had he been here, he could have better explained the misconception under which the gentlemen who had presented this Petition appeared to have been laboring. He (the Vice-President) would have been able to point out that every part of the Code which bore on this subject, as it stood to-day, was substantially as it left his hands when he was the Legislative Member of the Supreme Council. The law relating to contempts in Civil Courts, to which this Petition particularly referred, was Act XXX of 1841. That law gave Civil Courts the power of fine up to two hundred Rupees and simple imprisonment up to one month; and when this question was last under discussion, he (Sir Bartle Frere) distinctly stated that nothing further was required in his opinion by the Civil Courts than a continuance of that power. In all that was pointed out in the Petition as to that law having been in force for nearly twenty years without its provisions having been complained of either as not being sufficiently stringent or as giving too much power, he entirely concurred, as he had always done. The question of any alteration or enhancement of the punishment prescribed in the existing law, for contempt in Civil Courts, had been raised, and criminal imprisonment for such contempts had been proposed, not by him (Sir Bartle Frere) or by any Member of the Executive Council, but by the Honorable and learned Vice-President himself. In all that the Petitioners required on this point, he (Sir Bartle Frere) entirely went with them, and he was ready to vote for any measure which would give effect to those views.

But there was one paragraph of the Petition which he thought it only due to the Government to notice, though it did not relate to this portion of the Act under discussion. It was that paragraph in which they said—

"That the views of the independent European community with regard to the great injustice of any measure of this character or tendency have been so frequently expressed that your petitioners consider it unnecessary to recapitulate them. Your petitioners, however, would humbly submit that the frequent attempts which have been made of late to subject Europeans to the Mofussil Criminal Courts

and Native Magistrates, and the warm support which such a proposal invariably receives whenever it is brought forward, are calculated seriously to discourage the settlement of Englishmen in the interior, and to awaken in their minds grave distrust and suspicion of the policy of Government."

Now these were words of very considerable import, coming as they did from a body of such respectable gentlemen who represented the Landed and Commercial interests of this Province; and he should be sorry indeed to think that anything which the Government had done gave color to the apprehensions which they had expressed. He knew of no act of the Government of India, certainly of no late act, or of any which had been done since he had had the honor of holding a seat in the Government of India, to justify any such apprehensions. The policy of the Government of India for many years past was in accordance with the words of the Charter Act of 1833 which had been so often quoted and which could not be too often repeated. They were :—

"And be it enacted that no native of the said territories, nor any natural born subject of Her Majesty resident therein, shall by reason only of his religion, place of birth, descent, color, or any of them, be disabled from holding any place, office, or employment under the said Company."

These views were repeated in Her Majesty's Proclamation of the 1st November 1858, where she said :—

"We hold ourselves bound to the natives of our Indian territories by the same obligations of duty which bind us to all our other subjects;"

and then went on to say :—

"And it is our further will that, so far as may be, our subjects, of whatever race or creed, be freely and impartially admitted to offices in our service, the duties of which they may be qualified by their education, ability, and integrity, duly to discharge."

These words justly represented the policy which it was the wish of the Government of India to carry out. But they were not the words of the Government of India. They were the words of the Sovereign of England and of the Legislature of England, embodying the views of some of the greatest statesmen and philanthropists of modern days, men whose memories would be cherished as long as the English language and the English nation should endure. The policy thus enunciated was not for India only. It was a part of that system which had made England the example and envy of all other free people, the wonder and the dread of all despots. It was a policy which he believed could never be reversed as long as England continued to hold her foremost place among the nations of the earth. The Government of India further believed that the words he had quoted described the policy calculated not only to secure the peace and prosperity of the many nations of India, but to give to the industrious and enterprising Englishman free scope as a settler in this country. They believed that, by acting on this policy, Government would best secure the profitable residence of Europeans in every part of this country, so that the English settler could apply his energy and capital and bring those kindly and humane feelings and that love of justice which are inherent in his race to bear upon the moral and material advancement of India. There were other observations on this subject which he would not, in the absence of the Honorable and learned Vice-President, obtrude on the Council. He would only further add that, in the belief that the policy embodied in the words of the Charter Act and of the Proclamation which he had quoted was the best for India, it was the purpose of the Government of India firmly to act on it through good report and through evil report, as long as God would give them power and strength to carry it out; and in so doing the Government were fully confident that they would secure the assistance of all right hearted Englishmen whether they belonged to the official or non-official class.

REGISTRATION OF ASSURANCES.

MR. FORBES presented the Report of the Select Committee on the Bill

"to provide for the Registration of Assurances."

LIMITATION OF SUITS.

SIR CHARLES JACKSON, in the absence of the Vice-President, postponed the Motion (which stood in the Orders of the Day) for the first reading of a Bill to amend Act XIV of 1859 (to provide for the limitation of suits).

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.

MR. HARINGTON said he would ask the Committee to go back to Section 318 which prescribed the forms of finding and sentence. It would be in the recollection of the Committee that considerable alterations had been made in the Chapter relating to Juries, and the amendments which he proposed to introduce in Section 318 were simply intended to carry out the alterations made in that Chapter. They involved no change in the substantive law as settled by the Committee, and related only to the forms in which the finding of the Jury was to be delivered and the sentence of the Court recorded.

SIR BARTLE FRERE asked if the Committee could not proceed with the consideration of Chapter X.

