

Wednesday, June 12, 1867

**COUNCIL OF GOVERNOR GENERAL
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Abstract of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 & 25 Vic., cap. 67.

The Council met at Simla on Wednesday, the 12th June 1867.

P R E S E N T :

His Excellency the Viceroy and Governor General of India, *presiding*.

His Excellency the Commander-in-Chief, G. C. S. I., K. C. B.

The Hon'ble H. Sumner Maine.

The Hon'ble G. Noble Taylor.

The Right Hon'ble W. N. Massey.

The Hon'ble Major General Sir H. M. Durand, C. B., K. C. S. I.

The Hon'ble Sir George Yule, C. B., K. C. S. I.

The Hon'ble John Strachey.

CURRENCY ACT AMENDMENT BILL.

The Right Hon'ble MR. MASSEY presented the Report of the Select Committee on the Bill to amend Act XIX of 1861 (to provide for a Government Paper Currency).

LICENSE ACT AMENDMENT BILL.

The Right Hon'ble MR. MASSEY also moved for leave to introduce a Bill to explain and amend Act No. XXI of 1867 (for the Licensing of Professions and Trades). He said :—“The amendments refer chiefly to that part of the Act which regulates the procedure. By clauses 10 and 11, the Collector is to determine under which class every person liable to the tax is to be assessed, and to compile a register of the persons licensed, of their respective professions and trades, of the class under which each has been assessed, and of the amount paid. After the Collector has fixed the assessment under clause 10, it becomes the duty of the person assessed to take out his license accordingly, or to petition against the assessment; and failing to do either of these things, he is liable to the penalty prescribed by Section 15. Now this proceeding may be considered rather too abrupt. A professional gentleman or a trader may neglect to take out a license without any intention to dispute his assessment, or to

resist the law. It is not likely, indeed, that the Collector would in such a case resort to extreme measures, or that he would in any case seek to enforce the law in a vexatious or offensive manner. But the tax-payer has a right to expect that reasonable precautions will be taken against a possible abuse of the law. I propose, therefore, to modify the 10th Section, so far as to provide that notice of his assessment shall be served on the person who has omitted to take out a license, seven days before proceedings are taken against him under the penal Section. Section 11 is re-cast to correspond with the amendments in Section 10. I now come to the penal Section itself, in which the more important amendment is made. The Section runs thus:—

‘If after the said first day of May 1867, any person shall exercise his profession or trade without having taken out a license as required by this Act, he shall be liable, on conviction before a Magistrate, to a penalty not exceeding five times the amount which in the judgment of the Magistrate would have been payable by such person in respect of a license duly taken out as aforesaid.’

Now these words may be read in two different senses. The Magistrate may hold that, as the Act has provided machinery for rectifying any error in the original assessment, by petition to the Collector and ultimately by appeal to the Commissioner of Revenue, the penalty attaches if the defendant has neither paid nor appealed, and that the measure of the penalty is five times the amount of the original assessment. But the words are susceptible of a different construction; and the Magistrate may be of opinion that he is bound, or at least that it is open to him, to satisfy himself by an independent enquiry as to the class in which the defendant is liable to be assessed, before he determines the amount of the penalty. I will not pretend to give an opinion as to which interpretation of the Act is the correct one; but certainly it was not the intention of its framers, either, on the one hand, to subject the person exercising a profession or trade to the annoyance of an investigation of his profits in a Court of law; nor, on the other, to clog the collection of the tax with the difficulties and delays which such a process would entail. I propose, therefore, to leave out the words which may appear to confer this discretion, or to impose this obligation, on the Magistrate. Section 15, as amended, will therefore run thus—

‘If the Collector shall have caused a notice to be served on any person stating the class under which he has been assessed, and requiring him within seven days from the date of the service to take out a license and to pay for the same the sum (mentioning it) payable therefor under the provisions of this Act, and if the person so served shall not, within the period specified in the said notice, have taken out a license and paid for the same as required by the said notice,

he shall, on conviction before a Magistrate, be subject to a penalty not exceeding rupees five hundred, and not less than the sum mentioned in such notice. Every such notice shall be deemed to be sufficiently served if left at the residence or usual place of business of the person to whom it is addressed.'