MR. HARINGTON said that he had given notice of some amendments in this Chapter; but he thought it would be better to defer their consideration until Saturday next when they might hope that the Honorable and learned Vice-President would have recovered from the indisposition which had prevented his attendance today. After what had fallen from the Honorable Member of the Government (Sir Bartle Frere) and the Honorable Member for Bombay before they went into Committee upon this Bill, he was anxious that the amendments of which he had given notice should be read by the Clerk of the Council. They might then be allowed to lie over until the next meeting of the Committee. He did not wish to discuss the proposed amendments at this time, but he desired at once to correct a mistake into which he thought the Honorable Member of the Government (Sir Bartle Frere) who had spoken on the Petition which had been read to the Council to-day, had fallen in the remarks which he had made on that Petition. The reading of the Petition before they went into Committee upon the Bill to which it related, and the debate which had followed the perusal, were, he thought, somewhat irregular. It was customary when a petition relating to a Bill which was before a Committee of the whole Council was presented to the Council, to cause it to be read when the Council were sitting in Committee upon the particular Bill to which the Petition referred, and he could not understand why this practice had been departed from on the present occasion. But he would not dwell further upon the point. He understood the Honorable Member of the Government to say that no Member of the Executive Government had agreed to the punishment for contempts of Court being increased when the contempt was committed against a Civil Court, and the Honorable Member had expressed himself as quite satisfied with the law as now in operation under which a fine of two hundred Rupees, commutable to one month's imprisonment in the Civil jail in default of payment, was the highest punishment that could be awarded. The Code of Criminal Procedure before the Committee did not deal with the question as to what were suitable punishments for the various classes of offences cognizable by the Courts. It was the Penal Code which defined the extent of punishment, and any increase in the penalty for contempts of Court was made in the Penal Code which was passed last year, not in the Criminal Procedure Code which was still under consideration. Now he believed he

was right in saying that when the Section of the Penal Code which treated of the offence of contempt of Court and provided the punishment for that offence, was adopted, every Member of the Executive Government who was present at the time, including the Honorable Chairman (Sir Bartle Frere), had voted for it. That Section applied equally to contempts against Civil and Criminal Courts, and having voted for the Section, he (Mr. Harington) was not at all prepared to say that the maximum punishment prescribed by the Section should never be awarded in any case of contempt against a Civil Court, much less that the punishment for contempt committed against the Civil Courts should be restricted to the provisions of the law of 1841. He had not gone into the question as to what Courts should administer the law. That was altogether a distinct question. But he was quite prepared to alter the Procedure Code so as to take away all reasonable ground of complaint against it and to do what was right and proper. The amendments prepared by him would remove many of the objections which had been stated in the Petition read to-day, to Chapter X of the Code as it now stood. He hoped that those amendments would be adopted.

SIR CHARLES JACKSON said, he thought it would be better to go on with the other parts of the Code first, and postpone the consideration of Chapter X till Saturday next. He knew that the Honorable and learned Chief Justice had some definite views on the subject, and he thought it desirable that the Committee should avail themselves of his assistance in the matter.

SIR BARTLE FRERE suggested that it would save time if the Chapter could now be settled in the form in which the Committee were willing to pass it subject to any alterations or criticisms which the Honorable and learned Chief Justice might feel disposed to offer on Saturday next.

SIR CHARLES JACKSON said that the criticisms of the Honorable and learned Vice-President after the Chapter was settled, would be quite a different matter from the benefit of his advice and assistance during the discussion on the Chapter.

MR. HARINGTON said, he was quite prepared to go on with his amendments to-day. Personally he had no objection to the Committee proceeding with them at once; but he begged to call attention to the fact that the Committee were not now dealing with a part of the Code which had not yet been settled. What was proposed was to go back to a Chapter which had already been settled and to re-cast that Chapter. The Honorable and learned Vice-President was present when the Chapter was settled, and he believed he was right in saying that the only amendments which were made in the Chapter when it passed through Committee were made on the Motion of the Honorable and learned Vice-President. This was, he thought, an additional reason for their not going into the Chapter again to-day in the absence of the Honorable and learned Vice-President and making perhaps important alterations in it.

MR. SETON-KARR said that, looking to the important principles involved in this Chapter, to the animated discussion which took place on this head a fortnight ago, and to the part which the Honorable and learned Chief Justice had taken in the framing of the Chapter and in the discussion generally, he thought it would be advisable to postpone the consideration of this question until the Honorable and learned Chief Justice could attend, and he should accordingly vote for the postponement of the consideration of this Chapter.

MR. HARINGTON then proposed that his amendments should be read.

MR. ERSKINE said, he had no wish to interfere with any course of procedure which might be regarded as advantageous by the Council. But he confessed he did not quite see the object of allowing these amendments to be read at present if no discussion was to follow. That might have the appearance of pledging Honorable Members to the principles of those amendments.

MR. HARINGTON said that, if his amendments were merely put from the Chair to-day and no discussion took place upon them, he should not consider any Honorable Member pledged to or bound by a single word in the amendments. What he wished was that his amendments should appear to-day on the records of the Council. Having moved the amendments, which he was prepared to do without comment, he was quite willing at once to move that their further consideration be postponed until Saturday next.

MR. ERSKINE said, he had not the least wish to oppose the proposal of the Honorable Member on the conditions explained by him.

MR. HARINGTON then read the following Sections with the permission of the Committee; and having done so, he moved that the Sections be allowed to lie over until Saturday next:—

"When any such offence as is described in Section 175, 178, 179, 180, or 228 of the Indian Penal Code, is committed in any Court, Civil or Criminal, it shall be competent to such Court to cause the offender to be detained in custody, and at the rising of the Court to take cognizance of the offence, and the offender shall be liable to punishment as authorized by the said Sections. In any such case in which a Court subordinate to the chief Civil Court of original jurisdiction in the District, or in which any Magistrate exercising powers less than those of a Magistrate shall consider that the offender should be imprisoned, or that a fine of larger amount than 200 Rupees should be imposed upon him, such Court or Magistrate shall not pass sentence, but shall record the facts constituting the contempt with any statement the offender may make, and the finding thereupon, and shall refer the case to the Court or Magistrate to which such Court or Magistrate is subordinate. The Court or Magistrate to which the case is referred shall pass such sentence or order as to such Court or Magistrate shall seem proper and which shall be according to law. When a case is referred under this Section, the offender shall be detained in custody until the decision of the Superior Court is made known, or may be admitted to bail if sufficient bail be tendered for his appearance when required. The imprisonment adjudged under this Section shall be in the Civil jail.

When a person has been sentenced to punishment, or whose case has been referred, under the last preceding Section, for refusing or omitting to do any thing which he was required to do, it shall be competent to the Court to remit the punishment, or, in case of reference, to discharge the offender on the submission of the offender to the order or requisition of such Court.

When any such offence as is described in Chapter X of the Indian Penal Code, except Sections 175, 178, 179, and 180, is committed in contempt of the lawful authority of any Court, Civil or Criminal, by a European British subject, such offence shall be cognizable only by a Magistrate who is a Justice of the Peace, and such Magistrate shall have the same powers of punishment for such offence, which are vested by the Statute 53, George III, c. 155, s. 105, in a Justice of the Peace for the punishment of an assault, and may deal with the offender on conviction in the same manner as is provided in that behalf in the said Statute, If such Magistrate shall consider the offence to require a more severe punishment than a Justice of the Peace is competent to award under the said Statute, he may commit the offender to a Supreme Court of Judicature. If the Judge or Magistrate of the Court against which the offence is committed is not a Justice of the Peace, he shall send the offender to a Justice of the Peace to be dealt with under this Section."

SIR BARTLE FRERE thought that they should be very much expediting matters by proceeding to vote on the Sections now, reserving to themselves the power of altering them next Saturday, should they be disposed to do so after hearing the criticisms of the Honorable and learned Vice-President.

MR. FORBES said that he was in favor of postponing the consideration of the Chapter till next Saturday. He thought that the Honorable Member for the North-West had referred to a point of some importance in saying that the Honorable and learned Vice-President had himself drawn up the whole of the Chapter which it was now proposed that they should amend. In his (Mr Forbes') opinion it would be hardly courteous to the Honorable and learned Chief Justice, who had taken great interest in the matter, to alter the Chapter in his absence.

SIR BARTLE FRERE said, as the Honorable Member for Madras thought it would be discourteous to the Honorable and learned Chief Justice if the Committee were now to proceed with

the revision of Chapter X, there was an end of the matter.

The consideration of the Chapter was accordingly postponed.

MR. ERSKINE moved the insertion of the following Clause in Section 3, the object of which was to reserve the powers of Assistant Sessions Judges:—

"It shall be lawful for a Sessions Judge in the Presidency of Bombay to delegate cases for trial by an Assistant Sessions Judge: and such Assistant Sessions Judge shall be competent in such cases to pass sentences within the following limits:—Imprisonment of either description—for a term not exceeding seven years (including such solitary confinement as is authorised by law), or fine, or both. If the sentence be one of imprisonment for a term exceeding three years, it shall be passed subject to confirmation by the Sessions Judge. The Sessions Judge may review and hear appeals against the proceedings of his assistants, and may confirm and amend (but not so as to enhance), or may reverse their sentences or orders. It shall not be competent to an Assistant Sessions Judge to review or hear an appeal against the proceedings of a Magistrate."

Agreed to.

MR. HARINGTON said, he was anxious to move the introduction, after Section 36, of two Sections of which he had given notice. The object of those Sections was to extend to this country what was known as Lord Campbell's Act relating to thefts, embezzlement, and other similar offences. The Sections were as follows:—

"If, upon the trial of any person charged with the offence of dishonest misappropriation of property under Section 403 of the Indian Penal Code, or of dishonest misappropriation of property possessed by a deceased person at the time of his death under Section 404 of the said Code, or of criminal breach of trust under Section 405 of the said Code, or of criminal breach of trust as a carrier wharfinger or warehouse-keeper under Section 407 of the said Code, or of criminal breach of trust as a clerk or servant under Section 408 of the said Code, or of criminal breach of trust as a public servant or as a banker merchant or agent under Section 409 of the said Code, it shall be proved that he took the property in question in any such manner as to amount to the offence of theft under Section 378 of the said Code, or of theft in any building tent or vessel under Section 380 of the said Code, or of theft as a clerk or servant of property in possession of his master under Section 381 of the said Code, he shall not be entitled to be acquitted, but the Court, or Jury, in cases tried by Jury shall be at liberty to return as their finding that such person is not guilty of the offence charged, but is guilty of the said other offence under the said Section 378, Section 380, or Section 381, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been found guilty upon a charge under such Section.