Thus the duty of the Magistrate will be clear and simple. If the defendant has neither taken out a license pursuant to notice, nor exercised his right of appeal, he will be subject to a penalty not exceeding the maximum duty leviable under the Act.

There is one other amendment of a different character which I also propose to make. By Schedule B of the Act, public Companies are assessed according to their paid-up capital or declared profits. But it has been represented to us that some of these Companies have only agencies in this country, and that their capital is an inaccurate criterion of their Indian profits. I have added a clause, therefore, providing that, if any such Company shall satisfy the Collector that it is assessed on a scale exceeding two per cent. on its profits in India, no more than two per cent. of such profits shall be required in payment of a license.

These are the only amendments which I propose ; but there is one other point to which I should perhaps advert. It has been said that the 5th Section of the Act is not sufficiently explicit as to the mode by which the proper assessment of every person liable to the tax shall be arrived at. The words are 'every person,' &c., 'whose annual profits shall be Rupees 200 or upwards, shall take out a license;' and stress has been laid on the words 'shall be,' as if they imported something which could only be ascertained in the future. Now it would be a sufficient answer to this objection, that such a construction would be wholly inconsistent with a main provision of the Act, which requires any person exercising a trade or profession on the first day of May in the present year to take out a license, and subjects him to a penalty if he exercises his trade or profession after that day without taking out a license; and, therefore, according to the elementary rule which requires every doubtful expression to be construed so as to support and not to defeat the manifest intention of the legislature, the construction contended for must be at once rejected. But, in truth, there is no ambiguity in the clause. The words 'shall be' in Acts of Parliament are merely an expression of legislative will. They are employed indifferently to signify the future or the present tense, and are always governed by the context and the general scope of the Act. In the case of the License Act, on and after the first of May 1867, the words 'shall be' in Section 5 were

and are to be understood as equivalent to 'are.' The plain meaning of the enactment is that the trader shall be assessed according to his actual profits ; and these profits will be ordinarily computed by the profits which he has made in the preceding year. I do not attempt, therefore, by any precise definition, to guide the Collector in his estimate of the profits at which the trader should be assessed. Such an attempt would only be calculated to raise questions which it has always been deemed expedient to avoid in framing laws for the collection of the public revenue.

By the provisions to which I have referred, the functions of the Collector, and the duty of the Magistrate, will be distinctly separated. To the Collector is assigned, in the first instance, the determination of the class in which every person liable to the tax shall be assessed. The Magistrate has only to adjudicate the penalty according to the assessment of the Collector, or the decision of the Commissioner of Revenue, as the case may be.

As the Bill does not affect the principle of the Act, and as it is desirable that the collection of the tax should proceed without further delay, I shall ask you, Sir, to suspend the Rules for the Conduct of Business, in order that the Bill, if agreed to by the Council, shall pass through its stages and become law forthwith."

The Motion was put and agreed to.

The Right Hon'ble MR. MASSEY then applied to His Excellency the President to suspend the Rules for the Conduct of Business.

The PRESIDENT declared the Rules suspended.

The Right Hon'ble MR. MASSEY then introduced the Bill, and moved that it be taken into consideration.

The Hon'ble MR. MAINE said that, like his Right Hon'ble friend, he should, in speaking of the Act to be amended, confine himself to its mechanism, and say nothing of its principle or policy. He agreed with Mr. Massey that one particular Section of Act XXI of 1867 might possibly be found to work unsatisfactorily in one of the Presidency towns, or even in all of them. It was necessary, however, to explain that the procedure Sections of his Right Hon'ble friend's Act were not new law, but old. They were substantially drafted by Sir H. Harington five or six years ago, and were by him submitted to the former Legislative Council. They were then adopted by the Bengal legislature, and

they, in fact, constituted the law under which the Municipal License Tax had been for four years collected in Calcutta. Now Mr. Massey had stated that he had it in contemplation to hand over the proceeds of this license tax to the Local Governments, and it was probable that, if every province in India had a legislature of its own, permission would have been given to it by His Excellency, under the Indian Councils' Act, to tax itself to the amount required. Mr. Massey had further consistently declared that this tax was not an income but a license tax, and the Council was well aware, from the discussions last Session on the Panjáb Municipal Act, that whenever a local body in India was trusted to tax itself, a license tax was, perhaps, the least objectionable in principle of the imposts to which it had recourse. Hence, it was natural that his Right Hon'ble friend, intending to create a local tax for convenience sake by imperial legislation, should have been satisfied to extend to all India the law under which the largest and most important self-taxing local body in the country, the Municipality of Calcutta, collected a license duty. It was true that the Municipal License Tax differed somewhat in form from that of his Right Hon'ble friend. As in the case of some of the English license taxes, a fixed annual sum was levied on the trader ; but the system was not purely capricious, like that which obtained at home. An attempt was made to include all trades and callings, and to arrange them in five classes. Each class paid a heavier license duty than those below it, and the reason for placing a particular calling in a higher class was obviously a presumption of superior profit. Thus, under the Schedule to the Calcutta Municipal Act, a merchant or a barrister was taxed twice as much as a boarding-house-keeper, and a boarding-house-keeper twice as much as the keeper of a stall in a bazaar. There was no doubt that his Right Hon'ble friend, in taking from Sir H. Harington's Bill the "annual profits" of the trader as the standard of assessment, and in substituting the actual profits for a rough presumption of profit, rendered his own tax juster and fairer than the Municipal License Tax ; but MR. MAINE thought it could not be denied that every attempt to add to the equity of a general license tax exposed it to the imputation (from which even the Calcutta Municipal Tax was not free) of being an income tax in disguise. Sir H. Harington's proposed measure, though differing vastly from his Right Hon'ble friend's in respect of the height to which it carried the scale of taxation, and in respect of the percentage on which the scale was founded, resembled it in taking "annual profits" as the standard of assessment, and in leaving the exact mode of applying the standard to be collected from the context. Morally speaking, there could be no doubt of what Sir H. Harington intended. He had obviously intended to

follow the English licensing Acts, requiring from certain traders annual licenses at varying rates, of which there was a considerable number in the Statute Book. Under all of these Acts the license was for the current year, but the duty was calculated on the extent of the business in the year preceding. The question however remained, whether, from a legal point of view, there was on the face of Act XXI of 1867 an ambiguity in the use of the expression "annual profits." With very genuine respect for the eminent members of his own profession who had expressed an opinion to the contrary, MR. MAINE was compelled to agree with Mr. Massey that there was none. To much which had been said and written, it was enough to oppose the doctrine of one of the most distinguished of English Judges :—

"If the subject-matter to which an Act of Parliament applies, be such as to make a given construction of its clauses impossible or irrational, I cannot for a moment doubt the right and the duty of a Court to have regard to such subject-matter, as necessarily bearing on the legal construction of the Act."

This very principle of construction had recently been expressly declared applicable to Acts imposing duties. But it was not necessary to enter into a lengthened argument on the point, for which the time and the place were not very appropriate, since his Right Hon'ble friend would impliedly settle it by the words he proposed to introduce into Section 4 of the amending Bill—not certainly because his Right Hon'ble friend wished to do indirectly that which he had just disclaimed the intention of doing directly, but because it was really impossible to apply the theory of the law to any particular case, without rendering it apparent that the intention of the legislature was to adopt as the standard of assessment the profits of the year preceding the year of assessment. The Section of the Act in which MR. MAINE really thought there was a defect, the 15th, occurred in identical language in Sir H. Harington's Bill, and, with the substitution of 'Justice of the Peace' for 'Magistrate,' in the Calcutta Municipal Act of 1863, and again in the amending Act of 1866. MR. MAINE had himself no doubt that, by the words 'the amount which in the judgment of the Magistrate would have been payable,' Sir H. Harington deliberately intended to give the Magistrate a very wide discretion ; and there was an *ex post facto* justification of this in the admissions of all who had taken part in the actual working out of the Income Tax Act. There was much reason to believe that, over the greatest part of India, only arbitrary conclusions, within very wide limits, could be reached on the subject of income or profits, though it did not follow that such conclusions were (and practically they