In like manner, if, upon the trial of any person charged with the offence of theft under the said Section 378 of the said Code, or the offence of theft in a building tent or vessel under the said Section 380 of the said Code, or of theft as a clerk or servant of property in the possession of his master under the said Section 381 of the said Code, it shall be proved that he took the property in question in any such manner as to amount to the offence of dishonest misappropriation of property under the said Section 403, or the offence of dishonest misappropriation of property possessed by a deceased person at the time of his death under the said Section 404, or the offence of criminal breach of trust under the said Section 405, or the offence of criminal breach of trust as a carrier wharfinger or warehouse-keeper under the said Section 407, or the offence of criminal breach of trust as a clerk or servant under the said Section 408, or of criminal breach of trust as a public servant or as a banker merchant or agent under the said Section 409, he shall not be entitled to be acquitted, but the Court or Jury, in a case tried by Jury, shall return as their finding that such person is not guilty of the offence charged, but is guilty of the said other offence under the said Section 403, Section 404, Section 405, Section 407, Section 408, or Section 409, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been charged and found guilty under such Section, and no person tried for theft, dishonest misappropriation of property, or criminal breach of trust under any of the said Sections of the said Code, shall be liable to be afterwards prosecuted for theft, misappropriation of property, or criminal breach of trust under any of the said Sections hereinbefore mentioned upon the same facts."

MR. ERSKINE said, he did not desire to oppose the adoption of these Sections; indeed, as he had only received them last evening, it had been impossible for him to give them more than a passing consideration. He wished therefore rather to offer a suggestion with regard to them. He observed that Section 205 of the Code of Procedure allowed a Court at any stage of a trial to alter the charge; while Section 208 provided that, in all such cases of alteration, the accused person should have the right to recall and cross-examine any witness who

might have been examined. But the Sections now proposed, as he understood them, would give power to the Jury, even after they had retired to find their verdict, to bring in a fresh charge against the accused; who, in that case, although the charge would have been altered, could have no opportunity of altering or adding to his defence. For instance, a person might be charged with theft, and, though acquitted of that crime, might still be convicted, without further evidence and without being allowed to make a fresh defence, of criminal breach of trust of an aggravated kind. If that would be the effect of the Section, he thought it would require re-consideration.

SIR CHARLES JACKSON said, the principle of the amendment was not unknown to the English law. In the Criminal Procedure Act prepared by Lord Campbell, and extended to this country in 1852, there would be found a very similar provision. By Section 13 of that Act, if a person were tried for embezzlement and was found guilty of theft—or, *vice versâ*, if tried for theft and found guilty of embezzlement—the Jury might find him guilty of theft, though charged with embezzlement or, *vice versâ*, find him guilty of embezzlement though charged with theft. Now the principle was this. The evidence in such cases was generally of the same nature, and the accused person was required in either case to show how he became possessed of the missing property, and the variance was no surprize upon him. Section 208, however, seemed to him to apply to a different state of things. That Section provided that, in all cases of amendment or alteration of a charge, the accused person should be allowed to recall and cross-examine any witness who might have been examined for the prosecution; whereas this Section applied to cases where the charge was not altered or amended, but where the offence actually proved was very much of the same nature with that charged. But the principle of such a Clause required that it should be confined to cases of a very similar nature. It could not be applied to all cases. For instance, suppose a man was charged with cutting and wounding, and it turned out afterwards that the man whom he had wounded died: in serious cases of that kind this Section would not be applicable. But there should be a new charge, and the accused should be allowed to recall and cross-examine any witness. If the amendment now proposed had applied to indictments for trivial offences, such as that, for instance, of a servant who embezzled money which he ought to have paid to his master; in such a case the servant was bound to show how the money came into his hands; and whether he were tried for theft or embezzlement, there would be no great variance in the proof, and the line of defence would be much the same. The same might be said with regard to the other offences, into which the speaker went at some length.

MR. HARINGTON said, he should only injure his case if he attempted to add anything to the very able explanation of the Sections which had been given by the Honorable and learned Judge, and he was quite willing to rest his defence of the Sections upon what had been said in that explanation.

MR. SETON-KARR said that the doubt that occurred to him was, what precise state of things, or what particular stage of the trial, was contemplated by the Honorable Member for the North-Western Provinces in his amendment. As he read the Sections, he understood that they contemplated all the proceedings to have terminated and the Jury to be either on the point of retiring, or to have actually retired in order to consider their verdict. If this were the state of things, the same should be clearly understood, and there was no provision made for any recalling of witnesses or for calling for any further defence from the defendant.

SIR BARTLE FRERE said, it seemed to him necessary to provide that, if a man was charged with one offence and found guilty of another, the punishment should not be made heavier unless opportunity were given

to him to recall and re-examine the witnesses.

MR. HARINGTON explained that the punishments were the same.

After some further discussion—

MR. ERSKINE said, after the opinion expressed by the Honorable and learned Judge, he should not wish to press his objections now, but would reserve to himself the right of reverting to the subject, if necessary, on the re-committal of the Bill before the third reading.

MR. HARINGTON remarked that so many alterations had been made in the Bill in its passage through Committee, that he thought it would be advisable to reprint the Bill before it was read a third time. This would give Honorable Members time to consider the Bill as it now stood; and if any Honorable Member wished to propose any further amendments, he would have an opportunity of doing so by moving the recommitment of the Bill on the motion for the third reading.

Section 1 was then put and carried.

The consideration of Section 2 was postponed till Saturday next, on the Motion of Mr. Harington, who undertook to revise the Section with reference to the objections which had been taken to it as it now stood.

MR. HARINGTON said, he had undertaken on Saturday last to prepare, 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. After carefully revising the Code, the Honorable Members just referred to concurred with him in thinking that an appeal should be allowed when a person was required by a Magistrate under Section 256 or 257 of this Code to give security for good behaviour, but they were agreed that in no other cases, not already provided for, should an appeal be permitted. He would therefore move that the following words be inserted in Section 335 which declared in what cases an appeal should lie from the sentences or orders of a Magistrate :—

"or required by such Magistrate or other Officer under Section 256 or 257 of this Act to give security for good behaviour."

Agreed to.

Section 4 of Chapter XIX*c*. (of disputes relating to the possession of land or the right of use of any land or water), which was as follows, was then omitted, on the Motion of Mr. Harington, as unnecessary with reference to Section 337 as amended, which declared that, unless otherwise provided by this Code or by any law for the time being in force, no appeal should lie from any order or sentence of a Criminal Court :—

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

MR. HARINGTON said, he had given notice of another Section to follow Section 344. The proposed Section had reference to cases of the nature of those which they had just been discussing. But as the consideration of one of the Sections which related to these cases had been deferred until Saturday next, he would ask the Committee to allow him to postpone the consideration of this Section also until the same day. The Section was as follows :—

"No finding by a Court and no verdict of guilty by a Jury in a case tried by Jury of the offence of dishonest misappropriation of property under Section 403 of the Indian Penal Code, or of dishonest misappropriation of property possessed by a deceased person at the time of his death under Section 404 of the said Code, or of criminal breach of trust under Section 405 of the said Code, or of criminal breach of trust by a servant wharfinger or ware house-keeper under Section 407 of the said Code, or of criminal breach of trust as a clerk or servant under Section 408 of the said Code, or of criminal breach of trust as a public servant or as a banker merchant or agent under Section 409 of the said Code, shall be liable to be reversed or altered by any Court, whether on appeal or revision, on the ground that the offence proved by the evidence was the offence of theft under Section 378 of the said Code, or the offence of theft in a building tent or vessel under Section 380 of the said Code, or the offence of theft as a clerk or servant of property in the possession of his master under Sec-

tion 381 of the said Code; and no finding by a Court and no verdict of guilty by a Jury in a case tried by Jury of the offence of theft under the said Section 378, or of theft in a building tent or vessel under the said Section 380, or of theft as a clerk or servant of property in the possession of his master under the said Section 381, shall be liable to be reversed or altered by any Court, whether on appeal or revision, on the ground that the offence proved by the evidence was the offence of dishonest misappropriation of property under the said Section 403, or the offence of dishonest misappropriation of property possessed by a deceased person at the time of his death under the said Section 404, or the offence of criminal breach of trust under the said Section 405, or the offence of criminal breach of trust as a carrier wharfinger or warehouse-keeper under the said Section 407, or the offence of criminal breach of trust as a clerk or servant under the said Section 408, or the offence of criminal breach of trust as a public servant or as a banker merchant or agent under the said Section 409."

Section 318 provided that, in trials by Jury, the finding and sentence should be recorded in the following form or to the same effect :—

"When the Jury are unanimous :

The Jury find that Z is guilty of the offence specified in the charge, namely, that Z has waged war against the Queen, and has thereby committed an offence punishable under Section 121 Chapter VI of Act XLV of 1860 (The Indian Penal Code) ; and the Court directs that the said Z [sentence.]

2*nd*. The Jury find that Z is not guilty of the offence specified in the charge, namely, that Z has waged war against the Queen and has thereby committed an offence punishable under Section 121 Chapter VI of Act XLV of 1860 (The Indian Penal Code) ; and the Court directs that the said Z be discharged.

When the Jury are not unanimous, but a majority of the Jurors concur in thinking the defendant guilty :—

3*rd*. A majority of the Jurors (stating the number) find that Z is guilty of the offence specified in the charge, namely, that Z has, with the intention of inducing the Honorable A. B., a Member of the Council of the Governor-General of India, to refrain from exercising a lawful power as such Member, assaulted such Member, and that he has thereby committed an offence punishable under Section 124 Chapter VI of Act XLV of 1860 (The Indian Penal Code). The Court concurs in such finding, and directs that the said Z be [sentence.]

4*th*. A majority of the Jurors (stating the number) find that Z is guilty of the offence specified in the charge, namely, that Z has, with the intention of inducing the Honorable A. B., a Member of the Council of the Governor-General of India, to refrain from exercising a lawful power as such Member, assaulted such Member, and that he has thereby committed an offence punishable under Section 124 Chapter VI of Act XLV of 1860 (The Indian Penal Code). The Court does not concur in such finding, and directs that the said Z be discharged.

5*th*. When the Jury are not unanimous, but a majority of the Jurors concur in thinking the defendant not guilty, the form No. 2 shall be followed.

When the Jury or a majority of the Jurors concur in thinking the defendant guilty of an offence, but are doubtful under which of two heads of a charge the offence falls :—

6*th*. The Jury or the majority of the Jurors (stating the number) as the case may be, find that Z is guilty either of the offence specified in the first head of the charge, or of the offence specified in the second head of the charge ; namely, that Z has either committed theft, and has thereby committed an offence punishable under Section 379 of the Penal Code, or that he has committed criminal breach of trust, and has thereby committed an offence punishable under Section 406 of the same Chapter of the Penal Code. The Court directs [or, the Court concurs in such finding, and directs] that under the provisions of the above mentioned Sections, and the provisions of Section 72 of Act XLV of 1860 (The Indian Penal Code), the said Z be [sentence.]

When the Jury are equally divided in opinion, the finding and sentence of the Court shall be recorded in the following form or to the same effect :—

7*th*. The Jury are equally divided in opinion and the Court concurs with the Jurors who have found that Z is guilty of the offence specified in the charge, namely, that he has committed, &c., &c., and the Court directs that the said Z be [sentence] ; or (as the case may be)—

8*th*. The Jury are equally divided in opinion and the Court concurs with the Jurors who have found that Z is not guilty of the offence specified in the charge, namely, that Z has committed, &c., &c. ; and the Court directs that the said Z be discharged."