were not) unjust to the tax-payer. But if in any part of India the Magistrate took the view that, in applying the provisions of this Section, he could only exercise his judgment on strict evidence of annual profits, the result would be such as the legislature had certainly not contemplated. It might not be impossible to supply such evidence, even though the Collector had not under the Act the same materials for influencing the judgment of the Magistrate which he had for guiding his own; but still there would be an unreasonable departure from the principle pervading all revenue laws, English and Indian, under which the power of assessment was confined absolutely to the revenue authorities, and, moreover, the valuable time of the presidency town Magistrates would be taken up with enquiries foreign to their proper functions. It was only right that MR. MAINE should add that perhaps he had himself been the means of aggravating the defectiveness of the Section. The Council might recollect that, when his Right Hon'ble friend first submitted his measure, it included a Section taken from Sir H. Harington's Bill, by which the right to enforce all the contracts of a trader trading without a license was absolutely annulled. MR. MAINE had expressed objections to this Section, and had prevailed on Mr. Massey to omit it. Part of these objections might seem of a somewhat technical character. The English licensing Acts had been repeatedly considered by the English Courts, and it had been laid down as a principle that, when the object of the legislature was to discourage or limit a trade—which was really the object of some of the earlier licensing Statutes—the contracts of the unlicensed trader should be void; but when the object was only to raise revenue, which of course was the case with the present law, the omission to take out a license had no effect on the trader's contracts. That appeared to be a sensible principle, and it seemed to MR. MAINE a strong thing to set it aside. But the ground of his strongest objection was that the punishment appeared to him out of all proportion to the offence. The provision could be understood in Sir H. Harington's Bill, for there the scale of taxation went up as high as five hundred pounds; but the highest sum payable by an individual under his Right Hon'ble friend's Bill, as originally prepared by him, was twenty pounds, and it did seem harsh to visit the non-payment of this or smaller sums by consequences which might be so extremely serious, particularly in the presidency towns. They knew under what conditions of climate and otherwise business was there carried on. It might happen that a young partner or assistant had forgotten that the first of May had arrived; the effect would be to annul all the contracts of the firm until the omission was rectified, and thus transactions to the amount of lakhs of rupees might be compromised. But, though MR. MAINE was satisfied it was right to omit the Section, the omission

had doubtless weakened the procedure. The dangers of which he had spoken were rather those of future years than of the present. For the first year, at all events, men would have hastened to take out their licenses, and the practice of the Act would have tallied with the theory. As it was, the stress of the procedure was thrown on the penal Section, which, in MR. MAINE'S opinion, was too weak to bear it, so far as certain parts of the country were concerned. He concurred, therefore, in the necessity of his Right Hon'ble friend's amendments, which doubtless carried out the real intentions of the legislature, and, as under the English fiscal system, conferred a power of absolute assessment on the revenue authorities.

The Right Hon'ble MR. MASSEY wished to add that the Bill had not been suggested by any resistance to the Act, nor had he any serious apprehension that the Act as it stood would not work. But it was right to relieve the taxpayer from all doubt as to his liabilities, and to remove all possible obstacles to the collection of the tax.

The Motion was put and agreed to.

The Right Hon'ble MR. MASSEY then moved that the Bill be passed.

The Motion was put and agreed to.

The Council adjourned till the 19th June 1867.

SIMLA, }
The 12th June 1867. }

WHITLEY STOKES,
Asst. Secy. to the Govt. of India,
Home Department (Legislative).