MR. HARINGTON moved the omission of the above and the substitution of the following, in consequence of the amendments lately adopted in the Chapter relating to Juries :—

"When the Jury are unanimous :

The Jury are unanimous in finding that Z is guilty of the offence specified in the charge, namely, that Z has waged war against the Queen and has thereby committed an offence punishable under Section 121 Chaper VI of the Indian Penal Code ; and the Court directs that the said Z be [sentence.]

2*nd*. The Jury are unanimous in finding that Z is not guilty of the offence specified in the charge, namely, that Z has waged war against the Queen and has thereby committed an offence punishable under Section 121

Chapter VI of the Indian Penal Code ; and the Court directs that the said Z be discharged.

When the Jury are not unanimous, but such a majority as is required by Section 273 concur in finding the accused guilty :

3*rd*. A majority (stating the number, consisting of four out of five, or five or six out of seven, or six, seven, or eight out of nine, as the case may be) find that Z is guilty of the offence specified in the charge, namely, that Z has, with the intention of inducing the Honorable A. B., a Member of the Council of the Governor-General of India, to refrain from exercising a lawful power as such Member, assaulted such Member, and that he has thereby committed an offence punishable under Section 124 Chapter VI of the Indian Penal Code. The Court directs that the said Z be [sentence].

When the Jury are not unanimous, but such a majority as is required by Section 273 concur in finding the accused not guilty :

4*th*. A majority of the Jury (stating the number as above) find that Z is not guilty of the offence specified in the charge, namely, that Z has, with the intention of inducing the Honorable A. B., a Member of the Council of the Governor-General of India, to refrain from exercising a lawful power as such Member, assaulted such Member, and that he has thereby committed an offence punishable under Section 124 Chapter VI of the Indian Penal Code. The Court directs that the said Z be discharged.

When the Jury, or such a majority as is required by Section 273, concur in finding the accused guilty of an offence, but are doubtful under which of two heads of a charge the offence falls :

5*th*. The Jury, or a majority of the Jury (stating the number as above), find that Z is guilty either of the offence specified in the first head of the charge, or of the offence specified in the second head of the charge, namely, that Z has either committed theft, and has thereby committed an offence punishable under Section 379 of the Indian Penal Code, or that he has committed criminal breach of trust, and has thereby committed an offence punishable under Section 406 of the said Code. The Court directs that under the provisions of the abovementioned Sections, and the provisions of Section 72 of the Indian Penal Code, the said Z be [sentence].

When a majority less than the number required by Section 273, find the accused guilty :

6*th*. A majority of the Jury (stating the number as above,) find that Z is guilty of the offence specified in the charge, namely, that he has committed, &c., &c., the Court directs that the Jury be discharged, and that there be a new trial.

A similar form shall be followed if a verdict of not guilty is found by a majority less than is required by Section 273.

If the finding be on a second trial, and a majority less than is required by Section 273 find the accused guilty :

7*th*. A majority of the Jury (stating the number as above), find that Z is guilty of the offence specified in the charge, namely, that he has committed, &c., &c.,

This being a second trial under Section Act of 1861, the Court directs that the said Z be discharged."

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

MR. HARINGTON moved the introduction of the following definition in Chapter I :—

"The word 'written' shall include 'printed,' 'lithographed,' or 'engraved'."

Agreed to.

The postponed definition of "Court of Session" was passed as it stood.

The Council then resumed its sitting.

CIVIL PROCEDURE.

MR. HARINGTON moved that the Council resolve itself into a Committee on the Bill "to amend Act VIII of 1859 (for simplifying the Procedure of the Courts of Civil Judicature not established by Royal Charter)" ; and that the Committee be instructed to consider the Bill in the amended form in which the Select Committee had recommended it to be passed.

Section 1 (or the repealing Clause) was passed after the inclusion of Sections 339, 358, 375, and 381 of Act VIII of 1859 and of Section 10 Act XLII of 1860.

Sections 2 and 3 were passed as they stood.

Section 4 provided as follows :—

"If on the day fixed for the defendant to appear and answer to a suit it shall be found that the summons to the defendant has not been served in consequence of the failure of the plaintiff to deposit within the time allowed the sum required to defray the cost of issuing the summons, the Court may order that the suit be dismissed. Whenever a suit is dismissed under the provisions of this Section, the plaintiff shall be at liberty to institute a fresh suit, unless precluded by the rules for the limitation of actions, or if the plaintiff shall satisfy the Court within the period of thirty days from the date of the order that there was a sufficient excuse for his not making such deposit within

the time allowed, the Court may order a fresh summons to issue upon the plaint already filed."

MR. HARINGTON moved the omission of the latter part of the above Section commencing "Whenever a suit is dismissed," and the substitution of the following proviso :—

"Provided that no such order shall be passed although the summons shall not have been served upon the defendant, if on the day fixed for the defendant to appear and answer he shall have entered an appearance by a pleader or by a duly authorized agent when he is allowed to appear by agent or shall be in attendance in person.

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

MR. HARINGTON moved the introduction of the following new Sections after the above. He observed that the first of these Sections was only a re-enactment, with some verbal amendments, of the latter part of Section 4 omitted above :—

"Whenever a suit is dismissed under the provisions of the last preceding Section, the plaintiff shall be at liberty to institute a fresh suit, unless precluded by the rules for the limitation of actions, or if the plaintiff shall satisfy the Court within the period of thirty days from the date of the order dismissing the suit that there was a sufficient excuse for his not making the deposit required within the time allowed, the Court may order a fresh summons to issue upon the plaint already filed.

The provisions of the last two Sections shall apply to appeals also.

Agreed to.

Sections 5 to 19 were passed as they stood.

Section 20 provided as follows :

"Cases referred for the opinion of the Sudder Court shall be dealt with by *a full Bench* of that Court."

MR. HARINGTON moved the substitution of the words "two or more Judges" for the words in italics.

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

Section 21 provided as follows :—

"The Sudder Court shall fix an early day for the hearing of the case, and shall notify the same by a proclamation to be fixed up in the Court-house of that Court."

MR. SETON-KARR would suggest that the time should be fixed. An early day was rather vague. One month should be the time allowed. As these cases were not very intricate, and as it was expedient that they should be decided speedily, one month would be time sufficient.

MR. HARINGTON said that the Section formed part of the existing law and was taken from the Small Cause Courts Act. He had no doubt that the words objected to by the Honorable Member for Bengal were well considered at the time they were adopted. Many words equally vague were to be found in our Regulations and Acts, such as "within a reasonable time"—"without unnecessary delay"—"with all convenient expedition." He would not tie the Sudder Court down as to time in the manner suggested by the Honorable Member for Bengal. He did not think it desirable to alter the wording of existing laws unless they could be shown to have worked badly in practice.

The Section was then passed as it stood.

Section 22 provided as follows :—

"The parties to the case may appear and be heard in the Sudder Court in person or by pleader.

SIR CHARLES JACKSON proposed the insertion of the words "their Counsel or" before the word "pleader.

MR. FORBES said, this was a Bill to amend Act VIII of 1859 in which the word *Counsel* was not used. If used in one part of the Bill and not in another, difficulty might arise. It might be said that Counsel was allowed to appear in some cases, and pleaders only in others, and he thought that the Courts would be uncertain what the meaning of the Legislature was. The Bill now before the Committee was to be read as part of Act VIII of 1859, and should in his (Mr. Forbes') opinion be entirely consistent with it. It would not be consistent if in one Section Counsel and Pleaders were allowed to appear, and in another Section Pleaders only might, by implication, be heard ; and on this ground he objected to the proposed amendment.

SIR CHARLES JACKSON said that the introduction of a general Section would meet the objection of the Honorable Member for Madras.

MR. HARINGTON said that Section IV Act I of 1846, which was the law relating to pleaders in Courts not established by Royal Charter, enacted that "the office of pleader in the Courts of the East India Company shall be open to all persons of whatever nation or religion," and Section 5 provided that "every Barrister of any of Her Majesty's Courts of Justice in India shall be entitled as such to plead in any of the Sudder Courts," but "subject to all the rules in force in the said Sudder Courts applicable to Pleaders." This seemed to show that the Barristers of the Supreme Court, when they practised in the Sudder Court, appeared there as Pleaders. He saw no great necessity for the amendment proposed by the Honorable and learned Judge, though if the learned gentlemen to whom they were referring, preferred the designation of Counsel, he had no wish to deprive them of it.

After some further discussion, the consideration of the Section was postponed till Saturday next, when Sir Charles Jackson undertook to prepare and bring forward a Section which would raise the whole question.

Sections 23 and 24 were passed as they stood.

Section 25 was passed after verbal amendments.

MR. HARINGTON moved the introduction of the following new Sections after Section 25 :—

"When an order is made for the execution of a decree against which an appeal has been preferred, it shall be lawful for the Court which pronounced the decree to require security to be given for the restitution of any property which may be taken in execution of the decree or of the value thereof and for the due performance of the decree or order of the Appellate Court. The Appellate Court may in any such case direct the Court which pronounced the decree to take such security.

Unless when otherwise provided, the Appellate Court shall have the same powers in cases of appeal which are vested in the Courts of original jurisdiction in respect of original suits."

Agreed to.

Section 26 provided as follows :—

"The provisions of Act VIII of 1859 shall be applicable to all miscellaneous cases and proceedings which, after the passing of this Act, shall be instituted in any Court to which the said Act shall apply, so far as the same shall be applicable and necessary."

MR. HARINGTON moved the omission of the above Section with a view to the substitution of the following :—

"The procedure prescribed by Act VIII of 1859 shall be followed as far as it can be in all miscellaneous cases and proceedings which after the passing of this Act shall be instituted in any Court."

Agreed to.

Section 27 was passed as it stood.

MR. HARINGTON moved the introduction of the following new Section after Section 27 :—

"The Sudder Court shall have power to make and issue general rules for regulating the practice and proceedings of that Court and the Courts subordinate to it, and also to frame forms for every proceeding in the said Courts for which it shall think necessary that a form be provided, and for keeping all books, entries, and accounts to be kept by the officers, and from time to time to alter any such rule or form; provided that such rules and forms be not inconsistent with the provisions of this Act or of any other law in force."

Agreed to.

MR. HARINGTON moved the introduction of the following new Section after Section 9 :—

"When a decree is passed in any suit of the nature and amount cognizable by Courts of Small Causes constituted under Act XLII of 1860, the Court passing the decree, whether such Court be a Court constituted as aforesaid or any other Court, may, at the same time that it passes the decree, on the verbal application of the party in whose favor the decree is given, direct immediate execution thereof by the issue of a warrant directed either against the person of the judgment-debtor if he is within the local limits of the jurisdiction of the Court passing the decree, or against the personal property of the judgment-debtor within the same limits. If the warrant be directed against the personal property of the judgment-debtor, it may be general against any personal property of the judgment-debtor wherever it may be found within the local limits of the jurisdiction of the Court, or special against any

personal property belonging to the judgment-debtor within the same limits which shall be indicated by the judgment-creditor."

Agreed to.

MR. HARINGTON said, he had undertaken on Saturday last, with reference to a suggestion made by the Honorable and learned Vice-President, to prepare a Section to the effect that no appeal should lie from any order or decision passed in any suit instituted under Section 15 Act XIV of 1859 (to provide for the limitation of suits). In consequence of the absence of the Honorable and learned Vice-President, he (Mr. Harington) would postpone the consideration of the Section till Saturday next.

MR. SETON-KARR moved that the following words be added to the new Section introduced, on the Motion of the Honorable Member for the North-Western Provinces, after Section 37 :—

"Any rules framed under this Section shall be published in the Official Gazette."

The object, of course, was to enable suitors and the subordinate Courts to become acquainted with the provisions of the rules, which were often as important as those of the law itself.

Agreed to.

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

ARTICLES OF WAR (NATIVE ARMY.)

SIR BARTLE FRERE postponed the Motion (which stood in the Orders of the Day) for a Committee of the whole Council on the Bill "to make certain amendments in the Articles of War for the Government of the Native Officers and Soldiers in Her Majesty's Indian Army."

CATTLE TRESPASS.

MR. HARINGTON moved that the Council resolve itself into a Committee on the Bill "to amend Act III of 1857 (relating to trespasses by cattle)"; and that the Committee be instructed to consider the Bill in the amended form in which the Select Committee had recommended it to be passed.

Agreed to.

The Bill passed through Committee without amendment, and, the Council having resumed its setting, was reported.

FLOGGING.

MR. HARINGTON said, the Bill "to provide for the punishment of flogging in certain cases" stood next in the Orders of the Day for a Committee of the whole Council. It was not expected that the Bill would come on to-day, and he understood that some Honorable Members were not prepared to enter immediately upon the consideration of the Bill. It was not his wish to take any Honorable Member by surprise, and he was quite willing to move that the Committee of the whole Council upon the Bill be deferred until Saturday next on the expression of a wish by any Honorable Member that this should be done.

SIR CHARLES JACKSON expressed a wish that the consideration of the Bill should be postponed till Saturday next. He had received a letter from the Magistrate of Benares which he had left at home to-day, and which he should like to bring down and read to the Council.

The consideration of the Bill was then postponed, on the Motion of Mr. Harington, who gave notice that on Saturday next he should move that the Council resolve itself into a Committee on the Bill.

EXECUTION OF MOFUSSIL PROCESS.

MR. FORBES moved that the Council resolve itself into a 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)"; and that the Committee be instructed to consider the Bill in the amended form in which the Select Committee had recommended it to be passed. In doing so, he said that a wish had been expressed that

the Bill should be re-published before it was read a third time. He proposed, therefore, after the Bill passed through a Committee of the whole Council, to move that it be re-published for six weeks.

Agreed to.

The Bill passed through Committee without amendment, and, the Council having resumed its sitting, was reported.

MR. FORBES then moved that the Bill be re-published for a period of six weeks.

Agreed to.

PARSEES.

SIR BARTLE FRERE moved that 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, be adopted.

Agreed to.

The Council adjourned.

Saturday, August 17, 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-Genl. Sir R. Napier,	Hon'ble Sir C. R. M. Jackson, and
H. B. Harington, Esq.,	W. S. Seton-Karr,
H. Forbes, Esq.,	Esq.

BRANCH RAILWAYS, &c.

THE CLERK presented to the Council a Petition from the Landholders and Commercial Association of British India, concerning the Bill "to provide for the construction, by Companies and by private persons, of Branch Railways, Iron Tram-roads, Common Roads, or Canals, as Feeders to public Railways."

MR. SETON-KARR moved that the Petition be printed and referred to the Select Committee on the Bill.

Agreed to.

FLOGGING.

THE CLERK presented a Petition from the British Indian Association against the passing of the Bill "to provide for the punishment of flogging in certain cases."

MR. HARINGTON moved that the Petition be read at the table when the Council resolved itself into a Committee on the Bill.

THE VICE-PRESIDENT said, the Bill for the amendment of the Articles of War was set down in the Orders of the Day before the Bill for the punishment of flogging; and as the former was a long Bill, it would probably occupy the Council the whole day. He would suggest, therefore, that, instead of moving that the Petition be read when the Council went into Committee on the latter Bill, the better plan would be to move that it be printed.

MR. HARINGTON said that, in the event of the Bill for the punishment of flogging not coming on today, he would move at the close of the sitting that the Petition be printed.

The Motion to read the Petition was then put and carried.

CRIMINAL PROCEDURE.

THE CLERK also presented a Petition from the British Indian Association, praying for a republication of the Bill "for simplifying the Procedure of the Courts of Criminal Judicature not established by Royal Charter."

MR. HARINGTON said, the republication of the Bill would cause great delay in its passing. They had certainly made many changes in the Bill as it passed through Committee, but they were chiefly verbal, and he did not know that any of them touched the more important principles in the Code. It was intended that the Code should take effect from the 1st January next, on which date the Indian Penal Code would come into operation, and there were only four months left for the translation of the Code and its publication and circulation.

THE VICE-PRESIDENT thought that it would be better to postpone